

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
SERIOUS INJURY LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-15-03757

MATTHEW EBDEN

Plaintiff

v

BERRY STREET VICTORIA INC

Defendant

<u>JUDGE:</u>	HIS HONOUR JUDGE BOWMAN
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	26 April 2016
<u>DATE OF JUDGMENT:</u>	19 May 2016
<u>CASE MAY BE CITED AS:</u>	Ebden v Berry Street Victoria Inc
<u>MEDIUM NEUTRAL CITATION:</u>	[2016] VCC 617

REASONS FOR JUDGMENT

Catchwords: *Accident Compensation Act 1985* – s135A and s135AC – allegation of severe long-term mental or severe long-term behavioural disturbance or disorder – injury alleged to have been caused by a fatal fire in the course of employment in 1995, but not manifesting itself until after a cycling accident in 2011 – whether application made within three years after the date the incapacity became known – whether symptoms arise from the fire or from the cycling accident – whether in any event plaintiff has satisfied the statutory requirement of severity – factors to be considered.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms M Britbart QC with Mr C O'Sullivan	Adviceline Injury Lawyers
For the Defendant	Mr P Trigar	Lander & Rogers

General background

- 1 This matter comes before me by way of an application pursuant to s135A of the *Accident Compensation Act* 1985, herein after referred to as "the Act". In particular, the plaintiff seeks leave to bring proceedings pursuant to s135A(4)(b) of the Act. Pursuant to s135A(6), a court must not give such leave unless it is satisfied that the injury is a serious injury. The matter also involves the operation of s135AC(b) of the Act. This provision reads as follows:

"Despite anything to the contrary in the *Limitation of Actions Act* 1958, proceedings in accordance with section 135 or 135A must not be commenced –

....

- (b) if the cause of action arose before 12 November 1997 and the incapacity arising from the injury was not known until after 12 November 1997, unless an application for a determination from the worker under section 135A(2B) has been made to the Authority or a self-insurer before the expiration of 3 years after the date the incapacity became known."

- 2 In the present case, reliance is placed upon the definition of "serious injury" found in s135A(19) of the Act – namely, severe long-term mental or severe long-term behavioural disturbance or disorder. This is alleged to have arisen out of an accident in the form of a fire which occurred on 18 September 1995, hereinafter referred to as "the fire". At the time, the plaintiff was employed as a resident attendant carer doing an overnight shift at a unit operated by the defendant at Diamond Creek. Also staying in the unit were a co-worker, Mr Edward Scoleri, and three young male residents. During the night, the plaintiff awoke to find that the unit was on fire. Without going into all the details, the plaintiff was able to escape, although he returned into the building in an attempt to find two of the residents. Ultimately, the residents were accounted for and had escaped the blaze. Tragically, Mr Scoleri did not, and died in the fire. This description of what occurred was not challenged for the purposes of the present application. The plaintiff suffered symptoms of mental illness as a result. He

lodged a WorkCover claim, which was accepted. He saw a psychologist for in excess of a year after the fire and also consumed medication for a few months, ceasing that because of unpleasant side-effects.

3 The plaintiff completed studies and qualified as an occupational therapist in 1997. The plaintiff worked as an occupational therapist, and in 2002 commenced working full-time as a lecturer, progressing to being a senior lecturer at Deakin University. The plaintiff continued in that work until 2013.

4 Meanwhile, in 2004, the plaintiff and a friend were assaulted whilst touring Vietnam. In 2008, he was involved in a motor vehicle accident whilst cycling. He received some counselling after each of these incidents. The impact of these incidents upon the plaintiff's condition and whether either play a significant and ongoing role in his presentation is debatable and is an issue to which I shall return.

5 On 23 July 2011, the plaintiff was involved in another cycling accident, this being of considerably greater magnitude than the incidents of 2004 and 2008. Apparently the plaintiff was riding his bicycle when a motor vehicle failed to give way to him and collided with him. This event shall herein after be referred to as "the cycling accident". In the cycling accident, the plaintiff sustained both physical injuries and mental health consequences. These shall be discussed in greater detail. It was during the course of treatment by a psychologist subsequent to the cycling accident that the psychological effects of the fire allegedly became apparent. This was a central issue in the contest and shall be discussed further.

6 Ms M Britbart QC with Mr C O'Sullivan of counsel appeared on behalf of the plaintiff. Mr P Trigar of counsel appeared on behalf of the defendant. The plaintiff gave oral evidence, in which he adopted three affidavits as being true and correct, and was cross-examined. The balance of the evidence was documentary in nature and was tendered either by consent or without objection.

- 7 The issues raised by Mr Trigdar at the outset were as follows. Firstly, it is far from clear that the plaintiff's current problems do not arise from the cycling accident. There is material which goes to his credit in this regard and generally. The Court should not be satisfied that his current problems relate to the fire as opposed to the cycling accident. Secondly, for the purposes of s135AC(b) of the Act, the defendant asserts that the plaintiff had acquired the relevant knowledge prior to March 2012. Thirdly, it disputes that the plaintiff has suffered a serious injury within the meaning of the Act, which injury and its consequences have to be severe and attributable to the fire.

Factual background

- 8 I have given a general outline of the factual background, but will now set out greater detail. The plaintiff is a single man, aged 45 years, having been born on 16 June 1970. He completed his secondary education to Year 12 level. He then moved to Canada, ultimately studying biochemistry. He then returned to Australia and undertook an occupational therapy degree, studying for this at the time of the fire. He completed his studies as an occupational therapist and thereafter worked at a number of places. As stated, in 2002 he commenced working fulltime as a lecturer at Deakin University and continued that work until 2013. I accept that, by the time of the cycling accident in 2011, he was suffering some symptoms of anxiety, nightmares and the like, particularly at the time of the anniversary of the fire but, essentially, he was fit and enjoyed a considerable number of sporting activities. It was after the cycling accident, and during his treatment for mental health problems arising therefrom, that his difficulties relating back to the fire allegedly became manifest and led to his substantial cessation of work in August 2013. As shall be discussed, he has done a small amount of work since.

The plaintiff as a witness

- 9 Essentially, I accept the plaintiff as a witness of truth. I note that in his report of 14 July 2015, Dr Dush Shan, consultant psychiatrist, examining on behalf of the defendant, described the plaintiff as being pleasant, co-operative, clear and

coherent. Admittedly, and without seeing the plaintiff again, he subsequently wrote a brief letter in which he said that the plaintiff was inclined to emphasise the fire and minimise the cycling accident, but he did not modify his earlier observations.

- 10 Dr Richard Prytula, consultant psychiatrist, similarly examining, also described the plaintiff as being pleasant and co-operative. The plaintiff's treating psychiatrist, Professor Malcolm Hopwood, referred to him as being co-operative and intelligent. Dr David Weissman, consultant psychiatrist, who saw the plaintiff at the request of his solicitors, referred to him in very similar terms, recording that the plaintiff was pleasant, polite, punctual and co-operative. This was also the impression that the plaintiff gave in the witness box. Further, I am not of the view that his credit was damaged to any noticeable extent in cross-examination. I accept his evidence.

The state of the plaintiff's health prior to the fire

- 11 In this case, the state of the plaintiff's mental health prior to the fire was an issue that received little or no attention. Rather, a considerable amount of focus was placed upon the state of that health prior to and after the cycling accident. In any event, I note that Dr Weissman recorded that the plaintiff had no past psychiatric history prior to September 1995, being the date of the fire, and that there was no family history of psychiatric illness. The contrary has not been argued.

The injury, its treatment and diagnosis

- 12 This is an unusual case and the treatment for the mental condition resulting from the fire is not something that flows in an uninterrupted straight line. The issues of the symptomatology, its timing, its treatment and the time at which the plaintiff allegedly knew that any incapacity arose from it are central to the outcome of this application insofar as the operation of s135AC(b) of the Act is concerned and generally.

- 13 Following the fire, the plaintiff underwent debriefing. Subsequently, there was a coronial inquiry. He saw a psychologist, Ms Helen Bruckner, for between one and two years after the accident. As earlier discussed, he was prescribed some medication, but took it only for a few months.
- 14 I accept that thereafter, apart from some nightmares and the like, the plaintiff was not troubled by major symptoms of a psychological or psychiatric nature prior to the cycling accident.
- 15 As a result of the cycling accident, which occurred in Warrnambool, the plaintiff suffered physical injuries to his lower back and knee, and particularly to his right shoulder. The shoulder injury received considerable treatment, including surgery on two occasions. In addition to his physical injuries, the plaintiff suffered from such matters as anxiety, insomnia, possible Post-Traumatic Stress Disorder ("PTSD") and the like.
- 16 The consequences of the cycling accident prevented the plaintiff from engaging in many of the sporting and physical activities which he had been undertaking. He has sworn in his affidavit of 29 June 2014, in support of his claim pursuant to the *Transport Accident Act* 1986, that this caused a deterioration in his psychological state. A result of this was that, in September 2012, a general practitioner, Dr Simon Andrade, referred the plaintiff for treatment to a psychologist, Mr Piers Lloyd, whom he saw on a weekly basis. Mr Lloyd originally diagnosed chronic PTSD and, in a report to Dr Andrade of 17 July 2013, noted that the plaintiff had difficult and complex emotions that had arisen as a consequence of the cycling accident "...and an antecedent traumatic event approximately 20 years previously".
- 17 In a more detailed report of 12 April 2016, Mr Lloyd stated the following:
- "As reported, Matthew had initially presented in October 2012 with symptoms relating to an experience of recent trauma, but by the beginning of February it had become apparent that his difficulties related to a considerably more significant traumatic experience, namely a fatal house fire some 18 years earlier. It may be important to emphasise that

at times an experience of trauma can trigger an association with earlier experiences that may have been insufficiently dealt with.”

18 It seems to me to be logical that the February referred to above was February 2013. The contrary was not suggested.

19 As stated, the plaintiff had been referred to Mr Lloyd by Dr Andrade, who is in the same clinic as Dr Rebecca Goodman, who has been the plaintiff’s treating general practitioner since 20 February 2014. In her report of 8 October 2015, Dr Goodman recorded the following:

“Matthew was 1st seen in our clinic in August 2011. He saw Dr Stephen Dang and presented with anxiety and low mood since a bicycle accident (23/7/2011) which was noted to precipitate past trauma (including an event in 1995 where he witnessed the death of a person in his care during a fire where he was a carer at the boys’ home) and then in 2005 whilst travelling in Vietnam was held hostage...

I 1st saw Matthew on 20/2/2014. At that visit I obtained a history of Post Traumatic Stress Disorder (PTSD) following a workplace fire 18 years ago in which a coworker died. Matthew reported that he had managed the stress following this by distraction/physical activity. However when he had a bicycle accident (2011) this limited his physical activity and his PTSD symptoms deteriorated including difficulty concentrating making him unable to work.

...

Matthew’s symptoms commenced after the events that occurred at his work in 1995. The symptoms were exacerbated after a bicycle accident in 2011, but I believe his ongoing symptoms are attributable to the initially (sic) event during his employment in 1995. This question may be better answered by a psychiatrist.”

20 Another doctor in the same clinic as Dr Goodman was Dr Coniela Sgroi. She referred the plaintiff to Professor Hopwood. Professor Hopwood reported back to Dr Sgroi on 9 December 2013. Professor Hopwood took a detailed history, particularly of the fire. He also took a history that the plaintiff’s anxiety had increased since he was involved in the cycling accident. Professor Hopwood diagnosed PTSD and major depression. He expressed the opinion that the PTSD was primarily related to the fire. It was probable that, at some point in the past, the PTSD symptoms had improved to the point where they may have been considered “sub syndromal”, but they had been recently exacerbated in

the setting of the cycling accident. Professor Hopwood described this as being "of course not uncommon".

21 Professor Hopwood went on to say that he suspected that, as part of the plaintiff's avoidance of what had occurred, he had incompletely dealt with the traumatic experience in the fire, despite his "moderately successful initial therapy". Professor Hopwood made various recommendations as to treatment, including medication, therapy and the like.

22 On 29 January 2014, Professor Hopwood wrote to the solicitors for the plaintiff. Much of that report is a restatement of what was contained in the earlier report to Dr Sgroi. However, Professor Hopwood also answered some specific questions. In relation to prognosis, he considered it to be guarded. Full recovery from PTSD, once it has been present for at least three to five years, is uncommon. He believed that there were grounds for expecting that there could be a full remission of the major depression, but with a risk of relapse. He also expressed the view that the plaintiff had the depression independently of such things as the assault in Vietnam and the cycling accident.

23 Professor Hopwood expressed the view that, whilst the plaintiff had been largely able to maintain employment (as at the time that Professor Hopwood saw him), he suspected that the plaintiff was not functioning at his full potential.

24 The plaintiff has also been treated by Dr James Courtney, clinical psychologist. I would refer to Dr Courtney's report to the plaintiff's solicitors, such report being dated 22 September 2014. Dr Courtney appears to have obtained an appropriate history. He felt that the plaintiff reported symptoms consistent with the criteria for PTSD. He was of the view that the plaintiff's trauma symptomatology was a direct result of his exposure to the fire. He referred to the fact that the plaintiff had already received psychiatric and psychological treatment at the Austin Health Psychological Trauma Recovery Service, Dr Courtney also being located at the Austin Hospital. He felt that, whilst treated,

the plaintiff's trauma symptomatology had reduced, but he had ongoing moderate symptomatology that was the focus of current therapy. He noted that the plaintiff's presentation included a reported inability to focus on the task at hand due to impaired concentration, attention and poor short-term memory. The plaintiff also reported significant sleep disruption with concurrent pervasive fatigue. He had been avoiding locations and the like that acted as "triggers", but appeared to be settling in this regard.

25 In relation to the cycling accident, Dr Courtney recorded that the plaintiff stated that his physical exercise activities which had helped manage his symptoms had been affected adversely by the cycling accident and the assault in Vietnam. Specifically, the plaintiff had indicated that his shoulder injury had impacted upon his ability to ride or rock climb and that he was more hypervigilant and fearful in public places.

26 The plaintiff's most recent treating psychiatrist has been Dr Arthur Velakoulis. Dr Velakoulis first assessed the plaintiff in May 2015. He has provided a report dated 14 December 2015. To Dr Velakoulis, the plaintiff described intrusive fire-related dreams and other symptoms. These included symptoms of depression, lack of motivation, past suicidal ideation and the like. The plaintiff's attention, concentration and work capacity remained significantly impaired. Dr Velakoulis diagnosed chronic PTSD. He was aware that the plaintiff had previously been diagnosed with a recurrent Major Depressive Disorder. Dr Velakoulis was also of the view that the possibility of an underlying bipolar affective disorder had been raised.

27 Dr Velakoulis expressed the opinion that the plaintiff's PTSD was primarily attributable to the fire. The subsequent incidents, including the cycling accident, would have exacerbated his pre-existing PTSD and depressive symptoms. He was of the view that the plaintiff required psychiatric review every two to three weeks and was likely to suffer from chronic, ongoing, relapsing PTSD, anxiety and depressive symptoms in the months and years to come.

- 28 Dr Velakoulis was also of the opinion that the plaintiff's current capacity for vocational, social and recreational pursuits had been significantly impaired by his disorders. In relation to the development of a possible bipolar disorder, Dr Velakoulis stated that the underlying aetiology of bipolar affective disorder is multifactorial, but would suggest that the plaintiff's trauma exposure and PTSD were likely to be factors in the precipitation of possible bipolar disorder.
- 29 The plaintiff has also been seen for medico-legal purposes. At the request of his solicitors, he was seen by Dr Weissman on 22 October 2015. Dr Weissman took a very detailed history, including that the plaintiff had suffered from depression from the time of the fire, but that this had increased markedly after the cycling accident. He referred to waking with nightmares about the fire. In his daily activities, he was having problems managing. The plaintiff said that he still thought about the fire "all the time, every day".
- 30 The conclusion of Dr Weissman was that this was a complex case. He was aware of the sequelae of the cycling accident and formed the view that, on balance, because the plaintiff has no longer been able to keep fit and active and engage in exercise after the cycling accident, he has lost one of the key mechanisms that he had used to keep his previous PTSD symptoms and depression at a reasonable level. He felt that the plaintiff continued to suffer from moderately severe, classical and discernible chronic PTSD symptoms and traumatisation features. These relate solely to the circumstances of the fire. The plaintiff also suffered from "at least" a moderate mixed depressive syndrome with some milder secondary, reactive or consequential contributions from the right shoulder injury in the cycling accident. Dr Weissman also thought that the plaintiff had suffered a type of bipolar mood disorder triggered or precipitated by anti-depressant medication.
- 31 However, Dr Weissman's overall view was that the plaintiff's PTSD was solely and entirely caused by the fire. The bulk of his Chronic Major Depressive Disorder was also caused by the fire, but with a small contribution from the

cycling accident. Dr Weissman was of the view that, following the cycling accident, the fire-related psychiatric symptoms increased or deteriorated markedly, becoming moderately severe and leading to a significant impairment of the plaintiff's occupational interpersonal functioning and general stability in life.

32 Dr Weissman considered the prognosis to be quite uncertain and guarded. He thought that the plaintiff's life had been changed irrevocably by the fire and that, by and large, his symptoms would remain in their current form of severity for the foreseeable future, regardless of whether the plaintiff had treatment.

33 The defendant has also had the plaintiff examined. Dr Alan Jager, forensic psychiatrist, reported to the defendant on 1 November 2013. He diagnosed chronic PTSD and a Major Depressive Disorder. Dr Jager believed that the plaintiff's condition was materially related to the fire and contributed to his incapacity. He believed that there had been further deterioration as a consequence of the assault in Vietnam and the cycling injuries of 2007 and 2011, and particularly the latter. He did not believe that constitutional psychiatric changes had superseded the injury sustained in the fire. However, he thought that there had been contribution from the other incidents just described. On balance, he thought that approximately 50 per cent of the plaintiff's current psychiatric impairment was due to the fire and the other 50 per cent to the subsequent incidents.

34 Dr Prytula saw the plaintiff at the request of the defendant on 24 April 2014. The plaintiff stated to Dr Prytula that he only slept for approximately three hours a night, with nightmares on most nights. He was sensitive to smoke and silence. He continued to feel depressed and guilty about the death of his colleague in the fire and has had suicidal thoughts.

35 In the opinion of Dr Prytula, the plaintiff appeared to have residual symptoms of PTSD with concurrent symptoms of depression. His current condition appeared

to be materially contributed to by the fire. The injury to his right shoulder sustained in the cycling accident caused pain and restricted movement. He considered the plaintiff to have no current work capacity. His current psychiatric symptoms prevented a return to work. However, the plaintiff was due to undertake a course at the Victorian Trauma Centre (this would appear to be the treatment at the Austin Hospital). A review of his capacity for work should follow completion of that course. However, Dr Prytula was of view that the prognosis was guarded. He also thought that there was "a certain level of intellectualisation about his symptoms and a lack of appropriate emotion connected to them".

36 Dr Prytula examined the plaintiff again on 5 January 2015. Whilst he noted that the plaintiff, since the last examination, had had a reduction in the level of his symptoms of PTSD, he continued to suffer from disturbed sleep. While some of this had been attributed to sleep apnoea, the rest appeared to be due to core insecurity as part of his PTSD. The sleep disturbance had been present since the fire. He described other symptoms, such as occasional irritability, a labile mood, occasional tearfulness and the like. Dr Prytula diagnosed PTSD with moderately severe sleep disturbance and labile mood. He was of the view that the plaintiff's condition continued to be materially contributed to by the fire. He thought that the plaintiff did not have a work capacity, essentially due to his moderately severe sleep disturbance.

37 However, he did not consider that the plaintiff's incapacity was indefinite, as he required further treatment. He thought that the plaintiff's work capacity was likely to recover in a period of six months with appropriate treatment. He felt that the plaintiff was progressing due to his attendance at the Trauma Clinic at the Austin Hospital. His view was that the plaintiff was improving and that his general prognosis was "good overall".

38 Also before me are reports from Dr Shan. The earliest of these is dated 18 November 1996, and is addressed to an insurer. The plaintiff described to him

a number of symptoms from which he had been suffering following the fire, these including problems with concentration and with sleeping. The recent coronial inquiry had caused an exacerbation of some symptoms. At that time, Dr Shan diagnosed PTSD and said, "Evidence suggests that Matthew is suffering from PTSD with the possible complication of mild depression". He related it to the fire. Dr Shan felt that treatment with anti-depressant medication may be required and that the plaintiff was presently incapacitated for work, but fit for suitable employment (on the face of it, somewhat contradictory statements). In any event, he was prepared to make an impairment evaluation pursuant to the AMA Guides, an essential ingredient of which is permanence.

39 Dr Shan reported again on 5 July 1999. The plaintiff had completed his degree in occupational therapy and had started working on a full-time basis. He had experienced some worsening of symptoms some six weeks prior to seeing Dr Shan and had undergone three sessions with a psychologist. Sleep was still a problem, although he was sleeping some five to six hours, waking up a couple of times during the night. He had not seen a psychologist for approximately 12 months prior to the recent interviews, these following his commencing his new job. Dr Shan felt that there was a lack of objective evidence of significant impediment to the plaintiff functioning either at work or at home because of nervous symptoms. Based upon the plaintiff's description of the symptoms, Dr Shan felt that there was some continuing evidence of a mild chronic PTSD. He did not feel that there was any incapacity for work due to it. There were also some non-employment factors involved. Dr Shan again made an assessment pursuant to the AMA Guides, although this was to a reduced level.

40 Dr Shan reported to the defendant's solicitors on 14 July 2015, having re-examined the plaintiff on that day. The plaintiff had ceased employment in 2013. He stated that, after a period of some years of relative wellness, he was again having nightmares, palpitations, intrusive thoughts and flashbacks of the fire. He was having chronic sleep problems. A recent attempt at a return to

work had not been successful. The diagnosis of Dr Shan was of PTSD and Major Depressive Disorder. He considered that the fire was a significant contributing factor to the plaintiff's condition. He stated that it seemed quite evident that, if not for the cycling accident, the plaintiff would not have experienced a resurgence of PTSD-type symptoms as he would have continued to deal with it by sporting and other activities. He felt that the plaintiff's condition had stabilised. He again made an assessment pursuant to the Guides. He was of the view that the plaintiff did not have the capacity to perform the work which he had been performing before the exacerbation or aggravation which occurred in the cycling accident. Dr Shan considered the prognosis to be guarded.

41 Finally, Dr Shan provided a supplementary report of 4 April 2016 to the defendant's solicitors. It is apparent that this was provided on the basis of material forwarded, and Dr Shan did not examine the plaintiff again. Dr Shan seems to have concentrated largely on a revision of his calculation of impairment pursuant to the Guides, he having been sent the affidavit of the plaintiff which supported his Transport Accident Commission application in relation to the cycling accident. He felt that the plaintiff was inclined to emphasise the fire when examined by him and minimise the cycling accident. In the overall scheme of things, whilst this observation might imply some suspicion on the part of Dr Shan that the plaintiff was tailoring his complaints to suit the particular applications, this supplementary report does not appear to take matters much further.

42 Reference was also made by the defendant to a report of Dr Albert Kaplan, consultant psychiatrist, who examined the plaintiff at the request of the solicitors who acted for him in relation to the cycling accident. Dr Kaplan saw the plaintiff on 28 January 2013. Amongst other things, he took a history that the plaintiff was suffering from insomnia and was experiencing considerable anxiety. Dr Kaplan also recorded that the plaintiff had been referred to a psychologist in

September 2012 and was continuing to consult this person on a weekly basis. Presumably this psychologist was Mr Lloyd.

43 The plaintiff told Dr Kaplan of the fire, also observing that he underwent counselling and recovered from that trauma. It is to be remembered that it was in February 2013 that it had become apparent to Mr Lloyd that the plaintiff's difficulties related to the fire. In other words, Dr Kaplan would appear to have interviewed the plaintiff a very short time before the importance of the fire became apparent to Mr Lloyd and, therefore, before the significance of it was explained to the plaintiff.

44 Dr Kaplan did not attach any great significance to the incident in Vietnam or the earlier bicycle accident in 2008. The plaintiff described to him a number of restrictions and problems from which he suffered following the cycling accident, comparing his capacities in this regard with his earlier capacity. This was particularly so in relation to physical activities such as cycling, kayaking and the like. Dr Kaplan diagnosed him as suffering from an adjustment disorder with mixed anxiety and depressed mood, in addition to PTSD. Of course, as stated, these opinions were expressed shortly before the treating psychologist, Mr Lloyd, formed his opinion as to the importance of the fire as the primary cause of the PTSD.

45 That concludes my summary of the medical material. I turn now to some findings based upon it. One aspect of the diagnosis of the plaintiff's condition seems to be close to unanimous. The plaintiff suffers from PTSD and some symptoms of depression. It also seems to me to be close to unanimous that these conditions are consequential upon the fire. It may be that there has been some aggravation because of subsequent traumatic events, and in particular the cycling accident. Indeed, I would accept the proposition that, following the cycling accident, the plaintiff's symptoms, originating from the fire, became florid. I accept that it was during treatment by Mr Lloyd that the connection

between the plaintiff's post-cycling accident symptomatology and the fire became apparent.

46 In short, I accept that there is a direct and causative link between the fire and the plaintiff's psychological or psychiatric state. I accept that his PTSD and the other immediate sequelae of the fire may well have improved significantly and effectively lain dormant for many years, but that they rose to the surface and manifested themselves after the cycling accident. I note that, in his closing address, Mr Trigdar in fact submitted that it was clear that the plaintiff was functioning at a high level prior to the cycling accident – see Transcript 46. However, as stated, I also accept that the PTSD and associated conditions (such as some depressive symptoms) which appeared after the cycling accident were directly related to the fire.

47 As to whether the injury is long-term within the meaning of the definition contained in s135A(19), on balance I am satisfied that it is. This is not an issue which attracted significant, if any, attention during the conduct of the trial. I note that Dr Weissman has commented that, by and large, the plaintiff's symptoms will remain in their current form and severity for the foreseeable future with or without treatment. I note that one of the treating psychiatrists, Professor Hopwood, has stated that the prognosis must be considered guarded and that full recovery from PTSD, once it has been present for at least three to five years, is uncommon. He further observed that the plaintiff's symptoms have fluctuated, but never gone away completely and he doubted they were likely to do so. The plaintiff's treating general practitioner, Dr Goodman, regarded the prognosis as being guarded. Another treating psychiatrist, Dr V Velakoulis, stated that the plaintiff will require long-term psychiatric care. Dr Prytula, examining on behalf of the defendant, considered that there could be improvement and that the plaintiff's condition was not currently stable, and consequently would not conduct an impairment assessment. I note that Dr Jager, also examining on behalf of the defendant, expressed the view that the

plaintiff's current treatment should continue indefinitely, although subsequently qualifying that to some extent.

48 In any event, on balance, I prefer the views expressed by those examining on behalf of the plaintiff and treating him. They seem to me to indicate clearly that the plaintiff's behavioural disturbance or disorder is long-term within the meaning of the Act.

49 It is not suggested that the relevant mental injury is the aggravation of a pre-existing condition. Rather, the argument is that the consequences of the fire have been brought to light or aggravated by a subsequent injury, namely the cycling accident. Certainly, it seems to me that the treatment for the plaintiff's mental condition following the cycling accident revealed the significance or importance of the fire in relation to the symptoms being suffered by the plaintiff. In addition, because of the constraints imposed by the physical injury suffered in the cycling accident, the plaintiff's mechanisms for dealing with the PTSD originating from the fire were substantially reduced.

Other developments since the injury

50 As earlier discussed, after the fire the plaintiff ultimately returned to full-time employment. I accept that he was also involved in a number of physical activities, including cycling, kayaking, triathlons and the like. This remained the situation until the cycling accident. Ultimately, in July 2013 the plaintiff ceased work. Until that time, his work had been that of a senior lecturer at Deakin University. He had an extended period of sick leave until July 2015. He then was the successful applicant for a tender to perform a research contract with the New South Wales Government Office of Environment and Heritage as part of his employment with Deakin University. He struggled to cope with this and, as at November 2015, went on unpaid sick leave.

Ruling

51 There are a number of issues to be determined in this case. I shall deal firstly with the question of the plaintiff's knowledge for the purposes of s135AC(b) of the Act.

52 In this regard, Ms Britbart QC, in her submissions, referred me to the decision of the Court of Appeal in *Morris & Joan Rawlings Builders & Contractors v Rawlings* [2010] VSCA 306. As she submitted, it is a case concerning s135AC(b) of the Act and involves a factual situation with marked similarities to the present case.

53 In relation to the burden of proof, the Court of Appeal in *Rawlings* ruled that "...it is for the worker to establish that his or her application was made under s 135A(2B) within the three year period after the date the incapacity became known". In that case, the worker suffered from a multitude of mental health symptoms, including anxiety and depression, essentially related to business problems which had confronted his employer, which was, basically, a family business. The major problems with the family business occurred in the years leading up to 1994, when the business collapsed. Subsequently, he also made a claim for compensation in which he referred to a physical injury (knee problems) and continuous pain which was causing severe depression. In addition, in April 1994 the worker had undergone an operation to his knee.

54 When considering the principles to be applied, the Court of Appeal, at paragraph 36, said the following:

"It is sufficient to bar the claim if the respondent knew of facts that, viewed objectively, constituted the serious injury incapacity. The fact that an applicant/worker (in this case the respondent) does not subjectively appreciate that the injury is serious until after the relevant date is not necessarily determinative."

55 In a supporting affidavit, the worker swore that it was not until he consulted a psychologist, Ms Perrett-Abrahams, in August 2006 that he understood that the cause of his difficulties was work-related. During the intervening years he

had endured problems with alcohol and the like and said that he had no recollection of various events.

56 At paragraph 43, the Court said as follows:

“As has been observed, the starting point is that the test of whether the incapacity was known is whether the respondent subjectively knew of facts at the relevant time which, if viewed objectively at that time, would have been taken to mean that he was then suffering from ‘the incapacity’.”

57 At paragraph 45, the Court of Appeal stated:

“Parliament cannot have intended that time would run against such a worker until the connection to the work place was capable of ascertainment.”

That observation was made in the context of a consideration of insidious causes of a physical injury.

58 Their Honours went on to say at paragraphs 46 and 47:

“The second point is that, in this case, we are concerned with serious injury constituted by a permanent severe mental or permanent severe behavioural disturbance or disorder. Such an injury cannot be regarded as if it were, or approached in the same way, as a physical injury.

If a worker loses a limb or is burned or deafened or damages his or her spine in the course of employment, the nature and extent of the injury and the incapacity of which it is productive are to a large extent obvious. If, however, a worker suffers a mental or behavioural disturbance, its existence, nature and extent may well go undetected. ... In most cases, it is only when and if they are so diagnosed that they are capable of knowing that the incapacity of which they were aware arises out of that condition.”

59 Subsequently, at paragraph 81, the Court stated the following:

“...As was noted at the outset, we are concerned here with a permanent severe mental or permanent severe behavioural disturbance or disorder and, therefore, with circumstances in which a claimant may be aware of his symptoms but not know that he has sustained such an injury. Consequently, although it is plain that the respondent was suffering stress/anxiety/depression symptoms right up to the time he consulted Ms Perrett-Abrahams, and to some extent was aware of them, it does not follow that he knew of facts which, if viewed objectively at that time, would be taken to mean that he was then suffering from incapacity arising from a permanent severe mental or permanent severe behavioural disturbance or disorder. Indeed, to the contrary, the respondent’s medical records, ... show that the respondent was not diagnosed as suffering from a mental disorder of that nature and gravity until he ultimately found his way to Ms Perrett-Abrahams in August 2006.”

60 At paragraph 83, the Court said:

“...The injury in question is a permanent severe mental or permanent severe behavioural disturbance or disorder of a kind recognised as such by psychiatric medicine. Consequently, it is of such a nature, that until the respondent was diagnosed as suffering from that injury, he could not have known, nor could he be expected to know, of facts sufficient from which objectively it could be inferred that he was suffering from incapacity arising from that injury.” (My underlining)

61 The Court of Appeal also referred to the fact that the worker’s testimony was consistent with the medical record evidence and consistent with the undisputed fact that the worker continued to work as a builder for a number of years prior to the diagnosis by Ms Perrett-Abrahams.

62 As stated, there are a number of parallels with the present situation. I accept that the plaintiff had some mental health problems in the period immediately following the fire, but that he had returned to full-time employment. He had been functioning at a high level prior to the cycling accident, as discussed earlier.

63 The plaintiff then suffered from mental health problems after the cycling accident. The treatment of these included being seen by Mr Lloyd. I accept that it was Mr Lloyd who, in approximately February 2013, came to the belief that the plaintiff’s difficulties were related to the fire.

64 Even assuming that Mr Lloyd immediately expressed his opinion to the plaintiff, it means that the earliest date at which the plaintiff could have appreciated that his psychological and psychiatric problems were related to the fire was February 2013. It was the earliest date at which he could have known that the incapacity from which he suffered arose from the fire. That would mean that, for the purposes of s135AC of the Act, proceedings would have to have been commenced before February 2016, that being the expiration of the three year period after the date upon which the incapacity arising from the injury had become known. I would refer to the observations of the Court of Appeal in *Rawlings* in this regard.

65 In fact, the Originating Motion was issued in August 2015. That is comfortably within the three year period.

66 Thus, it seems to me that, particularly bearing in mind the decision in *Rawlings* and the similarities between that case and the present situation, the plaintiff did not acquire the requisite knowledge until, at the earliest, February 2013 and commenced proceedings within three years of that date. In short, in relation to the argument concerning s135AC of the Act, I find in favour of the plaintiff. I find that he commenced proceedings within three years of acquiring the requisite knowledge.

67 It is inherent in the above that I am satisfied that the plaintiff's current problems arise from the fire, as opposed to the cycling accident. I am not satisfied that his credit has been damaged in this regard or generally. I would refer to my previous observations to the effect that his credit has not been damaged. In relation to causation, I prefer the views of those who have been treating the plaintiff and of Dr Weissman. The required causative link between the fire and the plaintiff's subsequent psychological or psychiatric problems after the cycling accident seems to me to have been made out. I refer to my earlier observations in this regard.

68 There is then the issue of whether the consequences of the plaintiff's mental or behavioural disturbance or disorder are severe within the meaning of the definition of "serious injury". In my opinion, they are. I have come to that conclusion for the following reasons.

- (i) Save for performing a very limited amount of work in the second half of 2015, the plaintiff has been unable to engage in remunerative employment since July 2013. Dr Velakoulis has referred to the plaintiff's capacity for vocational pursuits as being significantly impaired. Dr Weissman regards the plaintiff as having been incapacitated. At the time that he saw him, the plaintiff was performing the research job in New

South Wales, but experiencing difficulties. Dr Weissman formed the view that, when the plaintiff returned to Melbourne, he should be able to work as a lecturer on a part-time basis. Examining the plaintiff on behalf of the defendant on 5 January 2015, Dr Prytula expressed the view that the plaintiff did not have a capacity for suitable employment, but thought that there might be improvement and a recommencement of some employment within three to six months.

Dr Shan, also examining on behalf of the defendant, last saw the plaintiff on 14 July 2015. Following that examination, he expressed the view that the plaintiff did not have the capacity for the work that he had been performing prior to the exacerbation or aggravation of the condition that occurred in the cycling accident. He modified this in his brief report of 4 April 2016, expressing the opinion that “now – the patient does have the capacity for the work he was performing before the transport accident of 2011”. Exactly how he reached this conclusion is not clear, particularly as he had not seen the plaintiff again after his examination in July 2015.

The plaintiff himself has sworn in his affidavit of 31 March 2016 that he was not well enough to work. His affidavit of 17 January 2016 described the short period of work that he performed between July 2015 and November of that year. He had struggled to cope, could not keep up with deadlines and the like. As a result, he had gone on unpaid sick leave.

I am satisfied that the plaintiff’s mental or behavioural disturbance or disorder resulting from the fire has impacted greatly upon his working capacity. In the past two and three quarter years, he worked for approximately four months, struggled with that, and finally took unpaid sick leave. There has been quite a dramatic impact upon his employment capacity.

- (ii) The plaintiff has sworn, and I accept, that as at approximately June 2013 he found that he was suffering from more sleep disturbance than normal and was experiencing frequent nightmares. In his affidavit of 17 January 2016, the plaintiff has sworn that he was continuing to struggle with sleep, waking every three to four hours on average, and having nightmares about the fire two to three times per week. In his most recent affidavit of 31 March 2016, the plaintiff has sworn that he continues to sleep poorly, has nightmares about the fire a couple of times a week, at other times wakes up feeling sweaty and fearful, and that the end result is that he feels tired. Interference with sleep is a factor that has been viewed as being of importance by the Court of Appeal – see, for example, paragraph 45 of the Judgment of Maxwell P in *Haden Engineering v McKinnon* (2010) 31 VR 1 and subsequent cases such as *Sutton v Laminex Group Pty Ltd* (2011) 31 VR 100.
- (iii) The plaintiff now struggles to socialise and enjoy the company of other people. He has regular flashbacks which relate to his experiences with the fire, these being particularly vivid to the extent that he can smell smoke. He has some suicidal thoughts and increased anxiety. He has sworn that he feels socially isolated and that his motivation has decreased. He is anxious, jittery, easily frustrated and irritable. Whilst there has been improvement in relation to some of these symptoms, essentially they remain.
- (iv) The plaintiff was a person who was very involved in his local community. He was an active member, in some instances being on the Board, of local organisations. He was also physically active, enjoying a number of pursuits, such as kayaking, cycling, rock climbing, swimming, soccer, hiking, gym work and triathlons. He has resumed bike riding as a means of transport, but is still somewhat fearful. Generally, however, he no

longer has the energy or motivation to take part in the activities just described.

- (v) The plaintiff is on a comparatively high level of medication. He is currently taking Fluoxetine, Seroquel and Epilim daily, and Temazepam to assist with his sleeping.
- (vi) In his report of 14 December 2015, the plaintiff's current treating psychiatrist, Dr Velakoulis, stated that the plaintiff requires ongoing psychiatric care and the prescription of psychotropic medications. His condition is such that psychiatric review is required every two to three weeks, and Dr Velakoulis has expressed the opinion that the duration of the psychiatric care is likely to be long-term. The plaintiff is likely to suffer from chronic, ongoing, relapsing PTSD, anxiety and depressive symptoms.

Dr Velakoulis has also raised the spectre of a possible bipolar disorder and implicates the plaintiff's trauma exposure and PTSD as likely factors in its precipitation.

- (vii) The plaintiff is aged 45 years. Other than his bouts of suicidal ideation, concerning which there seems to have been some improvement and which are related to the relevant injury in any event, there is nothing to suggest that he will have anything other than a normal life expectancy. Thus, given the long-term nature of the consequences of that injury, he may well have decades of the relevant pain and suffering ahead of him.

69 I appreciate that the word "severe" as used in the definition of "serious injury" found in s135AB(19) of the Act is a word that carries with it certain requirements. I would refer to the well-known decision of *Mobilio v Balliotis & Ors* [1998] 3 VR 833. As was said in that case by Brooking J, "...I would say that 'severe' is used in the definition as a stronger word than 'serious'."

70 I have borne that in mind. However, it seems to me that the burden of proof has been discharged. I am of the view that, when the factors listed above are taken into account, the use of the word "severe", albeit a stronger word than "serious", is justified.

71 The plaintiff's application is successful. I find him to be a witness of credit. I am of the view that his proceeding has been commenced within the time constraints set out in s135AC of the Act. He has satisfied the statutory test of severity and has discharged the burden of proof. I shall hear the parties as to any ancillary orders that are required.