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

Revised
Not Restricted
Suitable for Publication

Case No. CI-17-03344

KENAN ELMAS — Plaintiff

v

VICTORIAN WORKCOVER AUTHORITY — Defendant

JUDGE:	HIS HONOUR JUDGE BOWMAN
WHERE HELD:	Melbourne
DATE OF HEARING:	15 & 17 May 2018
DATE OF JUDGMENT:	1 June 2018
CASE MAY BE CITED AS:	Elmas v VWA
MEDIUM NEUTRAL CITATION:	[2018] VCC 735

REASONS FOR JUDGMENT

Catchwords: *Workplace Injury Rehabilitation & Compensation Act* 2013 – s335 – reliance upon sub-paragraph (a) of the definition – application in respect of pain and suffering damages and pecuniary loss damages – injury to the back – concentration on pecuniary loss situation – whether plaintiff has capacity for suitable employment – s325(2)(g) – reasonableness of plaintiff's attempts to participate in rehabilitation or retraining – whether after rehabilitation or retraining plaintiff would have capacity for employment which would result in him earning more than 60 per cent of gross income in accordance with paragraph (f) – attitude of plaintiff to returning to workforce – whether burden of proof discharged – factors to be considered.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M Walsh with Ms M Yerusalimski	Zaparas Lawyers
For the Defendant	Mr D Myers	Lander & Rogers

HIS HONOUR:

General background

1 This matter comes before me by way of an application pursuant to s335 of the *Workplace Injury Rehabilitation & Compensation Act* 2013, hereinafter referred to "the Act". The plaintiff seeks leave to bring proceedings in respect of both loss of earning capacity and pain and suffering. In so doing, he relies upon sub-paragraph (a) of the definition of "serious injury" contained in s325 of the Act. The injury relied upon by the plaintiff is one to the low back. It is alleged that the injury occurred in a specific incident on 11 August 2015 when, whilst moving timber in the course of his employment, the plaintiff developed low back pain – see Transcript (hereinafter referred to as "T") 5. What occurred on 11 August 2015 shall hereinafter be referred to as "the accident".

2 The occurrence of the accident was not disputed and the payment of statutory benefits, which have recently been terminated, was admitted – see T16 and 17. Whilst the plaintiff is seeking leave in respect of both pain and suffering damages and pecuniary loss damages, the emphasis during the conduct of this case was very much on the latter, as shall be discussed subsequently. Very little, if any, challenge was made in respect of the nature of the pain and suffering consequences suffered.

3 Mr M Walsh of counsel with Ms M Yerusalimski of counsel appeared on behalf of the plaintiff. Mr D Myers of counsel appeared on behalf of the defendant. The plaintiff gave oral evidence, including the adoption of two affidavits as being true and correct. The balance of the evidence was documentary in nature, including quite lengthy videos, and was tendered either by consent or without objection.

Factual background

(a) The plaintiff's background, education, training and employment prior to the injury

4 The plaintiff is aged 30 years, he having been born in 1987. He is a married man with two young children. He was educated to Year 12 level, completing his VCE. He then started, but did not complete, an apprenticeship as a carpenter, in which he engaged for some two years. He then undertook some work building partitions. In early 2015 he commenced working as a saw-man and, whilst it is not entirely clear, it seems that he may have in fact returned to the firm where he had previously attempted his apprenticeship. In any event, it would seem that his employer was an entity called Mysands Pty Ltd. Nothing hinges on this. Thus, it can be seen that the plaintiff, whilst quite well-educated, performed manual work involving the sawing of timber and the like. This type of work seems to have been all that he has done. I also note that he is bilingual, being quite capable in both the English and Turkish languages.

(b) The plaintiff as a witness

5 The plaintiff's presentation was unusual and not particularly attractive. At times his presentation was almost sullen. He seems to be given to swearing quite a lot. I notice that an occupational therapist, Joanne Bryant, of CoWork Pty Ltd, when reporting to the defendant in relation to a vocational assessment, referred to his liberal and inappropriate use of expletives. The impression gained is that she had formed the view that this might not necessarily assist in relation to any interviews concerning employment (not that the plaintiff has engaged in any).

6 The surveillance videos made have done some damage to the plaintiff's credit in relation to whether or not he limps and whether or not his posture involves a forward tilt. The question would then arise whether such issues might or might not be part of any psychological or psychiatric reaction to injury. There seems to me to be no doubt but that questions of psychological reaction have

arisen, although the plaintiff has opted to rely solely upon paragraph (a) of the definition.

7 As shall be discussed, I am of the view that there are some indications of exaggeration, be it conscious or unconscious, in the plaintiff's presentation, but overall I am not of the view that his credit has been damaged to the extent of destroying his credibility. In some area of evidence, such as his failure, if not almost refusal, to seek work or undergo certain aspects of rehabilitation, he was quite forthright.

(c) State of the plaintiff's health prior to the injury

8 The plaintiff suffered an injury to his right arm in approximately 2008. This resulted in surgery, including having metal plates and screws placed in his arm. He has sworn that he fully recovered from that and there was no challenge to this proposition.

9 The MRI of the plaintiff's lumbar spine of 14 October 2015 revealed moderate L4-5 degenerative spondylosis, amongst other findings. Thus, it may well be that the plaintiff did have some degeneration of the lumbar spine prior to the accident. However, I accept that there was no prior history of a back injury or of back symptoms.

(d) The injury, its treatment and diagnosis

10 When the accident occurred, the plaintiff was aware of virtually immediate severe pain in the back and down the right leg and into the groin. He was taken to the Cairnlea Medical Centre, where he saw Dr Cenop, who was not his usual doctor. Dr Cenop referred the plaintiff for a CT scan of the lumbar spine. Essentially, this revealed marked bilateral L4-5 exit neuroforaminal narrowing bordering on stenosis and the radiologist raised the issue of a possible MRI scan. This CT scan was carried out on the day of the accident.

11 When there was no improvement, the plaintiff saw his usual doctor, Dr Uluca, at the Sun Crescent Medical Clinic. In a report of 13 November 2015, Dr Uluca reported that he had been seeing the plaintiff regularly since 13 August

2015. It is apparent that, on 14 October 2015, he referred the plaintiff for the MRI. The report of the radiologist was to the effect that the plaintiff had moderate L4-5 degenerative spondylosis and a small to moderate posterocentral L4-5 disc prolapse causing central canal stenosis and bilateral foraminal stenosis. There was mild impingement of the existing L4 nerve roots bilaterally.

12 Dr Uluca referred the plaintiff for treatment by way of physiotherapy. Ultimately, he referred the plaintiff to Professor Richard Bittar, consultant neurosurgeon, who first saw him on 14 January 2016. He considered the plaintiff to be suffering from symptoms most likely emanating from the L4-5 segment, the findings being consistent with a right L4 radiculopathy. Professor Bittar suggested referral to Dr Gavin Weekes, a pain specialist within the same overall practice, which is called “Precision”.

13 On 13 February 2016, Dr Weekes performed a right L4 nerve root block. Dr Weekes reviewed the plaintiff two weeks later. Whilst the plaintiff had not brought with him his pain diary, apparently he stated that his pain had been reduced from 8/10 to 5/10 and that there had been some improvement in terms of increased walking tolerance.

14 Dr Weekes also reported back to Dr Uluca on 8 March 2016. This followed a review on that day. Apparently, at that stage the plaintiff was working approximately two days a week on light duties and described himself as struggling with this. As shall be discussed, the plaintiff’s return to light duties only lasted approximately a fortnight and for comparatively few hours. The plaintiff was also describing some symptoms of depression. Dr Weekes was of the view that, if there was to be no further surgery, the plaintiff should attend a Pain Management Program.

15 Professor Bittar reviewed the plaintiff on 2 June 2016. The plaintiff was continuing to complain of lower back pain radiating to his right thigh.

Professor Bittar thought that the plaintiff remained totally incapacitated for work and suggested a weight-bearing MRI of the lumbosacral spine. This was performed on 10 June 2016. The report of the radiologist was to the effect of there being disc desiccation at the L4-5 disc, but with no disc bulge or protrusion and no cause for radiculopathy.

16 Professor Bittar reported to Dr Uluca again on 23 June 2016, having seen the plaintiff on that day. He was of the view that the plaintiff remained totally incapacitated for work. Professor Bittar was definitely not in favour of surgery in the form of an L4 nerve root compression. He suggested a pulsed radiofrequency neurotomy of the right L4 dorsal root ganglion, along with medial branch blocks and sacroiliac joint injections. He also suggested a multidisciplinary pain management program. In relation to a return to work, he indicated that he would refer the plaintiff to an occupational physician, Dr David Eaton. I might add that no report from Dr Eaton, who would also appear to be a member of the Precision group, was put before me.

17 On 17 July 2016, Professor Bittar reported to the plaintiff's solicitors. Essentially, this report detailed steps that had been taken to that point in time and which have been described. Professor Bittar expressed the view that the plaintiff was totally incapacitated for work. He also referred to the various steps which he considered to be advisable, including a pulsed radiofrequency neurotomy, median branch blocks, sacroiliac joint injections and participation in a multidisciplinary pain management program.

18 Professor Bittar stated that he had referred the plaintiff to Dr Eaton in relation to a return to work. Professor Bittar regarded the prognosis as being guarded, with the plaintiff likely to continue to experience significant pain and disability into the foreseeable future. He thought it highly unlikely that the plaintiff would regain a capacity to undertake pre-injury employment, but thought that he may regain some work capacity to perform alternate duties in a very sedentary role.

19 Dr Weekes also reported to the plaintiff's solicitors, this being on 26 July 2016. Essentially, he also went through the steps which had been taken. He regarded the plaintiff as being totally incapacitated for work as at the date of the last examination, which would appear to be 8 March 2016. He also regarded the prognosis as being somewhat guarded, as the plaintiff was still undergoing treatment. He also referred to the treatment options that might be adopted.

20 On 14 September 2016, Dr Weekes performed a bilateral sacroiliac joint injection. He saw the plaintiff again on 11 October 2016. Unfortunately, on this occasion, the plaintiff had lost his pain diary (having previously failed to bring it with him), but described his back pain as having been reduced from 6/10 to 3/10. Dr Weekes wondered whether it would be worthwhile performing a right L4 nerve root block, as there had been some success with that in the past. He noted that the plaintiff was awaiting participation in a multidisciplinary pain management program. He was also to be reviewed by Dr Eaton.

21 On 2 November 2016, Dr Weekes performed a right L4 dorsal root ganglion pulsed radiofrequency neurotomy. The plaintiff's leg pain seems to have been much improved, according to a letter from Dr Weekes to Dr Uluca on 13 December 2016. However, he was still complaining of back pain, particularly in the lumbar spine, and seemed to have some spasm in that area. Dr Weekes recommended participation in a multidisciplinary pain management program and again mentioned that there had been a referral to Dr Eaton in relation to a return to work. It is to be remembered that Dr Eaton is apparently an occupational physician, but no report from him was placed in evidence.

22 A letter of 25 January 2017 from Dr Weekes to the defendant indicated that the plaintiff continued to have significant lower back pain and it was recommended that he participate in a multidisciplinary cognitive-based pain management program. The plaintiff still had severe refractory lower back

pain. Dr Weekes said that he would report again following the plaintiff's pain management program.

23 Dr Weekes wrote again to Dr Uluca on 21 February 2017, having seen the plaintiff on that day. Apparently, an MRI of the lumbar spine had been performed, this apparently being on 15 December 2016. The report of the radiologist was that the study had been "heavily degraded" as a result of movement by the plaintiff. However, no appreciable spinal canal or foraminal stenosis which might account for the plaintiff's symptoms was detected . Dr Weekes was of the view that the plaintiff was going to participate in a multidisciplinary cognitive-based pain management program in April 2017. The plaintiff's current medication was Lyrica, Nurofen, Panadol and Lexapro. It was also suggested by Dr Weekes that bilateral L4-S3 medial and lateral branch blocks be performed.

24 Dr Weekes reported again to Dr Uluca on 16 May 2017. He had seen the plaintiff that day. The plaintiff had commenced his multidisciplinary cognitive-based pain management program, which he was finding difficult. An increase in his Lyrica had provided some analgesic benefit and improved his sleep. On 24 May 2017, Dr Weekes performed bilateral L5-S3 medial and lateral branch blocks. He saw the plaintiff again on 13 June 2017, reporting to Dr Uluca on that day. The plaintiff had completed his pain management program and had certainly obtained some improvement. He still had lower back pain radiating down his right leg. It was suggested that his intake of Lyrica be halved, as this might also assist in relation to weight gain. The plaintiff's average pain score was 5/10 and Dr Weekes thought that a further MRI might be worthwhile.

25 Dr Weekes reported again to Dr Uluca on 11 July 2017. Unfortunately, the plaintiff had not had an MRI scan, as he had lost his request slip. In the meantime, Dr Weekes had reported to the plaintiff's solicitors. This effectively recounted all the treatment, programs and the like which had taken place to

that point in time, including the referral to Dr Eaton. Dr Weekes implicated the accident in the causation of the plaintiff's symptoms. His diagnosis was of lumbosacral spondylosis. He was not of the view that the plaintiff was currently fit for pre-injury employment and that his fitness for alternate duties would be very limited. He believed it would be reasonable for the plaintiff to explore the options of a sedentary role of employment on a part-time basis. He thought it would be difficult for the plaintiff to maintain full-time employment on a consistent basis.

26 Finally, Dr Weekes reported to the plaintiff's solicitors on 23 April 2018. Much of the same history is set out again. Dr Weekes stated that he had not reviewed the plaintiff since 11 July 2017. He diagnosed lumbosacral spondylosis with some evidence of myofascial pain of the lower lumbar spine. He considered this to be consistent with the stated cause. He thought that the plaintiff's pain would continue for the foreseeable future. He also thought that such pain and restrictions had an organic basis. He was of the opinion that the plaintiff had no capacity to perform his pre-injury duties and no capacity to work on a reliable and consistent basis. He considered that the plaintiff was highly likely to continue to experience pain for the foreseeable future.

27 Professor Bittar reported to the plaintiff's solicitors again on 19 April 2018. Professor Bittar considered that the plaintiff should continue with analgesic medications and be regularly reviewed by his general practitioner. He also suggested a repeat MRI of the lumbosacral spine. He thought that the plaintiff had sustained a very serious injury to his lumbar spine and, as a consequence, had developed a significant chronic pain condition. He believed that the plaintiff was likely to continue to experience significant pain and disability into the foreseeable future. Whilst he had not seen the plaintiff since June 2016, he was of the view that there was likely to be an ongoing total incapacity for work. The plaintiff did not have a capacity to work on a consistent and reliable basis. Professor Bittar thought that the prognosis was

poor. Apparently, Professor Bittar had not actually seen the plaintiff since 23 June 2016.

28 Professor Bittar provided a supplementary report on 13 May 2018. Again, there is no indication that he saw the plaintiff prior to the provision of that report. Essentially, this report was to consider a number of employment options contained in an assessment by Recovre and a report from CoWork. Basically, Professor Bittar thought that the plaintiff would not be able to carry out any of the suggested roles in a reliable and consistent manner. He was also critical of a report from Dr Ralph Poppenbeek, specialist occupational physician, who had examined the plaintiff at the request of his solicitors. This criticism was in relation to diagnosis and the reference to an overriding psychological component. Professor Bittar considered the plaintiff's condition to be of a substantially organic basis. Professor Bittar was also critical of observations made by Mr Michael Dooley, who examined the plaintiff at the request of the defendant.

29 The plaintiff was referred by Dr Uluca to Dr Seyed Asadi, consultant psychiatrist. Whilst I appreciate that there is no reliance upon paragraph [c] of the definition in this case, nevertheless, consequences of a psychological or psychiatric nature are to be taken into account only for the purposes of that paragraph and thus are to be disregarded in the current case – see s325(2)(h). Accordingly, they can be of relevance.

30 In any event, on 26 May 2016, Dr Asadi reported to Dr Uluca. He considered the plaintiff to be suffering from an adjustment disorder with depressed mood and behavioural disturbance. Dr Asadi commenced the plaintiff on medication, namely Lexapro, the amount of which was doubled on a follow-up appointment. In a subsequent report of 21 February 2017, it was noted that the amount of Lexapro had doubled again. A further report of 8 August 2017 again referred to a diagnosis of adjustment disorder with depressed mood and behavioural disturbance. It is noted that the plaintiff felt frustrated by chronic

back pain and insomnia, also being irritable and having anger outbursts. Dr Asadi changed the medication from Lexapro to Pristiq, 100 milligrams per day.

31 On 5 May 2018, Dr Asadi reported to the plaintiff's solicitors. In this report, Dr Asadi answered some specific questions. He considered that the plaintiff was suffering from an adjustment disorder secondary to chronic pain and had psychological problems, including irritability, as a result. Dr Asadi stated that the plaintiff was not currently taking any psychotropic medication under his care. He reported that the plaintiff's capacity for employment was mainly affected by his physical injury. However, he also stated that, from a psychiatric point of view, it was most likely that the plaintiff would not be a consistent and reliable employee due to his irritability and anger issues. He did concede that the plaintiff's outbursts of anger, swearing and the like might be partly due to his pre-morbid personality.

32 Dr Olivia Twigg, clinical psychiatrist, who apparently is also part of the Precision Group, reported to Dr Uluca on 26 June 2017. The purpose of this was to state that the plaintiff had attended the Precision Ascend Pain Management Program between April and early June 2017. There was to be a further meeting and review to discuss goals and the like. A follow-up report and plan was provided on 14 December 2017. Essentially, the plaintiff was advised to continue working with his psychiatrist and to engage in regular walking, pacing and activity engagement. The plaintiff was complaining that the right leg still felt numb and unreliable and his exercises were modified accordingly. There is also reference to the stress associated with the medico-legal process.

33 Whilst there is no report from Dr David Eaton, apparently an occupational physician within the Precision Group, the defendant placed in evidence a report to Dr Uluca from Dr Reza Sabetghadam, occupational physician, whose report is also on the Precision letterhead. It is dated 28 March 2017. The report of Dr Sabetghadam is not particularly sympathetic to the plaintiff.

He records that, on observation, he did not notice any significant abnormality apart from lordosis and morbid obesity. Tenderness was non-specific. The plaintiff engaged in grimacing and pain behaviour. Dr Sabetghadam appears to have referred to the injury as being non-specific lower back pain. He encouraged the plaintiff to return to modified pre-injury duties as soon as he could. Apparently, he put to the plaintiff that he needed to make a choice as to whether he was willing to work despite having pain, was willing to modify his work, or chose not to work at all. Dr Sabetghadam observed that the plaintiff appeared to be guarded and unwilling to return to any employment, stating that his pain was incapacitating.

34 Dr Sabetghadam made various recommendations, including the ongoing review by a psychologist and physiologist, the latter being in an endeavour to shift the plaintiff's attention from pain to functional capacity. Amongst other things, he recommended the cessation of smoking and the continuation of exercise.

35 The plaintiff has also been examined for medico-legal purposes. Dr Ralph Poppenbeek, specialist occupational physician, reported to the plaintiff's solicitors on 20 April 2018. To him, the plaintiff described severe right sided and central low back pain, which was constant. He also described pain radiating to the right groin and right thigh and occasionally below the knee. Dr Poppenbeek believed that it was the CT scan of 11 August 2015 which identified the plaintiff's problem, namely that of a L4-5 facet joint dysfunction and arthropathy of the facet joints resulting in impingement of the right L4 and 5 nerve roots.

36 I might say that the opinion of Dr Poppenbeek is contested with some vigour by the treating neurosurgeon, Professor Bittar, who, in his report of 13 May 2018, refers to Dr Poppenbeek as incorrect; that the L5 nerve roots are not involved; and that a pain specialist would be better qualified than an

occupational physician (such as Dr Poppenbeek) to offer an opinion regarding diagnosis or to comment on chronic pain.

37 Dr Poppenbeek also observed that the plaintiff's extremely limited movement range was not in keeping with a purely physical condition. He also referred to there being an overriding psychological component in terms of a chronic pain disorder. Overall, Dr Poppenbeek did not think that the plaintiff had any capacity for employment on a consistent and reliable basis.

38 Dr Poppenbeek reported again on 11 May 2018. He had been sent various documents, but it would not appear that he had seen the plaintiff again. He noted that, whilst Professor Bittar felt that the plaintiff was totally incapacitated for work at the most recent review, this had been two years previously. Having viewed various reports, Dr Poppenbeek expressed the view that there was an adjustment disorder and associated behavioural and psychological issues, but maintained the view that the major issue was an organic lumbar spine injury. He also stated the following:

> "There are barriers to Mr Elmas returning to semi-professional or professional work because of the physical injury, but these barriers increase when one considers the psychological issues also."

39 He had been provided with lists of potentially suitable jobs. He thought that the plaintiff could probably ultimately work as an information officer, provided that the treatment recommendations that had been made became effective and improved his functional capacity. At the present time, he did not think that the plaintiff had any capacity for four jobs listed in a report from Recovre on a consistent or reliable basis. He also expressed an opinion concerning four jobs outlined in a report from CoWork Pty Ltd of 7 May 2018. He thought that work as a Turkish/English interpreter would be suitable, as would work as a control room monitor, provided that the plaintiff, when performing that work, had the facility to get up and move about from time to time during the working day. He also observed that the plaintiff appeared somewhat unsettled and to have difficulty coping with his claim and residual symptoms. If this could be

overcome, the plaintiff would have the capacity to adequately undergo and probably complete further studies, although that was impossible to predict at the current time. He thought that the plaintiff would need to work hard to overcome his difficulties so that he could try the two work options of interpreter and control room monitor.

40 Mr Michael Dooley, orthopaedic surgeon, saw the plaintiff at the request of the defendant on 27 March 2018. Mr Dooley considered the plaintiff to be significantly overweight. He noted his findings on physical examination, such as that the plaintiff's straight leg raising was limited on both side to 10 degrees and that there was reduced sensation in the whole of the right lower limb. Mr Dooley formed the opinion that the plaintiff had early disc degeneration involving the L4-5 disc at the time of sustaining injury. He diagnosed the injury as being soft tissue in nature. It may also have involved an aggravation of the underlying disease, with the possibility of the existence of a small disc prolapse occurring at the L4-5 level. With such a prolapse, Mr Dooley would have expected improvement and recovery over a period of approximately three months. He thought that there were many inconsistent signs on clinical examination.

41 Mr Dooley expressed the view that the plaintiff had suffered a soft tissue injury to the lumbar spine, together with a psychological reaction, which had significantly influenced ongoing symptoms. He thought that the plaintiff needed to increase his activity in general and undertake regular low impact exercise. He did not believe that the plaintiff required regular ongoing specific conservative orthopaedic treatment or surgical intervention. Mr Dooley was also of the view that some of the treatment which had been recommended or carried out would lead to reinforcement of the psychological component of the presentation. He expressed the opinion that the plaintiff had a physical capacity to work in various employments such as a dispatch clerk, information officer, forklift driver and other occupations.

42 Associate Professor George Mendelson, consultant psychiatrist and specialist pain medicine physician, also saw the plaintiff at the request of the defendant. In a somewhat lengthy report, Associate Professor Mendelson's conclusion was that the plaintiff did not have any diagnosable mental disorder. He may have emotional symptoms, predominantly related to irritability, anger outbursts and feelings of frustration. However, Associate Professor Mendelson would not accept that the plaintiff has an adjustment disorder with depressed mood and behavioural disturbance. He thought that the plaintiff needed to lose weight and possibly attend anger management classes. He also thought that the plaintiff required a functional restoration program with a view to eventually returning to gainful employment. He did not regard the plaintiff as having any loss of work as a result of any diagnosable mental disorder or psychiatric impairment. Associate Professor Mendelson also referred to the observation of Dr Sabetghadam that the plaintiff was unwilling to return to any employment.

43 The defendant has also had the plaintiff examined by Dr Michael Baynes, occupational physician, and Dr Alan Jager, psychiatrist. The plaintiff in fact put the reports of these practitioners into evidence as part of his court book.

44 Dr Baynes first reported to the defendant on 31 May 2016. The plaintiff complained of continuous lower back pain, more on the right side, and some other symptoms. He advised that he could walk for 20 minutes, but with a limp. He presented with a bent posture. Flexion, extension, rotation and straight leg raising appear to have been quite restricted. Dr Baynes diagnosed chronic lower back pain, most likely discogenic in origin, with degenerative change to the L4-5 disc and radiological impingement of the exiting L4 nerve root bilaterally. He implicated the employment incident. Dr Baynes hoped that the plaintiff would have the capacity to return to alternative duties in the next three to six months, and considered that a review after that period would be appropriate. He also expressed the opinion that there were

significant psychosocial factors impacting upon the plaintiff's condition. He recommended early referral to a pain management program, integrated with a return to work program.

45 Dr Baynes reported again on 3 August 2017, having seen the plaintiff on that day. The plaintiff stated that his pain was worse than at the time of the previous review. Upon examination, he walked with a slight limp. Again, flexion, extension and the like were very limited, with straight leg raising being restricted to 10 degrees on each leg. Dr Baynes' diagnosis remained the same. He noted that serial injections had not provided any benefit and that there had been only limited benefit from a pain management program. He thought that the plaintiff should be encouraged to undertake a home-based exercise program, but that, if his current treatment ceased, this would reduce his capacity for suitable employment. He did not believe that the plaintiff had a current work capacity, and suggested a review in one year's time. He also referred to the plaintiff having increasing frustration, anger and depression. He was hopeful that there would be improvement over the following six to nine months, allowing a capacity for sedentary-type duties.

46 Dr Baynes reported again on 8 December 2017, having been forwarded surveillance reports, a vocational assessment report, and some other material. It would not appear that he was sent the actual surveillance videos. His conclusion was that the surveillance reports conflicted with what had been described to him by the plaintiff and the poor range of movements of the spine found at examination. Dr Baynes also referred to the apparent absence of reference to the plaintiff walking with a limp. He concluded that the plaintiff had a greater capacity for activities of daily living than his history had provided.

47 In relation to the vocational assessment report, Dr Baynes expressed the opinion that the plaintiff would have a physical capacity for jobs such as an information officer, despatch clerk and workplace health safety adviser. He

thought that the plaintiff would be fit for sedentary work with no lifting greater than 5 kilograms and no lifting from below knee height or above shoulder height. It would be important that he could frequently rotate his postures.

48 Dr Jager reported to the defendant on three occasions. I note in his report that he had previously seen the plaintiff on 5 October 2016, but this report was not put before me. Dr Jager noted that the plaintiff swore profusely, as well as appearing to be grim and depressed.

49 Dr Jager diagnosed a major depressive disorder with agitation in partial remission or a chronic adjustment disorder with disturbance of emotions and conduct. Given the poor response to the high dose of antidepressant medication and psychiatric therapy, Dr Jager formed the view that the latter was the more likely diagnosis. He thought that the plaintiff was agitated, angry and violent, and could not be relied upon to limit such behaviour in the workplace.

50 Dr Jager reported again on 24 November 2017. He did not see the plaintiff again, but was provided with surveillance reports and a vocational assessment report. He did not regard the surveillance material as being of great assistance, save that the plaintiff's presentation was inconsistent with that at interview. He expected the plaintiff to develop a capacity for work, given his transferable skills, provided that his mental state improved.

51 Dr Jager reported again on 21 December 2017. This appears to have been in the context of being forwarded the report of Dr Baynes of 8 December 2017 and the 130 week vocational assessment report of 13 October 2017. In relation to Dr Baynes' report and references within it to the surveillance material, Dr Jager's opinion remained unaltered, namely that the plaintiff was unfit for all employment due to the risks posed by his emotional state. He expected the plaintiff to regain a capacity in the following six to nine months.

52 Dr Jager reported for a fourth time on 13 February 2018, having seen the plaintiff again on 30 January of that year. He complained of having no enjoyment of life, difficulty sleeping, low energy and the like. Dr Baynes considered the plaintiff to continue to have a major depressive order in partial remission. He recommended psychiatric treatment, including antidepressant medication and the undertaking of therapy. He considered the plaintiff to be fit to undertake pre-injury duties and hours within his physical restrictions. The plaintiff was also fit for various alternative employments that had been recommended within those restrictions.

53 The conclusion at which I have arrived is that the plaintiff has suffered aggravation of pre-existing lumbar degenerative disease, with a possible small prolapse at L4-5. This is consistent with the findings upon radiological investigation. It is also consistent with the diagnosis of Professor Bittar, who is the treating neurosurgeon.

54 Given the radiological findings, it also seems to me that at least part of the plaintiff's symptomatology results from the aggravation of pre-existing degenerative disc disease. This is consistent with at least part of the diagnosis of Professor Bittar and with that of Mr Dooley, examining on behalf of the defendant. However, I also accept that the plaintiff did not have lower back symptoms of any magnitude, if at all, prior to the accident. Accordingly, the symptoms and restrictions from which he now suffers emanate from the accident.

55 I am also of the view that the plaintiff's physical symptoms are permanent within the meaning of the Act in that they will persist for the foreseeable future. Dr Uluca, the treating general practitioner, has expressed the opinion that the plaintiff's prognosis is poor. That is also the opinion of Professor Bittar. The treating pain specialist, Dr Weekes, is of the opinion that the plaintiff is highly likely to continue to experience pain for the foreseeable future. On balance, I

am of the view that it has been established that the physical consequences of the accident are permanent.

56 Pursuant to s325(2)(h) of the Act, the psychological or psychiatric consequences of a physical injury are to be taken into account only for the purposes of paragraph (c) of the definition. In the present case, I am of the view that there are psychological or psychiatric consequences of some magnitude. I appreciate that Associate Professor Mendelson, who saw the plaintiff at the request of the defendant, did not think that the plaintiff had any diagnosable mental disorder, although he did have emotional symptoms, irritability, anger outbursts and feelings of frustration. However, the plaintiff's treating psychiatrist, Dr Asadi, is of the view that the plaintiff suffers from an adjustment disorder secondary to chronic pain and had psychological problems as a result. The plaintiff has had considerable treatment in this regard. However, he did state that the plaintiff's capacity for employment was mainly affected by his physical injury.

57 Dr Jager ultimately diagnosed a major depressive disorder in partial remission and, most recently, considered the plaintiff to be fit to undertake work within his physical restrictions. In short, there is a history of psychological or psychiatric consequences, although that condition may be in remission. In any event, such consequences shall not be taken into account for the purposes of the present application.

Other developments since the injury

58 The plaintiff returned to work with his former employer for a period of two weeks, working one and half hours per week. His duties seem to have involved sweeping. Apparently he was allowed to sit down during that time. He attended on three occasions and on the fourth, went home – see T20.

59 The plaintiff agreed that he has not otherwise looked for any work or for any course related to work or studies. He has not researched any possible jobs or applied for any jobs. He has not seriously considered any return to work

options. It has been suggested that he could work as a Turkish/English interpreter, but he has not looked at any kind of course in that regard. He has always had some ambition to run a restaurant, but believes that would be impossible.

Ruling

(a) Pecuniary loss damages

60 I am of the view that the plaintiff's application for leave to bring an action to recover pecuniary loss damages must fail. I have come to that conclusion for the following reasons.

61 Section 325(2)(g) requires consideration of such matters as a worker's attempts to participate in rehabilitation or retraining. The plaintiff appears to have done nothing in this regard. I accept that, when referred to an occupational physician, namely Dr Sabetghadam, he was encouraged to return to modified pre-injury duties as soon as he could. I accept that Dr Sabetghadam explained to the plaintiff the concept of pain and tolerance and that he needed to make a choice in relation to whether he was willing to work despite having pain, willing to modify his work, or not to work at all. Dr Sabetghadam then noted that the plaintiff appeared to be guarded and unwilling to return to any employment.

62 Thus, we have a young, 30 year old man with a reasonable to good level of education and apparently a good level of intelligence. He is bilingual, having been born and educated in this country, but also having a good grasp of Turkish. I note that, when interviewed for the purposes of the vocational assessment report of Recovre, it was noted that he contributed to the interview in a clear and articulate manner, and that he advised the interviewer at CoWork that he was fluent in reading and speaking Turkish. I note that the history he gave to Dr Baynes was that in fact he worked three years of a carpentry apprenticeship, but left due to conflict with his employer. In any

event, he is a young man of quite reasonable education and the possessor of some skills.

63 However, in the witness box he made it quite clear that he had not returned to work, save for the very brief and incomplete attempt at light duties; he had not attempted any course; he had not made any job application; he had not looked for any work; he had not looked for any course; he had not returned to physiotherapy; and he had not returned to hydrotherapy – see T23. He agreed that he stopped the physiotherapy and hydrotherapy. He stopped the psychiatric medication. He has not looked for any work or at any course of work. He has not researched any possible jobs. He has not applied for any jobs. He had not seriously considered any return to work options. He had not looked at any kind of course in terms of being an interpreter. He agreed with the observation in the CoWork report that he was firstly committed to a role of an injured or disabled person. For all of the observations just made, I would refer to T41.

64 I appreciate that some of the above may be repetitive, but the plaintiff was twice cross-examined in relation to this issue. There seems to me to be little doubt but that his attitude towards any return to work, looking for work, or seeking out and engaging in courses, rehabilitation or retraining is a firmly negative one.

65 This is consistent with the attitude displayed when interviewed by his treating occupational physician, Dr Sabetghadam. To that doctor, and after having the various options explained to him, he was guarded and unwilling to return to any employment. As earlier indicated, there are several references to him being referred to another occupational physician, Dr Eaton, within the same group, but what happened in that regard is far from clear.

66 Of the other occupational physicians, Dr Poppenbeek, who saw the plaintiff at the request of his solicitors, stated that, whilst the plaintiff has a physiological

impairment, clearly there is also a psychological issue. Given that the plaintiff is not relying upon paragraph (c) of the definition, this immediately causes some problems in relation to s325(2)(h).

67 Further, Dr Poppenbeek was of the view that work as an interpreter would be suitable because of the physical demands being relatively low. He stated that the same applied to work as a control room monitor, providing that the plaintiff had the facility to get up and move about from time to time. He referred to the plaintiff as being unsettled and appearing to have difficulty coping with his claim and residual symptoms, also observing that the plaintiff would need to work hard to overcome his impairment so that he could try those work options. Whether the plaintiff is working hard in that regard appears very doubtful.

68 The ultimate conclusion of Dr Baynes, the other occupational physician who has seen the plaintiff, was that the plaintiff was fit for sedentary work with restrictions and that he would have the physical capacity to engage in employment as an information officer, despatch clerk or workplace health safety adviser on a part-time basis of 20-25 hours per week.

69 The overall impression conveyed by the occupational physicians is that, if the plaintiff applied himself, he would be fit to return to work in suitable employment at least on a part-time basis.

70 To state the obvious, the plaintiff bears the burden of proof. He does so in a situation where it is alleged that he has no capacity for work and will have none for the foreseeable future. Accordingly, this is not a case where the quantum of earnings in various occupations has been put before me. The plaintiff simply asserts that he is totally incapacitated and has made no endeavours to look for work or engage in rehabilitation or retraining directed towards a return to work. Indeed, in a document filed and served on behalf of the plaintiff headed “Plaintiff’s Statement of ‘Without Injury’ Earnings, Loss of

Earning Capacity and 'After Injury' Earnings …", it is asserted that the figure which most fairly reflects the plaintiff's "after injury" earning capacity is "nil".

71 I am not satisfied that he is totally incapacitated and is unable to perform even part-time work on a consistent and reliable basis. I prefer the opinion of Mr Dooley that, given the physiological findings, the plaintiff has a physical capacity to return to some suitable duties. This seems to me to be consistent with those physical findings and with the ultimate observations of the occupational physicians. Certainly those observations do not go as far as saying that, if the plaintiff is currently totally incapacitated, that will be the situation for the foreseeable future. As earlier indicated, I accept that he will have symptoms and restrictions for the foreseeable future, but whether that means he is totally incapacitated for such a period is another matter.

72 In any event, the plaintiff fails in relation to pecuniary loss because of the operation of s325(2)(g). I have already discussed this. His attempts at participating in rehabilitation or retraining are virtually non-existent in a situation where the plaintiff does have a capacity for alternative employment and where, as stated, he has conducted his case on an "all or nothing" basis in relation to financial loss and figures relating to suitable employment, be it part-time or full-time.

73 In relation to the operation of s325(2)(g), I would refer to the decision of his Honour Judge Misso in *Ristevski v Demos Property Services (Australia) Pty Ltd* [2010] VCC 169, and his Honour Judge Jordan in *Elias-Mikre v The Royal Melbourne Hospital* [2013] VCC 1860. In *Ristevski*, and when considering the equivalent provision under the previous legislation, his Honour stated as follows:

> "The difficulty with a case of this kind is that in the absence of an effort on the plaintiff's part to rehabilitate and retrain, there are only two possible conclusions left open. Firstly, that the plaintiff is totally incapacitated for all work, or secondly, that in the absence of any effort to rehabilitate and retrain, it is simply not possible to determine whether the plaintiff has any residual capacity which she can exercise in suitable employment. I think the plaintiff falls into the latter category."

74 In *Elias-Mikre*, his Honour Judge Jordan referred to the "heavy onus" in relation to proving an inability to be retrained or rehabilitated or undertake suitable employment. With respect, I would agree with those observations and with the approach taken.

75 In summary, the plaintiff has failed to discharge the burden of proof in relation to pecuniary loss damages and his application in that regard is dismissed.

(b) Pain and suffering damages

76 The concentration of the parties, and particularly of the defendant, during the conduct of this case has been very largely upon whether there should be leave in respect of pecuniary loss damages.

77 Indeed, on behalf of the defendant, Mr Myers put before me a comprehensive Statement of Issues. Save for some discussion upon disentanglement of physical and psychological or psychiatric symptoms and complaints, this document is directed almost entirely to economic loss issues and particularly s325(2)(g).

78 Apart from an attack upon the plaintiff's credit generally, the closing address of Mr Myers is similarly directed to disentanglement and the operation of the relevant sub-section to which reference has been made. In other words, save for the above, the concept of pain and suffering took something of a back seat.

79 Viewing the plaintiff's pain and suffering consequences solely on the basis of paragraph (a) of the definition, as I must, I find that the burden of proof has been discharged and that the plaintiff is entitled to pursue damages. I have reached that conclusion for the following reasons, which are not listed in order of importance or significance.

(i) The plaintiff is aged only 30 years. There is no evidence or suggestion to the effect that he has anything other than a normal life expectancy.

Thus, he is likely to have ahead of him decades of pain and suffering, as well as restrictions in relation to his activities.

(ii) The plaintiff has sworn as to the difficulties that he has in relation to sleeping. The plaintiff has sworn that sleeping is a problem for him. He tosses and turns and his back pain keeps waking him. He has to get up and have a walk in the middle of the night.

In relation to the importance of disruption of sleep as a factor, I would refer to the decision of the Court of Appeal in *Haden Engineering v McKinnon* [2010] VSCA 69. As was said by Maxwell P:

> "It is, in my view, a matter of great significance for a person to be denied, seemingly for the rest of his life, the ability to enjoy uninterrupted sleep."

What was sworn to by the plaintiff in his affidavit was not challenged in cross-examination.

(iii) The plaintiff has sworn that the injury to his back has affected his ability in relation to looking after his children. He has referred to the fact that there were difficulties in picking children up, bathing them and the like. In the surveillance video material, the plaintiff was shown pushing a child on a swing. However, I note that he did this one-handed and effectively without bending. In relation to this particular activity, I do not think that his credit was damaged. Not being able to engage actively with his young children seems to me to be a factor of some weight.

(iv) The plaintiff has asserted in his affidavits that he has constant pain in the low back. This varies in severity. Of course, whether it and other sequelae of injury are of sufficient magnitude to prevent him from attempting a return to work is another matter. However, I accept that he continues to have some pain in the lower back and that this is constant. As was said by the Court of Appeal in *Kelso v Tatiara Meat Company Pty Ltd* [2007] VSCA 267:

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

I am satisfied that the plaintiff does have daily back pain which may wax and wane over the course of that day. I am also satisfied that such pain is of physical origin and will persist for the foreseeable future.

(v) The plaintiff has been on a regime of daily medication. As at the time when he swore his second affidavit of 1 May 2018, he was taking four to five tablets of Nurofen per day for his back pain, in addition to using Voltaren Gel. He has also undergone various procedures, such as a right L4 nerve root block, a right L4 dorsal root ganglion pulsed radiofrequency neurotomy and bilateral sacroiliac joint injections. In May 2017, he underwent bilateral L4-S1 medial and lateral branch blocks. In short, he has undergone quite a regime of medication and treatment.

(vi) The plaintiff has also sworn that his sex life is affected. Again, this was not challenged. It presents as another important factor.

(vii) There is also interference with the plaintiff's every day and social activities. He cannot walk for any substantial distance. He is limited in relation to such things as fishing, in which he used to engage, helping out in the garden, socialising, travelling over any substantial distance and the like. Doubtless these problems are an ongoing source of concern and inconvenience to him.

(viii) Whilst the plaintiff's attitude towards returning to the workforce or attempting so to do affected his application in respect of pecuniary loss adversely, it may well be that the area of work in which he used to engage – namely carpentry-type work, sawing and the like – is now closed to him. The inability to engage in the type of work which is now

apparently closed to him is another aspect to his pain and suffering which is to be borne in mind.

80 Bearing in mind all of the above, I am satisfied that the plaintiff has discharged the burden of proof in relation to the statutory test concerning pain and suffering damages.

Conclusion

81 The plaintiff is unsuccessful in his application for leave in relation to pecuniary loss damages. He has not discharged the burden of proof. He is successful in relation to his application for leave to pursue a claim for pain and suffering damages.

82 Accordingly, the application in respect to pecuniary loss damages is dismissed. Leave is granted to him in respect of pain and suffering damages.

83 I shall hear the parties as to any ancillary orders that are required.