IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CIVIL DIVISION
DAMAGES AND COMPENSATION LIST
SERIOUS INJURY DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CI-12-03260

ANDREAS IOANNOU — Plaintiff

v

SCA HYGIENE AUSTRALASIA PTY LIMITED (ACN 004 191 324) — Defendant

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JUDGE:	HIS HONOUR JUDGE JORDAN
WHERE HELD:	Melbourne
DATE OF HEARING:	18 and 19 June 2013
DATE OF JUDGMENT:	24 June 2013
CASE MAY BE CITED AS:	Ioannou v SCA Hygiene Australasia Pty Ltd
MEDIUM NEUTRAL CITATION:	[2013] VCC 819

REASONS FOR JUDGMENT

Subject:	ACCIDENT COMPENSATION
Catchwords:	Serious injury – injury to the non-dominant left hand/wrist – pain and suffering damages only
Legislation Cited:	*Accident Compensation Act* 1985, s134AB(37)(a)
Cases Cited:	*Woolworths Ltd v Warfe* [2013] VSCA 22; *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1; *Aburrow v Network Personnel Pty Ltd* [2013] VSCA 46; *Kelso v Tatiara Meat Co Pty Ltd* (2007) 17 VR 592; *Brett Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260
Judgment:	Leave granted to the plaintiff to bring proceedings for the recovery of pain and suffering damages.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D Churilov	Zaparas Lawyers
For the Defendant	Ms R Kaye	Hall & Wilcox

HIS HONOUR:

1 This is an application for leave to commence proceedings for the recovery of pain and suffering damages only. The plaintiff relies on s134AB(37)(a) of the *Accident Compensation Act* 1985 ("the Act").

2 The injury relied on was opened as an injury to the left wrist and hand that has resulted in open surgery by way of reduction of a radial fracture with implant of plate and screws, as well as carpal tunnel syndrome and median nerve damage together with possible osteoarthritis. The body function relied on is therefore of the left hand/wrist, which is the non-dominant hand.

3 The defendant admits the plaintiff suffered a compensable injury on 20 June 2008. There is some debate about the precise organic cause of the ongoing symptoms in the hand/wrist and while some comments will be addressed about the different diagnoses, I accept there has been an injury to the right wrist resulting in hand symptoms, as well as wrist symptoms. The body function is that of the hand/wrist.

4 The defence to the application is that this is a "range" case and I take this to mean the consequences of the impairment of the hand/wrist do not meet the test of being "at least very considerable".[1]

5 I note the recent repeal of s134AE of the Act and the explanatory Memorandum and Second Reading Speech that accompanied the repeal. Nevertheless, clear, proper and adequate reasons are required. It has been said often that a serious injury application necessarily involves a substantial amount of "value judgment" which does not, of itself, admit of detailed reasoning that is explicit.

6 In large part these pain and suffering applications involve matters of value

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1 Transcript ("T") 20

judgment, opinion or impression.[2]

The Plaintiff's evidence

7 The fifty-nine-year-old plaintiff came to this country in 1976 and has worked for the defendant, although that company has changed names, for the last thirty-four years. He still works there full time as a forklift driver but does not work the overtime that he has done over the years prior to 2008.

8 The plaintiff has suffered previous fractures of his wrists some thirty-five years ago, as well as some knee symptoms since 2001 and then had some further wrist symptoms in 2003.[3] However, I find that as at 20 June 2008 when he suffered the admitted compensable injury, he had no physical limitations from his knees, wrists or other body parts that limited his capacity to work full time, do overtime and to fully enjoy all his interests outside of work. He used to work whatever overtime was offered to him and up to 16 hours of overtime per week was available at certain times.[4]

9 This application saw little if any challenge to the plaintiff's affidavit evidence. He describes in detail his symptoms and the impact on his work and lifestyle principally in the first two affidavits. A good deal of focus by the defendant was on the plaintiff's undoubted capacity to continue working full time in his forklift job, which I accept he is able to do, providing he avoids certain of the heavier activities involving his left upper limb. The fact that the plaintiff has been able to carry out this work over the last five or so years raises the relevance of a return to work in a pain and suffering application. The Court of Appeal has indicated that this does not preclude any affirmative finding of serious injury but is one of the matters to be taken into account.[5] What is required is to put aside the capacity for work and judge the extent to which pain interferes with the ordinary activities of life. A number of dot points for

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2 *Woolworths Ltd v Warfe* [2013] VSCA 22 per Kaye AJA at 129 and 130
3 Plaintiff's Court Book ("PCB") 5
4 PCB 13
5 *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1 per Maxwell P at paragraphs 15, 19 and 20

consideration are set out that are relevant to such a judgment.[6]

10 The plaintiff has endured a great deal of treatment since the subject fall. In spite of open surgery on 22 June 2008, further surgery on 12 January 2010 and a great deal of conservative treatment the plaintiff still endures constant daily pain.[7] He still requires prescription painkillers for his pain.[8]

11 I found the plaintiff a credible and truthful witness and, in spite of some language difficulties, reliable. In particular he did not overstate his symptoms or disabilities. He has done everything within his capacity to rehabilitate himself by way of following medical and other advice and has been prepared to keep working full time in spite of daily symptoms. I note that there is no doctor who questions the genuineness of his complaints on either side, although there is some debate about the precise organic diagnosis. I accept also that he would do overtime if he could and he is a family man who needs to earn the money.[9] This is consistent with his past work record. The only reason he is not working overtime since he was injured in 2008 is because of the hand and wrist problems that he has had and he still suffers from.[10]

Medical evidence

12 A treating surgeon, Mr Jason Harvey, orthopaedic surgeon, first saw the plaintiff on 24 June 2009 a year after the plaintiff had undergone open surgery by way of a radial fracture reduction and implant of plate and screws at the Dandenong Hospital. The complaint to Mr Harvey was of ongoing finger joint pain and wrist pain waking him from sleep and affecting his ability to work.[11] After nerve conduction studies, Mr Harvey performed open surgery by way of a left carpal tunnel release, removal of the metal implants and a flexor tendon synovectomy on 12 January 2010.

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6 *Haden Engineering Pty Ltd* v *McKinnon* [2010] VSCA 69 at paragraph 16, *Aburrow v Network Personnel Pty Ltd* [2013] VSCA 46 per Maxwell P and Tate JA at paragraph 20

7 PCB 8-10 and 13-14

8 PCB 13 and 50A; T46

9 T64

10 T64

11 PCB 53

13 Mr Harvey reviewed the plaintiff several times, the last occasion being 7 December 2010. There were continuing complaints of problems with the hand, including pain and:

> "The ongoing pain is more difficult to quantify as there is no specific abnormality that can be ascertained at this point of time."[12]

14 Mr Harvey thought work was causative of the current condition. He said, further:

> "He is fit only for alternative duties where he has minimal amount of lifting, gripping or triggering involving the left hand and does not have to do any significant pushing or pulling and he may take frequent breaks."[13]

15 The surgeon noted also, when he last saw the plaintiff back in 2010, that there was a 30 to 40 per cent risk of arthritis developing because of the fracture.[14] He also saw the need for regular Panadol Osteo and anti-inflammatory medication to try and control symptoms.[15]

16 I do not accept the defendant's argument that when the surgeon expresses a failure to find "... a good cause for his pain" this means the plaintiff's complaints of organically based pain ought to be rejected.[16] It is said in the context of Mr Harvey having no specific area "to target" surgically.[17] I do not read him as doubting the genuineness of the plaintiff's complaints of pain and he sums it up:

> "The diagnosis was left distal radius fracture with subsequent prominent metalware and carpal tunnel syndrome with current diagnosis being hand and wrist pain of unclear aetiology."[18]

17 The first treating general practitioner was at Medi7, a clinic where the plaintiff saw a number of different practitioners. The notes from that practice have been tendered and the first visit was on 25 June 2008 in relation to the subject

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12 PCB 54
13 PCB 55
14 PCB 55
15 PCB 52
16 PCB 54
17 PCB 54
18 PCB 55

claim. The notes cover over 10 years up to August 2010.[19] There are only two references to knee pain recorded and they are both in October 2007. This is relevant to the defendant's argument about the significance of knee symptoms in terms of enjoyment of life activities. While the clinic had administered various prescriptions for pain over the years it is worth noting that the narcotic drug Endone is mentioned for the first time on the day the plaintiff attended for the wrist fracture.

18 After 25 June 2008, attendances for wrist and hand pain are regular. By 12 July 2009, it is described as "chronic L hand pain.[20]

19 The defendant relied on the recorded note on 24 June 2010 about the plaintiff not being happy with the doctor being unable to justify further WorkCover certificates.[21] No firm conclusion can be drawn about this note. The plaintiff's explanation by way of language barrier for changing general practitioners may or may not be correct.[22]

20 What is important to note is that the general practitioner does record, on 24 June 2010, regarding work, that "...only may be more freaquent (sic) braikes (sic)" was discussed. This indicates it was a limited WorkCover certification that may have been the subject of discussion rather than a full clearance. In any event, I cannot reach any further conclusions about what discussion took place on that date when the general practitioner did not give oral evidence. I am left reading from very brief cryptic notes of attendances. However, two weeks later at the last visit on 8 July 2010 at this practice there is recorded "... worsening of the pain left wrist post work". On that last visit there are also referrals by the clinic to other doctors, including a re-referral to Mr Harvey, as well as a Panadeine Forte prescription.[23]

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19 DCB 33-47
20 DCB 46
21 DCB 47
22 PCB 7-8
23 DCB 47

21 I draw no conclusion adverse to the plaintiff in deciding to try another general practitioner in all these circumstances. Clearly though, the note shows the complaint of pain and the need for treatment were ongoing when he last visited this practice.

22 Dr Lolatgis, the new general practitioner, first saw the plaintiff in 2010 and reported in 2011 and 2013. He noted that the plaintiff had been on modified duties at work since being injured. The WorkCover Certificates indicate that he is still on modified duties now, some three years after first visiting this practice.[24] In the general practitioner's last report, he describes the diagnoses as the fracture, as well as carpal tunnel syndrome of the left wrist and he comments on the plaintiff's work capacity:

> "He is able to continue his modified duties, that being working as a forklift driver with rest breaks as required and at his own pace."[25]

23 Dr Lolatgis also thought the plaintiff's condition was stable and medication was still prescribed. Significantly, his last script on 8 March 2011 was for 192 tablets together with five repeat scripts.[26]

24 Associate Professor John Drago, neurologist, saw the plaintiff on referral from Dr Lolatgis in October 2010. At examination the hand was pale and cold but this was not particularly significant. He thought he "... will almost certainly develop osteoarthritis in the wrist..."[27] At review in 2013 there was no neurological diagnosis.[28] Again there is no suggestion that the symptoms were not genuine. Rather there was no neurological cause found.

25 The last of the treaters' reports tendered is from Sally Roberts, occupational hand therapist. She treated the plaintiff extensively from early 2010 until the insurer ceased paying for the therapy on 3 May 2012.[29] She reports in 2011

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24 Exhibit 2
25 PCB 49
26 PCB 50A
27 PCB 52.1
28 PCB 52.3
29 PCB 59

and 2013. The plaintiff had also had hand therapy following the original operation at Dandenong Hospital in June 2008 and such therapy, it seems, was carried out up to about 2010. It is very extensive hand therapy.

26 In 2011, Sally Roberts describes "... pain to be the most concerning issues" for the plaintiff and coldness was a problem that necessitated wearing gloves.[30] His condition had plateaued, she thought.[31]

27 The 2013 report follows a further fifteen hand therapy sessions that were conducted after the plaintiff had applied via conciliation for further treatment to address pain and functional limitations.[32] Sally Roberts reported ongoing pain, which fluctuates with use in activities of daily living and where heavy lifting or coldness was involved they increased the level of pain. She placed very real restrictions on the plaintiff's fitness for work, in stating them as:

> "• 5kg lifting restriction
> • Avoidance of repetitive activities involving his injured hand
> • No cold environments
> • Tasks be self paced and rest breaks available."[33]

I find these are very considerable limits on the capacity of the plaintiff.

28 Sally Roberts gave a comprehensive home therapy program to the plaintiff with an exercise and strengthening aspect to it. She did not expect any further significant improvements.[34]

29 The only medico-legal report for the plaintiff is from a Dr Leslie Roberts, neurologist. He examined the plaintiff in May 2013 but did not find a neurological cause of the pain. It was of musculoskeletal origin.[35] He thought it was now more appropriate for an orthopaedic surgeon to comment on

30 PCB 57
31 PCB 58
32 PCB 60
33 PCB 61
34 PCB 61
35 PCB 80.7

prognosis but again, there was no question raised about the complaints being genuine. I read the report as there being no neurological ongoing problems but they were nevertheless organic and were more in the orthopaedic field.

30 The defendant's medical material includes a letter, indicating scripts on 9 May 2007 for knee pain and him requiring occasional Stilnox to help sleep at night.[36] A TAC printout shows scripts presumably for the knee ending on 19 September 2009.[37] This material does not assist the defendant's argument that the knee symptoms are having any significant effect currently on the plaintiff's enjoyment of life, although the plaintiff conceded in cross-examination that he was still having some knee complaints. I have already alluded to the paucity of references to the knee condition in the ten years of Medi7 clinical notes overall.[38]

31 The only specialist hand surgeon in this case was Mr Murray Stapleton. He saw the plaintiff for the defendant on 30 May 2012. He had the treaters' reports sent to him and he thought that the diagnosis was –

> "This is not carpal tunnel syndrome, this is a direct injury to the median nerve as a result of this fall."[39]

32 Mr Stapleton found the plaintiff genuine and at examination noted some significant signs, including wide disparity in grip, even given that the right arm was the dominant arm.[40] His diagnosis was:

> "... comminuted fracture of the left wrist with median nerve damage on the left side."[41]

33 Mr Stapleton notes also that:

> "The pain of which he complains may, of course, relate to the onset of osteoarthritis. Which is always a possibility with fractures such as this."[42]

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36 DCB 5
37 DCB 30
38 DCB 32-47
39 DCB 17
40 DCB 18
41 DCB 18
42 DCB 19

34 He felt that the plaintiff had a permanent impairment and he could work providing permanent modifications of his duties applied. Those permanent modifications were set out earlier in the report in these terms:

> "[The plaintiff] now has returned to work on normal duties but with permanent restrictions. They are that he cannot drive the sweeper machine as it is a two-handed operation, he has difficulty holding the high pressure hose, and some lifting is a problem for him."[43]

35 Dr N Baynes, occupational physician, saw the plaintiff more recently than any other doctor on 14 May 2003. He reported to the defendant a diagnosis of:

> "... a fracture of the distal radius to the left wrist undergoing an open reduction and internal fixation with a later development of carpal tunnel syndrome with Mr Ioannou undergoing a left open carpal tunnel release, median nerve neurolysis as well as removal of metal and a flexor tendon synovectomy on 12.1.2010. He reports chronic pain over the base of the left thumb likely associated with osteoarthritis."[44]

36 Dr Baynes thought also that it was:

> "... likely the worker will develop an aggressive osteoarthritis in the base of the left thumb and wrist."[45]

37 In relation to work, Dr Baynes considered:

> "I believe the worker has restrictions in terms of employment where there is no lifting greater than 5kgs with the left hand and where there is no repetitive forceful gripping or flexion/extension of the wrist."[46]

38 He thought the plaintiff could do full-time hours and do some overtime if it was spread over different days.[47] Dr Baynes is the only doctor to comment to the effect that the plaintiff was capable of overtime work.

39 Viewing the medical evidence overall, it is clear that there are some different diagnoses about the wrist and hand symptoms that are causing the current complaints. It is conceded no doctor questions the genuineness of these complaints. No doctor suggests that they have anything other than an organic

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43 DCB 17
44 DCB 23-24
45 DCB 24
46 DCB 24
47 DCB 24

base or bases.[48]

40 I am satisfied that the plaintiff has an injury to his left hand/wrist that included a fracture, and a carpal tunnel condition, as well as probable nerve damage and probably onset of osteoarthritic symptoms in view of the last doctor's assessment. This is consistent with the evidence that the pain is "increasing",[49] he now needs more breaks at work[50] and has a recent script that included five repeats.[51]

41 I am satisfied also that the medical evidence supports his complaint of constant pain and restrictions and that there is really no treatment now open to him save for exercise, sensibly observing restrictions on his activities and taking medication for pain.

42 Several affidavits and documents were tendered by the defendant including from Hannah Lewis and James Ryan along with other records.[52]

43 Ms Lewis describes the plaintiff doing his normal duties on the forklift and there is no real dispute about this. He takes some breaks and avoids some aspects of lifting, but I accept he is still forklift driving full time as he was doing prior to being injured in June 2008.

44 Mr Ryan says much the same and he only adds the comment that with respect to working overtime he "... has not done so of his own accord".[53]

45 I reject the suggestion that the plaintiff has just stopped doing overtime since the accident for some other reason than the hand/wrist problems. He has always done overtime in the past. That is not challenged. I accept he does not do overtime now because of the impairment of the "hand/wrist function". I accept the plaintiff's evidence that he needs the money still and has stopped

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48 T58-59
49 PCB 10
50 T59
51 PCB 50A
52 DCB 29 and 1-2(b), 48, 49-50
53 DCB 2(a)

overtime "... because of the pain that I have, the problems that I have".[54]

46 I accept that overtime is probably now available to him even though he understood originally that it was not open to him.[55] He cannot now do overtime simply because of pain and disability in the hand/wrist.[56]

47 There is a real financial loss to the plaintiff on the bald figures that have been given to me, with $87,101.00 being the 2007-08 yardstick.[57] Leaving aside whether or not there have been any increments over the last four or so years, the figures show that he has not got back to even the yearly earnings of 2007-08 in the last four years of full time work. Looking at the shortfall in the four years since he earned $87,101.00, it would appear that he has suffered a loss of at least $43,000, leaving aside the question of any pay rate increases over that time. Such loss is consistent with his evidence that he is upset about his role as the provider and worries about the future employment situation.[58]

Conclusions

48 I find the plaintiff has suffered and is continuing to suffer constant pain. He still requires regular painkilling medication five years after his fall. I accept his evidence that "... the pain has always been there".[59] He had years of hand therapy to help his problem and "I found that it was helping".[60] The insurer stopped funding this treatment.[61] The pain continues, controlled to a limited extent by medication.

49 The fact that the plaintiff puts up with permanent pain does not detract from its consequences in this case. It is worth assessing what has been said about permanent daily pain:

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54 T64
55 T23 and PCB 10
56 T54-55
57 DCB 48
58 PCB 10 and 14; T64, T66
59 T61
60 T63
61 T63

> "... The endurance of permanent daily pain requiring frequent medication, must, according to ordinary human experience, raise a real prospect of a 'very considerable' consequence."[62]

50 This is a case in which it is proper to conclude that on all the evidence:

> "The respondent's stoicism cannot hide the fact that pain is a major component in the respondent's life."[63]

51 I find the plaintiff is a man to whom other comments by appellate courts about his attitude to enduring pain are apposite.[64]

52 More particularly, the disabling effect of pain on the plaintiff's capacity for work is relevant to a pain and suffering application such as this.[65]

53 I accept that the plaintiff has given up working overtime due to pain and this is a very considerable consequence for him. While he does not seek leave with respect to pecuniary loss damages, due no doubt to the 40 per cent bar,[66] it is nevertheless a very considerable consequence that a hardworking sole family breadwinner over many years now has the worry of not providing as he would like to, as well as concerns about the prospects of redundancy.[67] I accept he will have the worry in this regard for the foreseeable future.

54 The medical evidence supports limitations on his capacity for manual work. I accept that the plaintiff, having worked overtime for years, is the best judge of whether or not he can do it or cannot do it given his hand/wrist symptoms.

55 I find it is beyond his capacity now to perform the overtime that he wishes to. I find he has to wear gloves at work, the hand gets worse during the day, and two or three times during a shift he has to put his hand in a bucket of water to assist with symptoms when cold.[68] I accept the pain is increasing as time

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62 *Kelso v Tatiara Meat Co Pty Ltd* (2007) 17 VR 592 per Dodds-Streeton JA at paragraph 199

63 *Haden Engineering Pty Ltd v McKinnon* (*supra*) per Buchanan JA at paragraph 47

64 *Brett Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 per Nettle JA at paragraph 3; *Aburrow v Network Personnel Pty Ltd* (*supra*) per Maxwell P and Tate JA at paragraph 11

65 *Haden Engineering Pty Ltd v McKinnon* (*supra*) per Maxwell P at paragraph 15; *Aburrow v Network Personnel Pty Ltd* (*supra*) per Maxwell P and Tate JA at paragraph 20

66 Section 134AB(38)(e)(i)

67 PCB 10 and 14; T66

68 PCB 9

goes on.[69]

56 The plaintiff's achievement in maintaining full-time work as a forklift driver is more reflective of his motivation and stoicism than a measure of levels of pain. His WorkCover Certificates right up to the present time still have him on reduced duties after some five years.[70] He copes with his job by being careful to avoid certain activities and being determined to put up with pain and discomfort that is constant.

57 There are other aspects of the plaintiff's life that have been impacted on by his impaired body function. They include his capacity to enjoy a good night's sleep.[71] I accept he was having some sleeping problems due to the knee condition;[72] however, in the context of his describing the hand/wrist effects on his sleep, he described getting only four hours' sleep, waking with discomfort, pain being worse if he puts pressure on his hand and at times taking painkillers, even during the night. These are all reflections on the very considerable consequences of the hand/wrist problem with respect to sleep.[73] The fact that his knee had and was still causing some sleeping problems that led to Stilnox being prescribed does not detract from the evidence which I accept about the severe interference he must now endure with respect to sleep caused by the hand/wrist impairment. The plaintiff's evidence about the disruption to sleep caused by the hand/wrist contrasts strongly with his doctor saying of the knee that it only "sometimes makes him unable to sleep" and "occasionally" needing Stilnox.[74] The ten years or so of clinical notes from Medi7 support the conclusion that knee pain was not a problem of any major significance in this man's life including sleep.[75]

58 I find the plaintiff's disturbed sleep due to the hand/wrist symptoms is a very

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69 PCB 10
70 Exhibit 2
71 PCB 9
72 T24
73 PCB 9
74 DCB 5
75 DCB 32-37

considerable consequence. It is a matter of great significance for him to have a permanent condition that denies the ability to enjoy an uninterrupted sleep.[76]

59 There are other consequences that I accept are largely unchallenged save for the defendant's suggestion that they are contributed to by his knee condition. Tennis is one example,[77] as is gardening.[78] I accept the plaintiff's evidence that it is his hand and not his knee that has impacted on his enjoyment of tennis with his daughter.[79] For a father not to be able to enjoy a sporting interest with his daughter is a very considerable consequence for this man in itself.

60 Household chores and car maintenance were other activities the defendant suggested were impacted on by knee symptoms.[80] Looking at the whole of the evidence, I reject the defendant's argument that the plaintiff's enjoyment of these activities was impaired to any real extent by his knee condition. I accept the fact that in spite of any knee symptoms that he may have had prior to 20 June 2008, he worked long hours which included significant regular overtime, played tennis with his daughter, attended to garden and household chores and maintained a family car. I do not accept there was any knee problem that had any real limitation on him prior to the subject injury.

61 For a proud working man, I accept the limitations outside the workplace, of themselves, are "serious" for the plaintiff. His demeanour and, in particular, the resignation in the witness box with which he conceded "I don't feel well" and "It has changed"[81] on this topic were obvious. They support the conclusion that the frustration of these effects on his enjoyment of his role in the family is a very considerable consequence.

62 I reject the defendant's argument that a psychological reaction plays any

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76 *Haden Engineering Pty Ltd v McKinnon* (*supra*) at paragraph 45
77 T33-35
78 T35-37
79 T35, L15-17; PCB 10
80 T37-39
81 T66, L3-12

relevant part in this man's pain and suffering consequences. I find the impairment is organic.

63 Understandably, the plaintiff needed counselling on a few occasions last year[82] to cope with him not being the breadwinner or family man he once was. That counselling helped after some three sessions and the plaintiff stated:

> "He told me certain things that I should do to help myself. I have been doing those things and it made me feel better."[83]

64 The plaintiff has not seen the psychologist now for some five or six months. This is consistent with a man who now is coping psychologically by just getting on with going to work and with life generally by putting up with his pain.

65 The defendant's doctors do not even raise the prospect of psychological issues being relevant in their assessment of the plaintiff's condition, including the cause of consequences.[84]

66 The defendant argued that the lack of specialist treatment was relevant in this case and the fact that no second orthopaedic opinion was sought in recent times. In the circumstances of this case, I consider that the plaintiff has undergone very extensive treatment including his two operations, medication and years of hand therapy. Reading the medical evidence overall, there is no realistic suggestion that there is any further treatment open to him that would make any difference. The only suggestion seems to have come at the eleventh hour in a medico-legal consultation by the neurologist, Dr Leslie Roberts, in advising obtaining an opinion about prognosis from an orthopaedic surgeon.[85]

67 This does not in any way impact on the plaintiff's credit in terms of his description of the level of his symptoms. Nor does it in any way suggest that any qualified orthopaedic surgeon would be doing any more than commenting

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82 T28
83 T61
84 DCB 18-19 and 23-24
85 PCB 80.8

on prognosis as opposed to any treatment avenue that might make a difference. I find the plaintiff has been a compliant patient who has done everything within his capacity to pursue what medical treatment was reasonably open to him in a motivated attempt to improve his lot. There is no further treatment that I find would make any difference to the permanency of his condition.

68 For the above reasons, I grant the plaintiff's application for leave to bring proceedings for the recovery of pain and suffering damages.

69 I will hear the parties as to costs.

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