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

Unrevised
Not Restricted
Suitable for Publication

Case No. CI-18-05508

MATTHEW NIKOLOFF-KING — Plaintiff

v

VICTORIAN WORKCOVER AUTHORITY — Defendant

JUDGE:	HER HONOUR JUDGE MILLANE
WHERE HELD:	Melbourne
DATE OF HEARING:	30 and 31 May 2019
DATE OF JUDGMENT:	28 June 2019
CASE MAY BE CITED AS:	Nikoloff-King v Victorian Workcover Authority
MEDIUM NEUTRAL CITATION:	[2019] VCC 942

REASONS FOR JUDGMENT

Subject:	Serious Injury Application
Catchwords:	Application for leave to commence proceedings for pain and suffering damages – paragraph (a) of the definition of 'serious injury' – whether, and if so what injury was sustained in employment – whether lower back injury is serious in its consequences
Legislation Cited:	*Accident Compensation Act 1985* (Vic)
Cases Cited:	*Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260; *Haden Engineering Pty Ltd v McKinnon* [2010] VSCA 69; *De Agostino v Leatch & Anor* [2011] VSCA 249; *Grech v Orica Australia Pty Ltd & Anor* [2006] VSCA 172; *Rowe v Transport Accident Commission* [2017] VSCA 377; *Borazio v State of Victoria* [2015] VSCA 131; *Barwon Spinners Pty Ltd v Podolak* (2005) 14 VR 622; *Ansett Australia Ltd & Anor v Taylor* [2006] VSCA 171; *Fokas v Staff Australia Pty Ltd* [2013] VSCA 230; *Ifka v Shahin Enterprises Pty Ltd* [2014] VSCA 8; *Sednaoui v Amac Corrosion Protection Pty Ltd* [2017] VSCA 66; *Sutton v Laminex Group Pty Ltd* (2011) 31 VR; *Davidson v Transport Accident Commission* [2015] VSCA 12; *Stijepic v One Force Group Aust Pty Ltd & Anor* [2009] VSCA 181.
Judgment:	Leave granted

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms M. Yerusalimsky	Zaparas Lawyers
For the Defendant	Ms L. Glass	Wisewould Mahony

HER HONOUR:

Introduction

1 The 26-year-old plaintiff, Matthew Nikoloff-King, makes application under section 134AB(16) of the *Accident Compensation Act 1985* (Vic) (the Act) for leave to bring common law proceedings for pain and suffering damages for injury sustained to his spine throughout the course of his employment with HOA Australia Pty Ltd (HOA).[1] The injury alleged is aggravation of lumbar spondylosis.

2 HOA employed the plaintiff as a casual worker between 17 and 18 October 2012. The plaintiff alleges that, at the time, he had been required to unload heavy boxes containing Asian food products and heavy bags of rice from shipping containers.

3 The parties were represented by counsel. Ms M. Yerusalimsky appeared on behalf of the plaintiff. Ms L. Glass appeared on behalf of the defendant.

The evidence at hearing

4 The plaintiff attested to the accuracy of two affidavits affirmed by him on 8 August 2018 and 13 May 2019 respectively.[2] He was cross-examined and re-examined.

5 The plaintiff's affidavits were tendered together with extracts from the Plaintiff's Court Book. The additional documents tendered comprised affidavits affirmed by the plaintiff's grandmother, Anthea Nikoloff, on 13 May 2019 and Jordan Cavanagh on 16 May 2019; reports from treating doctors and health professionals; letters of instruction to and reports made by medical-legal specialists; the results of CT lumbar spine investigation on 30 November 2012; football match records for the period from 2005 to 2016; and extracts from the

[1] Originating Motion filed on 10 December 2018.
[2] Exhibit P1, Plaintiff's Court Book (PCB) 1 to 7.

clinical records of Vermont South Chiropractic Centre and the Mount Waverley Chiropractic Centre made by chiropractor Matt Bonadio for the period June 2018 to April 2019.[3]

6 The defendant tendered a copy of a Letter of Offer dated 31 October 2012 identifying 26 October 2012 as the date from which the plaintiff commenced employment with another employer, Kelmatt.[4]

7 Extracts from the Defendant's Court Book were also tendered. These comprised: Worker's Injury Claim Form dated 28 May 2018; Notice of Limited Acceptance of Claim dated 27 June 2018; reports made by medical-legal specialists; clinical records of Mount Waverley Chiropractic Centre and Armadale Chiropractic Centre; extracts from the clinical records of Guardian Medical Burwood; Basketball Records; a Facebook post on 17 October 2016 containing a photograph; and a Camp America Form signed by general practitioner Dr Ali Zavery from Guardian Medical Burwood on 22 April 2015.[5]

8 The plaintiff presented as a truthful, yet nervous, witness. He impressed as not being given to exaggeration of his disability or the problems he has experienced by reason of a compensable lower back condition. His credit was not challenged.

9 It was apparent from the responses given at hearing that the plaintiff's recollection of the timing of the onset of symptoms and the extent to which he attended for treatment of lower back pain in the weeks, months and years following a short period of employment with HOA was limited.

10 Typically, notes kept by treating health professionals contain summaries, not verbatim accounts, of the history (if any) received about the onset of symptoms

[3] Ibid, PCB 8 to 14; 25 to 30; 31 to 39 and 42 to 45; 40; 41 and 46 to 58 respectively.
[4] Exhibit D1.
[5] Exhibit D2, Defendant's Court Book (DCB) 1 to 4, 5 to 9, 10 to 19, 20 to 46, 49 to 66, 73 to 77, 78 and 79 respectively.

of an alleged injury.

11 In this case, several clinical notes kept by treating chiropractors, physiotherapists or doctors record relatively contemporaneous statements about the circumstances in which the plaintiff first experienced back soreness/pain. However, such information as was recorded was not necessarily consistent in, for example, describing the timing of the onset of low back symptoms.

12 Importantly, interpretation of many entries in the extensive clinical notes tendered was not possible either because the handwriting was illegible and/or abbreviations used by the health professional required further explanation, which was not forthcoming. If anything this case highlights the importance of not affording undue weight to specific clinical notes where, for example, the import of a particular note is not fully apparent.

The application

13 The plaintiff's application was made under paragraph (a) of the definition of 'serious injury'.[6] The application was confined to the pain and suffering consequence of injury to the lower back, including the loss of enjoyment of life component of the claim. The latter was also apparently informed by likely permanent restriction on the plaintiff's ability to pursue a career working in the sports industry.[7]

14 The plaintiff was required to prove permanent serious impairment of the spine on the balance of probabilities.

15 Section 134AB(38)(c) of the Act requires that the pain and suffering and loss of enjoyment of life consequences of compensable injury to the plaintiff's spine when judged by comparison with other cases in the range of possible

[6] Section 134AB(37) of the Act.
[7] Transcript (TN) 165 to 166.

impairments or losses of body function be fairly described as being more than 'significant' or 'marked', and as being 'at least very considerable'.

16 In assessing whether the impairment consequences of the injury are serious, among other things, it is necessary to make a comparison between what the plaintiff has lost and what he has retained,[8] and to make further allowance for the long period over which this young plaintiff is likely to experience the injury.[9]

The issues

17 The defendant contends that the plaintiff has not established:

- What, if any, injury to the spine was sustained. In this regard, the defendant further submits that, on the evidence, it is open to the Court to find no injury, or possibly a temporary increase in lower back symptoms around the time the plaintiff was employed by HOA that had not impacted the pre-existing, underlying pathology/condition.
- That the initial causation of any spinal injury is related to employment with HOA.
- That any work-related injury to the spine is serious in accordance with the statutory test.

18 A general practitioner's clinical note dated 15 April 2016,[10] and the report of the plaintiff's medico-legal specialist, pain physician Dr Meena Mittal, made in March 2019,[11] indicate that the plaintiff likely presented to a general practitioner with symptoms of anxiety in 2016. He was later diagnosed and treated by a general practitioner for depression for a period during 2018.

19 A further contention to the effect that the plaintiff had failed to disentangle the physical from any psychological causes of the consequences alleged was, however, withdrawn.

20 My reasons for granting leave to the plaintiff are set out in the paragraphs that

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[8] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 [27], per JA Ashley.
[9] *Haden Engineering Pty Ltd v McKinnon* [2010] VSCA 69 [17], per Maxwell P.
[10] DCB 54.
[11] PCB 37 to 38.

follow.

Background matters

21 The plaintiff currently resides with his grandmother, two siblings and a niece.

22 After completing year 12, the plaintiff spent one year of study in a Sports Development course at the Box Hill TAFE. Within a few months of having commenced a Sports Science degree at Deakin University the plaintiff deferred his tertiary studies because, as he deposed, he had been uncertain about whether he should continue this course of study.[12]

23 As I understood the evidence, at the time, the plaintiff planned to work for a period before he again looked at a career in the sports industry.[13]

24 The plaintiff's health prior to October 2012, his work history from age 20 to the date of hearing, and the circumstances in which it is alleged he sustained injury to his lower back are analysed in the paragraphs that follow. Save where indicated, the facts summarised were not contentious.

Health prior to employment in October 2012

25 The plaintiff deposed that, other than suffering occasional aches and pains in his knees, back and neck "mainly… [that] always resolved pretty quickly," he had considered himself to be in good health prior to sustaining injury to his low back.[14] He deposed to an active lifestyle, playing contact sports such as football and rugby throughout high school and having later taken up basketball.[15]

26 The affidavit evidence of the plaintiff's maternal grandmother, Anthea Nikoloff, with whom the plaintiff was said to have a very close relationship, and of his friend Jordan Cavanagh paint a picture of a very fit, active and accomplished

[12] PCB 1 to 2.
[13] PCB 2.
[14] PCB 2.
[15] Ibid.

sportsman, whom as his grandmother deposed had been sports obsessed. Ms Nikoloff deposed as follows:[16]

> 8. Growing up Matthew was always a very motivated and active person. He had boundless energy. He has always been a very positive and stoic person and never really complained much, even throughout traumatic events such as his parent's separation. He has always tried to look on the bright side of life and often reminds me to do this myself.
>
> 9. Prior to the injury Matthew was an extremely active young man, he has always been obsessed with sports. In particular, Australian rules football, basketball and rugby. He would regularly play full seasons with his friends and I enjoyed watching and hearing about his games. It was nice to see him so passionate about sport.
>
> 10. Matthew was always winning medals and awards for his sporting performance in either football, rugby or basketball. I remember when he was in year 11 he won the school sports award. I was very proud of him. His obsession with sports knew no bounds.

27 The following passage from Mr Cavanagh's affidavit recalls his friend's earlier involvement in football:[17]

> 3 I met the Plaintiff at a pub. I was introduced to him through some mutual friends. I do not recall the year we met. Shortly after we met the Plaintiff started playing at the football club where I played, called Mount Waverley Football Club. I believe I played about 4 or 5 seasons with the plaintiff. The football season goes from March to September and usually consists of about 16 games. The Plaintiff played most of the games during the seasons we played together.
>
> 4 I remember that the Plaintiff was a good player. He was a good full forward player and had a bit of pace for a player of his build.

28 This is not to deny, however, the record of chiropractic attendances in the twelve years preceding the plaintiff's employment by HOA.

29 In August 2018, chiropractor Dr Matthew Bonadio from the Mt Waverley Chiropractic Centre wrote that the plaintiff had been a patient of that clinic for well over 15 years for various spinal issues. He was previously under the care of another chiropractor.[18] Based on the typed chiropractic notes, I concluded that the plaintiff likely commenced consulting Dr Bonadio from 31 August 2013,

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[16] PCB 9.
[17] PCB 13 to 14.
[18] PCB 29.

some 10 months after he ceased working for HOA.[19]

30 At hearing, the plaintiff explained that it had been his family's practice to attend this chiropractic clinic in the treatment of "general soreness".[20] I understood from the responses given under cross-examination and from the chiropractic notes tendered that the plaintiff had attended a chiropractor for general "maintenance" or at times for treatment of occasional lower back pain.[21] The plaintiff identified "general soreness" from playing sports as the trigger for these earlier attendances. He agreed that if he felt pain, more often than not he would attend for chiropractic treatment.[22]

31 Allowing for the plaintiff's responses and the passage of time, I concluded that the plaintiff probably has no meaningful recollection of the presenting problem for the attendances on a chiropractor recorded between 21 September 2000 and September 2012. Indeed, whilst he did not seek to dispute the content of most of the records of health professionals to which he was taken, much of the plaintiff's evidence about his attendances for treatment in this period appeared to be based on a reconstruction of events.

32 This is not to suggest, however, that those parts of the handwritten or the later typed records that can be understood both literally and contextually, and on which the plaintiff was cross-examined at some length, contradict the impression conveyed by the evidence of the plaintiff, his grandmother and his friend to the effect that the plaintiff was a fit, sports obsessed child, teenager and youth prior to employment with HOA in October 2012.

33 The chiropractic records kept for attendances between 21 September 2000 and June 2013 are handwritten. Where these notes are amenable to interpretation, either as to part or in full, 11 entries record attendances by the plaintiff over a

[19] DCB 21 to 33.
[20] TN 78.
[21] TN 18 and e.g. DCB 36 to 39.
[22] TN 19.

twelve-year period between ages 8 and 20 (21 September 2000 to 14 September 2012). Of these, 8 attendances appear to refer to complaint and/or the results of clinical examination referrable to the spine, whereas only 6 of the latter appear to contain references the lumbar spine.

34 Where these notes appear to reference the lumbar spine, I could not determine with any confidence the precise nature of the complaint or the treatment required by the plaintiff.

35 For instance, on 21 September 2000 the brief record made includes the abbreviations "L3" and "slt LBA".[23] As was suggested at hearing, these abbreviations probably refer to level three of the lumbar spine and a report of slight low back ache.[24]

36 Nearly five years later, there are two pages that record information for an attendance on 24 March 2005. The first page could refer to general maintenance ("gen maint").[25] The second page contains abbreviations that probably reference the cervical, thoracic and lumbar spines.[26] Thirteen months later, on 11 April 2006, the notes made on the same page appear to record several falls in which the 13 year old plaintiff slipped or fell off, for example, a skateboard, as well as complaint relating to low back pain.

37 When asked, the plaintiff could not recall either the attendance or the circumstances that brought him to treatment on the last-mentioned occasion.[27]

38 Further attendances were recorded on 11 July 2008, 14 March 2009, 14 October 2009, 28 May 2010, 1 February 2011, 29 July 2011, 18 January 2012 and 14 September 2012.

39 Whilst these do not necessarily implicate the lower back, I accept that notations

[23] DCB 38.
[24] TN 20.
[25] DCB 37.
[26] DCB 39.
[27] Ibid and TN 21 to 22.

made on 11 July 2008 probable include words or abbreviations indicating: a "general referral", an "increase at rugby" and the statement "varies in spine".[28]

40 Under cross-examination the plaintiff appeared to accept a general proposition to the effect that the chiropractic notes reflected the impact that sports activities might have been having on his back.[29]

41 Whilst it is fair to say that each of the later entries appeared to reference treatment of the spine, the lower back was not always mentioned and, where it was, I could not be satisfied that the lower back was the focus of the complaint made or treatment received on that date.

42 The first of two attendances in 2012, prior to commencing employment with HOA, appears to relate to treatment for neck and knee problems occurring in or about January 2012 in association with a gym work out.[30] The second, on 14 September 2012, may or may not implicate the lower back. The entry appears to refer to tension over a three day period and to, among other things, pain up to the base of the head.[31] Under cross-examination the plaintiff recalled, without being certain of this, that at the time he had been sleeping badly on his pillow and his "neck and stuff were tighter at that time".[32]

43 After being taken through these chiropractic notes in cross-examination, the plaintiff essentially acknowledged having from a young age experienced occasional low back pain or stiffness.[33]

44 To summarise then, the picture that emerged was of a fit individual who, from a young age, enjoyed and regularly participated in a range of high contact sports such as rugby, football and basketball. There was no evidence that occasional low back pain or stiffness, for which treatment was likely obtained from a

[28] DCB 36.
[29] TN 22.
[30] DCB 35.
[31] Ibid.
[32] TN 25.
[33] Ibid.

chiropractor on a handful of occasions spanning a twelve-year period, had impaired the plaintiff's capacity to enjoy and engage in an active lifestyle. Nor, as the plaintiff said in cross-examination, had low back pain or stiffness restricted his capacity to play seasonal sports such as football and basketball up to and including the seasons played in 2012.[34]

Employment with HOA

45 Assisted by an employment agency, the plaintiff obtained casual employment with HOA in October 2012. His duties involved unloading shipping containers. Affidavit and oral evidence indicate that the plaintiff probably worked two shifts over two days of employment on 17 and 18 October 2012. He unpacked containers containing boxes of Asian food products.[35]

46 The content of the boxes included soy sauce and bags of rice. These boxes varied in weight and were often very heavy. The plaintiff recalled that unloading bags of rice had involved quite heavy and repetitive work. It was the plaintiff's belief that he unloaded one or two containers during the first shift. The second shift on the second day, however, took most of the day and involved unloading a single shipping container of bags of rice.[36]

The onset of symptoms

Back soreness/pain

47 The plaintiff deposed that he had noted but ignored back soreness following his second shift with HOA because he believed the pain was "just muscle pain".[37]

48 Under cross-examination the plaintiff acknowledged several matters. When HOA contacted him by telephone the day after he completed the second shift, the plaintiff agreed he had not mentioned pain or injury to HOA. Rather, he had

[34] TN 80.
[35] PCB 2 and TN 26 and 29.
[36] TN 29 to 30.
[37] PCB 2 to 3.

advised that he planned to start another job and would not be returning to work for HOA.[38]

49 The plaintiff, however, deposed that back pain continued and worsened, such that he sought treatment from his chiropractor.[39]

50 It appears that the plaintiff did not commence living with his maternal grandmother, Anthea Nikoloff, until about 2013. Ms Nikoloff deposed as follows:[40]

> 12 I remember the few days that Matthew worked for Heart of Asia in 2012 as I saw him often even when he wasn't living with me.
>
> 13 I remember when he came home from work on his second day with the company and was complaining of a sore back and told me he wasn't sure if he could return to that job because of his sudden back pain.
>
> 14 I was shocked when he told me about the heavy nature of the work, he told me he was lifting big bags of rice all day.
>
> 15 I remember feeling concerned about his back pain as he was never one to complain, but I had hoped it was just a bit of muscular pain from a hard day's work that would get better over time. He was so young at the time I didn't think he would end up permanently injured and restricted like he is.
>
> ...

51 Ms Nikoloff's evidence was not challenged by cross-examination. Rather, the defendant submitted that the Court need not accept her evidence that the plaintiff came home from work with HOA complaining of a sore back if the Court was not satisfied by the plaintiff's evidence of the timing of the onset of back symptoms.[41]

52 As my analysis of the evidence shows in due course, I was satisfied that the plaintiff's account of the timing of the onset, and the persistence and worsening, of back symptoms in the period before he first sought treatment should be accepted.

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[38] TN 30.
[39] PCB 3.
[40] PCB 9 to 11.
[41] *De Agostino v Leatch & Anor* [2011] VSCA 249 [40], [43] - [51].

53 It is convenient to summarise the circumstances of the plaintiff's employment with a new employer before addressing attendances for treatment and the content of any contemporaneous accounts of the onset of lower back problems contained in health professionals' clinical notes.

Employment with Kelmatt

54 There was an interval of 8 days between cessation of the plaintiff's employment with HOA and commencement of employment with a new employer, Kelmatt, on or about 26 October 2012. This employment had been arranged through the same agency used by the plaintiff to obtain employment with HOA.[42]

55 The Letter of Offer from Kelmatt Australia Pty Limited, tendered by the defendant, establishes several further matters of note – that the company manufactured tennis court windscreens and sight screens, advertising banners, swimming pool covers and associated products, and that the plaintiff was initially employed as a casual Factory Hand.[43]

56 The plaintiff was employed by Kelmatt for approximately 18 months to two years. He deposed that despite his duties with this employer being a lot lighter than the unloading work performed for HOA, his back pain continued.[44]

57 In my view the employment duties with Kelmatt outlined by the plaintiff at hearing, and summarised below, probably were a lot lighter than unloading shipping containers over a two day period:[45]

- Folding and packing signage banners of varying sizes that had been manufactured from the company's materials.
- Filling bags weighing up to 12 kilos with metal off-cuts. These were filled by hand using a scoop and funnel. The plaintiff thought the scoop could accommodate up to 4 kilos of off-cuts at a time. Once full he moved the 12 kilo bags to a pallet that was sometimes close by, whereas smaller one to 2 kilo bags were moved on to a work bench depending on the

[42] PCB 3.
[43] Exhibit D1.
[44] PCB 3.
[45] TN 37 to 41.

task to be performed. These duties were not required every day. On the days they were, the number of bags filled and moved varied. Forklifts were available for heavy lifting. However, if a forklift was not available, as a general rule, two workers were required to move heavy materials of varying sizes and weights that needed to be placed on racks.

- Installation of windbreak or privacy tennis screens, manufactured with breathable fabrics, on fences. This work involved some bending to affix the lower parts of screens and pulling to tighten the screens. The time spent performing this activity depended on the orders received from customers, but it was not a daily requirement.

- Working at a work-station he agreed had been too low for his height. The plaintiff's duties and the tasks performed, however, varied throughout the working day, and involved tasks such as packing signs or cutting materials.

Comparison of the duties performed for each employer

58 Whilst dealing with evidence about the duties performed for either employer, it is appropriate to note that I did not permit cross-examination that appeared to be directed to the issue of negligence where, for example, the plaintiff was asked whether at the commencement of employment with HOA he had undergone induction training about reporting injury.[46] I did so on the ground that the question asked was not relevant to the task of determining the application for leave.

59 In response to a further query from the Court, counsel for the defendant withdrew a later question that asked the plaintiff about the method employed to unpack HOA's shipping container.[47] Counsel for the defendant subsequently objected when, during re-examination, the plaintiff was invited by his counsel to make a subjective comparison between the "heaviness" of the work performed with each of those employers.[48]

60 The plaintiff was permitted to answer the question posed on the basis that the Court would hear submissions in closing. The weight, if any, to be afforded the

[46] TN 26 to 27.
[47] TN 29.
[48] TN 81 to 82.

response given, that: "Overall" work at HOA was the heavier of the two,[49] was not, however, addressed in closing submissions.

61 The point to be made at this juncture is that the evidence given at hearing essentially restated affidavit evidence where, in August 2018, the plaintiff affirmed that the job with Kelmatt had been "a lot lighter than the unloading work" he had performed for HOA.[50] Moreover, subjective reports by the plaintiff that duties performed for HOA were comparatively heavier are also found in clinical records kept at or around the time the plaintiff first sought treatment of lower back pain. Extracts from these notes are considered in more detail below.[51]

Treatment in 2012 and 2013

Contemporaneous accounts, if any, of the onset of lower back symptoms recorded by health professionals

62 A handwritten entry was made in the Mt Waverley Chiropractic Centre records on 2 November 2012 by a chiropractor other than Dr Bonadio. Among other things, this entry appears to record complaint of pain in the lumbar spine travelling into the hip, tightness in the right lumbar spine and neck stiffness. The accompanying clinical notations also appear to reference the cervical, thoracic and lumbar spine.[52]

63 Notably, this and later entries made in the Mt Waverley Chiropractic Centre records do not record accounts that specifically implicate employment with HOA. Neither does the most recent report of Dr Bonadio dated 10 May 2019. Dr Bonadio reported as follows:[53]

....

Over the past few years Matthew has had continual treatment for persistent low back issues stemming from an injury sustained at work previously. Matthew reported

[49] TN 83.
[50] PCB 3.
[51] See for example the notes made by a physiotherapist on 10 December 2012 at DCB 65.
[52] DCB 35.
[53] PCB 30.

persistent Lumbar pain as well as some pain referred into his leg. He was successfully treated for the leg pain but has had some persistent issues with lumbar pain after 3-4 weeks post treatment. He reports lumbar muscle tightness, inability to lift anything in excess of 10 kg without discomfort as well as slow progression of pain after consistent lifting.

Matthew reports successful release of pain after treatment that lasts between 3-4 weeks before symptoms partially return. Matthew is treated using Ultrasound, Soft Tissue Therapy, Manual Manipulation, Ergonomic Education and Exercise Prescription. He is instructed to only lift within his limits of 10kg and stretch both before and after lifting. Matthew requires monthly maintenance care to ensure that symptoms and disability can be controlled and not relapse into previous injury symptomatology. Matthew shows consistent positive responses for his injury as long as he adheres to his regular care and exercise prescriptions.

Due to the extent on Matthew's initial injury we have a working diagnosis of Persistent Facet Sprain. We also are wary that some disc injury is possible and treat and maintain accordingly. Matthew continually works on his rehabilitation for improved lumbar symptoms.

64 The plaintiff has been a patient of Guardian Medical Burwood medical clinic since 2002. He first sought treatment of low back pain from a general practitioner working from this clinic on 29 November 2012. On that date, Dr Kong Hooi Lim noted the following history:[54]

History:

Over 2 weeks lower back pain. New bed and lifting at work. No radiation.

65 The doctor prescribed anti-inflammatory medication, Indocid, and ordered CT investigation of the lumbar spine. On 30 November 2012, a radiologist reported the results, as follows:[55]

Findings

The AP alignment and lumbar lordosis are maintained. The vertebral bodies and intervertebral disc spaces appear intact. There is minor annular bulging at the L3-4 level present with abutment but no significant impingement of the L3 nerve roots. The L4-5 level also demonstrates minor annular bulging and abutment of the L4 and L5 nerve roots but no significant impingement. Mild diffuse annular bulging also noted at the L5-S1 level with extension into the foraminal regions bilaterally and impingement of the exiting L5 nerve roots. Bilateral facet joint degenerative changes noted. No spondylolysis or spondylolisthesis noted.

Conclusion:

Minor annular bulging noted at the L3-4, L4-5 and L5-S1 levels with nerve root

[54] DCB 66.
[55] PCB 40.

abutment as described above.

66 Recent medico-legal opinion, obtained from orthopaedic surgeon Mr Michael J. Dooley for the defendant and neurosurgeon Mr Mohammed Awad for the plaintiff,[56] confirms that imaging obtained in 2012 revealed degenerative disease of the spine.[57] Their opinions, nevertheless, differ on the nature and permanency of any injury sustained during employment with HOA.

67 Under cross-examination, the plaintiff essentially confirmed that the attendance on Dr Lim on the date recorded and the radiological investigation had been triggered by back pain. However, as the exchange extracted from the transcript below shows, the plaintiff's evidence otherwise was probably largely based on reconstruction:[58]

> MS GLASS: .... The record on that date also indicates a reported history of over two weeks of lower back pain. Do you recall two weeks of lower back pain at or around that time? --- From that time, I mean, yes.
>
> Okay? --- Because that was the time why I got the scan, because I had back pain. So that's apparent.
>
> HER HONOUR: I just didn't hear that? --- Sorry, yes, that's when I got the scan. So my back pain – I would have had it. I don't have the best memory because it's that many years ago, but I remember the gradual process of it getting worse. So I don't know the question.
>
> MS GLASS: And do you remember it getting worse in the context of a new bed and lifting at work? --- I think I put bed down to try and find out what would have been causing it at the time, and then the lifting at work. They are the two things that have been – would have been the differences that were more likely to affect your back.

68 At hearing, the plaintiff's recall of what had transpired when he attended for treatment in this period was poor. He was, however, able to recall having received the results of the scan and, more generally, he recalled having discussed lifting with doctors.[59]

69 The record shows that the plaintiff was seen by a different doctor at the same clinic on 3 December 2012. The record made of that attendance some 6 weeks

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[56] DCB 14 to 16 and PCB 31 to 33 respectively.
[57] See DCB 15 and PCB 33.
[58] TN 45 to 46.
[59] TN 46 to 47.

after ceasing employment with HOA lends weight to the plaintiff's claim that the cause of the onset of persistent, daily low back pain had been heavy and repetitive lifting in the emptying of HOA's containers:[60]

> CT confirms multiple annular lumbar disc bulges c neural for abuttement
>
> Heavy repetitive lifting emptying a container for a week – 6 W ago c mild LBP persisting daily till today
>
> Basketballer [no pain]
>
> Current signwriting job c repetitive lifting 3-15/20 kg per day sans pain
>
> Bending is most troublesome
>
> AM pain worse (sic)

70 Apart from recording the results of the examination, the record also indicates that on the same date, the plaintiff was referred for physiotherapy and swimming exercise was recommended.

71 Notably when taken to this, the plaintiff questioned the accuracy of the entry made to the effect that employment with Kelmatt had involved repetitive lifting of weights of 3 to 15 or 20 kgs "without pain" (I'm not sure about that"[61]). He did, nonetheless, accept that he may have reported that bending was at that time the "most troublesome" activity ("It sounds like – vaguely at most, like, it sounds like something that does trigger it. So it would be likely that I would have said that"[62]).

72 The word "sans" is not a common medical abbreviation. Without more information, I could not exclude the possibility that "sans" was a typing error or, if used intentionally, I could not say with any confidence that in context "sans" carried the same meaning as when it is used in common parlance to indicate "without."

73 The point to be made at this juncture is that when the entry made on 3

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[60] DCB 66.
[61] TN 47.
[62] TN 48.

December 2012 is read at face value, the comparatively contemporaneous account recorded by the doctor clearly attributes the onset of symptoms to employment with HOA. The doctor has also recorded that an activity such as bending in the plaintiff's new employment was then problematic.

74 The chiropractic records kept by either the Armadale Chiropractic Centre or the Mt Waverley Chiropractic Centre establish further and multiple attendances in the treatment of mainly lower back problems from 5 December 2012 to April 2019.[63]

75 The plaintiff was treated at the Armadale Chiropractic Centre on 12 occasions between 5 December 2012 and 12 January 2013. This clinic's notes are handwritten. Save for discrete words or phrases, the notes are largely illegible.[64]

76 The handwritten record of the first attendance at the Armadale Chiropractic Centre on 5 December 2012, among other things, records an account which associates the onset of lower back pain with employment duties performed for HOA.[65] As put to the plaintiff during cross-examination, part of the notation amenable to translation reads as follows: [66]

> One month ago patient woke up with lower back pain possibly associated with lifting heavy weights. 25-kilogram rice bags from a shipping container. Patient was lifting these all day. Felt nothing at the time.

77 As the plaintiff explained at hearing, he had not experienced a sudden onset of pain. What he had at first experienced as general muscle soreness rather than acute pain, had progressively worsened to the point that the plaintiff sought treatment from a chiropractor on 2 November 2012.

78 Between 10 December 2012 and 3 April 2013, the plaintiff attended 10 physiotherapy sessions in the treatment of back pain by a physiotherapist working from Guardian Medical Burwood. During the same period the plaintiff

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[63] DCB 27 to 35 and 41 to 46 respectively, and PCB 47 to 58.
[64] DCB 41 to 46 and
[65] DCB 42.
[66] TN 75.

was seen on 4 further occasions by a general practitioner.

79 Save for the earliest of these, the mainly detailed entries made by various physiotherapists do not specifically link the onset of lower back pain with employment with HOA. The account extracted below from the entry made on 10 December 2012 does, nonetheless, link very heavy lifting in the unloading of heavy shipping containers several weeks earlier to the onset of low back pain that the plaintiff reported was aggravated by bending and lifting:[67]

> CT last thurs showing 3 x disc bulges.
>
> has had LBP for about 5/52, dull pain, intermittent pain, mostly in AM and with aggs,
>
> 1/10 pain currently. 3/10 with aggs.
>
> medications-arthrexin 2 x daily since he found out.
>
> aggs-bending, lifting.
>
> eases-lying down.
>
> Other Sx-nil pins and needles/numbness/weakness.
>
> Past lumbar-muscular pain when was 12/13 years old
>
> occupation-signmaking-some heavy lifting, changed from previously working unloading shipping containers-very heavy lifting.
>
> ...
>
> Patient normally plays basketball and football, thought he had to give these up given results of CT scan.
>
> ...
>
> HEP- given TA activation with leg lift. Advised pt return to GP for CDM referral (given had back pain since 12 yrs old)
>
> ...

80 Several notes made in the months that followed record periods of unfitness for work and complaints of back soreness when, in late January 2013, the plaintiff returned to lighter duties and reduced hours of work with Kelmatt.[68]

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[67] DCB 65 to 66.
[68] Clinical notes at DCB 59 to 64.

81 For instance, the notes reveal that, whilst his lower back condition gradually improved, between January 2013 and a return to full-time work in late March 2013 the plaintiff reported the onset of aching and soreness in the thoracic spine evidently in association with work duties with Kelmatt that involved leaning or reaching forward or bending over a low bench at work.[69]

82 However, as the plaintiff indicated in re-examination, lower back pain had remained his primary problem:[70]

> … and then it would move up my back and tighten as it would go, like, away from it. So that's why I would get the higher back pain, like, the thoracic or that area. So, like, it would be – it would spread, if that makes sense. So as that tightens and gets sore it spreads, if that makes sense.

83 The records made after April 2013 confirm that the plaintiff subsequently presented to the Mt Waverley Chiropractic Centre on 7 June 2013 and 31 August 2013 in the treatment of back symptoms.[71]

84 I make the preliminary observation at this stage that the combined weight of the evidence so far analysed supports a finding that employment with HOA over a two day period likely caused the onset of lower back symptoms, which persisted and were, at times, exacerbated by lifting and bending in employment with Kelmatt.

85 The entries recorded by physiotherapists and doctors in the 4 months between December 2012 and 3 April 2013 and by chiropractors between early December 2012 and August 2013 support a further finding to the effect that the plaintiff's lower back condition and any problems in the thoracic spine (related to work at Kelmatt) had gradually improved with treatment. The latter included a home-based exercise program and later gym work. Chiropractic records, nonetheless, suggest that the plaintiff's lower back condition had not fully resolved,

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[69] Clinical notes at DCB 59 to 63 and TN 55 to 58.
[70] TN 84.
[71] DCB 34 and 21 respectively.

particularly after he resumed playing football and basketball during 2013.[72]

Treatment and employment in 2014 and 2015

86 The plaintiff was unable to provide a clear picture of the period or periods over which he has held various jobs since leaving his employment with HOA.

87 Whilst I accept that in March 2019 the plaintiff's medico-legal specialist, pain physician Dr Meena Mittal, recorded some details of the alternative employment in which the plaintiff said he had been engaged,[73] I was not persuaded that the information Dr Mittal received from the plaintiff in 2019 was any more informative than the affidavit evidence in this regard.

88 The plaintiff deposed that, in or about 2014 to 2015, he worked for Spotlight.[74] At hearing, he could not say when in 2014 or 2015 he worked and, whilst expressing some uncertainty about the precise nature of the duties performed at Spotlight, the plaintiff appeared to accept that he had handled stock ranging from very light to quite heavy items in Spotlight's stock and despatch area.[75]

89 Various entries in doctors' clinical notes and in chiropractic records indicate that in the months prior to travelling overseas in 2014 the plaintiff continued to report back problems.

90 For instance, among other things, Dr Lim's clinical notes for 14 April 2014 and 28 April 2014 record that: back pain was not improving; it had progressively worsened following exacerbation at the end of 2013 ("lower back pain radiates up mid back"[76]); and that the plaintiff had ceased work in January 2014.

91 However, as the handwritten records of Vermont South Chiropractic Centre confirm the plaintiff relied on chiropractic treatment in the period before

[72] DCB 34 and 21.
[73] PCB 36.
[74] PCB 3.
[75] TN 69.
[76] DCB 56.

travelling overseas. These notes record 10 attendances between 20 February 2014 and 17 June 2014.[77]

92 Without being able to fully interpret the record made, it appears that the complaint made, and the chiropractic treatment received, were directed in the main to lower back aching and stiffness. This is not to deny that treatment may have also involved symptoms affecting the thoracic spine, as when the chiropractor referenced tension in association with the plaintiff having worked with a low sink.[78] Whilst the plaintiff could not recall this particular problem, he nonetheless accepted a general proposition to the effect that he had experienced some difficulty with the duties performed over the period of his employment with Kelmatt.[79]

93 I concluded that employment with Kelmatt probably ceased in the months before the plaintiff travelled overseas in mid-2014 to work at Camp America over the American summer. I did so having regard to the plaintiff's estimation that he was employed by Kelmatt for 18 months to two years; the evidence of employment overseas with Camp America in mid-2014 and again in mid-2015; various references to employment contained in clinical notes;[80] the plaintiff's further evidence to the effect that his back condition had been the reason he left Kelmatt to find work that was easier on his back than labouring work;[81] and to the affidavit evidence of the plaintiff's grandmother where she deposed to the following:[82]

> 16 .... He is very restricted in his day-to-day life because of his back injury and is always in some degree of pain.
>
> 17 I believe it is difficult for Matthew to hold down a full-time job on an ongoing basis because of his back pain. Over the years since finishing up with Heart of Asia Matthew has sought employment in both manual labour and also office-based jobs. He has struggled with both types of work because of his back pain

[77] PCB 46 to 47.
[78] PCB 47.
[79] TN 42.
[80] See entries in the general practitioner's notes on 14 April 2014 and 28 April 2014, DCB 56.
[81] TN 85.
[82] PCB 10 to 11.

and has eventually had to quit most jobs he's started.

18 He had a job for a while where he was working with sports nets or screens, I can't exactly remember. What I do remember is that he really enjoyed this job, but he eventually had to resign because his back was giving him constant grief. I remember he tried to take a break and travelled to America for a few months and do something that didn't worry his back so much. Unfortunately when he returned to Australia his back pain was much the same.

19 He tried his hand at a variety of other jobs upon his return to Australia, but I don't recall him ever being able to stick anything out on a long-term basis. He told me that was due to his back pain.

20 I remember being particularly hopeful when he obtained an office-based job, I thought this would be suitable for his back pain. Unfortunately he told me that the long periods of sitting caused his back to become stiff and painful.

94 The plaintiff was employed in the role of general counsellor by Camp America at Camp Integrity in New York State over a nine to twelve-week period in the American summer of 2014. The camp setting was near a lake. His job involved supervising and entertaining groups of children whose ages varied from around eight to 15 years. The activities in which he and the children engaged included hiking and bush walking, swimming, canoeing, archery, fishing and sporting activities such as basketball, soccer, volleyball and beach volleyball.[83]

95 Under cross-examination, the plaintiff agreed that he had been able to engage fully in the activities described, and had enjoyed his time at Camp America, so much so that he returned to work with Camp America during the American summer in 2015.[84]

96 During re-examination, the plaintiff, nonetheless, recalled having experienced aggravation of lower back pain and tightening of his back in 2014 when performing physical tasks that involved moving heavier items, as when he moved canoes or kayaks out of the water at Camp America.[85]

97 Other than an attendance on 17 June 2014 for treatment of an unrelated problem by Dr Ali Zlavery,[86] another doctor working from Guardian Medical

[83] TN 62 to 65.
[84] TN 65 to 66.
[85] TN 85 to 86.
[86] DCB 56.

Burwood, none of the medical or chiropractic records record attendances for treatment in the latter part of 2014 following conclusion of employment with Camp America and a short period of travel before returning to Australia.

98 Chiropractic treatment of back problems is next recorded by Dr Bonadio on 22 April 2015 ("Low back tender as usual"[87]). However, on the same day, Dr Ali Zavery signed a Camp America Medical Form in which, among other things, he recommended the plaintiff as fit for "Unlimited" physical activity and, despite provision being made for this in the form, did not notify any problems with "Orthopaedics".[88]

99 There were further attendances on the chiropractor on 30 June 2015 and 8 December 2015. The first of these probably pre-dates the plaintiff's return to work at Camp America. This entry records, among other things, complaint of low back stiffness.[89] Whereas the entry likely made some months after the plaintiff again returned from Camp America and a short period of travel more generally references complaint of stiffness between shoulders.[90]

100 Under cross-examination, the plaintiff confirmed that he had returned to work as a general counsellor at Camp America during the American summer in 2015. He had, the plaintiff agreed, engaged in, and at the time had felt capable of engaging in, a similar range of activities as the year before.[91]

101 The plaintiff however, claimed not to have enjoyed Camp America as much as he had in 2014.[92] In re-examination, the plaintiff attributed this to lower back pain and the need to manage his condition at the time.[93]

102 The plaintiff also described his experience of flying on multiple flights taken in

[87] DCB 22.
[88] DCB 79.
[89] DCB 23.
[90] DCB 24.
[91] TN 66.
[92] TN 66.
[93] TN 86.

2014 and again in 2015 as "terrible" due to increasing back pain.[94]

103 My interpretation of the evidence relating to working with Camp America in 2014 and 2015 was that the plaintiff had not been free of lower back problems, which continued to be exacerbated by activities that involved for example lifting or prolonged sitting.

Treatment and employment in 2016

104 At hearing the plaintiff appeared to accept that, in keeping with the clinical records of Guardian Medical Burwood, he had not attended a doctor for treatment of back pain during 2016.[95] On the other hand, the chiropractic records show two attendances during 2016 for "Maintenance", on 19 August 2016 and again on 25 November 2016.[96] At hearing the plaintiff appeared to accept that these several attendances reflected the extent of his need for treatment for back pain in 2016.[97]

105 The plaintiff could not recall whether it was 2015 or 2016 when he worked for TNT unloading trucks containing goods he agreed had ranged between very light to substantially heavier items.[98]

106 By way of contrast, the plaintiff seemed more certain when he replied that during 2016 he had worked at AutoParts picking car parts for stock orders, the weights of which had varied from grams to kilograms. This full-time employment had, he said, lasted for either 6 or 12 months.[99]

Treatment and employment in 2017 and 2018

107 At hearing, in keeping with medical and chiropractic records, the plaintiff agreed that the only treatment sought in 2017 was from Dr Bonadio on 6 September

[94] TN 86.
[95] TN 69.
[96] DCB 25 and 26 respectively.
[97] TN 69.
[98] TN 69 to 70.
[99] TN 70.

2017.[100] The entry made designates this as: "Maintenance".[101]

108 It appears that in 2017 the plaintiff commenced driving small trucks for Coles, delivering groceries and foodstuffs the weights of which he said varied between very light and much heavier items. The plaintiff was employed as a casual employee. He recalled working up to three shifts on the weeks he worked.[102] Having initially deposed that he had not been able to continue work with Coles due to back pain,[103] in his further affidavit affirmed on 13 May 2019 the plaintiff deposed that he was still employed by Coles with whom he had not worked for "a number of months.[104] I understood the latter was a consequence of lower back problems.

109 In August 2018 the plaintiff deposed he had consulted a physiotherapist at 'Back in Motion' in Blackburn on several occasions in 2018.[105]

110 That said, the chiropractic records tendered record multiple attendances for treatment throughout 2018.[106] The first of these records complaint of lower back stiffness in association with the plaintiff's delivery work for Coles.[107] Later entries require evidence of the meaning of the abbreviations used by the chiropractor.[108]

111 The defendant submits that the chiropractic records consistently refer to the thoracic spine and not the lower back. In this regard, however, the plaintiff relies on Dr Bonadio's reports on 6 August 2018 and 10 May 2019.[109]

112 Whilst I could not interpret the many abbreviations used by Dr Bonadio in typed notes made since August 2013 that record the complaint made and the outcome

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[100] Ibid.
[101] DCB 27.
[102] TN 70-71.
[103] PCB 3.
[104] PCB 7.
[105] PCB 4.
[106] DCB 28 to 33 and PCB 51 to 55.
[107] DCB 28.
[108] See for example an attendance on 27 June 2018 at PCB 51.
[109] PCB 29 and 30.

of assessment and treatment, the chiropractor's reports dated 6 August 2018 and 10 May 2019 nonetheless satisfied me that complaint and treatment was likely focussed on lower back problems.

113 In short compass, in August 2018 Dr Bonadio reported that the plaintiff was recently treated for a recurrence of lower back pain that had progressively worsened due to lifting at work. I understood the latter to reference the plaintiff's employment with Coles. At the time, Dr Bonadio concluded there was evidence of lumbar spine facet strain with some referral into the posterior leg and with reports of occasional episodes of mild numbness in the L5 nerve distribution.[110] In August 2018 the chiropractor advised a guarded prognosis.

114 I have already set out the substance of the report dated 10 May 2019. I accept that, as reported, the plaintiff probably has, over the past few years, presented for, in Dr Bonadio's words: "continual treatment" of persistent low back issues stemming from a previous workplace injury.[111]

Back pain, treatment and current level of participation in sporting activities

115 In his first affidavit the plaintiff deposed as follows:[112]

> 17 Since my injury with HOA my back has not felt normal. I have a tight or uncomfortable feeling in my low back all the time. This tightness and discomfort can at times spread up the left side of my back. If I do not adequately modify my daily living activities this tightness and discomfort can build up and become quite painful. In order for me to avoid having back pain, I have been working less than I planned to. I also do exercises to stretch my back when I feel the pain getting worse. My back pain gets worse the more I do. Prolonged sitting generally makes my back pain worse. In the mornings my back is stiff and it takes a bit of time for me to get going. A hot shower helps. In winter my back pain is usually worse. My level of back pain constantly fluctuates.
>
> 18 Driving for more than about an hour to an hour and a half increases my back pain. I usually need to get out of the car and stretch my back if I am going for a long drive.
>
> 19 Bending makes my back pain worse. I try to avoid bending such as when I am putting on my shoes and socks. I often need to my foot up on the desk and put

[110] PCB 29.
[111] PCB 30.
[112] PCB 4 to 5.

on my shoes that way.

20 About once or twice a month I get restless legs, usually that happens to my left leg.

21 I am nowhere near as active as I used to be prior to my back injury. I still try to play sports such as basketball, but I do not play as often due to my back pain. Recently, I am more of an emergency fill-in player for a social team than a regular player. I believe that in the last 6 years I have played less football games that I used to play in one season. A season usually consists of about 20 games, of which I have only managed to participate in a small proportion.

22 After participating in a game of football or basketball my back pain and tightness is significantly worse, however I am a young man and sport has always been a passion of mine. The thought of never playing football or basketball with my friends again greatly saddens me so I still try to participate from time to time at a reduced level.

116 More recently, the plaintiff deposed he consults his chiropractor about once a month.[113] As earlier noted, in May 2019, whilst not ruling out the possibility of some discal injury, the treating chiropractor advised a working diagnosis of Persistent Facet Sprain, involving lumbar pain that progressively worsens within 3-4 weeks of treatment due to "consistent lifting".[114]

117 The plaintiff has, he deposed, a "constant feeling of discomfort" in his lower back and, depending on his activities, he experiences daily pain that averages from "very little pain to a 7-8/10 pain. I am now just used to having some level of pain in my back which I classify as discomfort when it is not severe."[115]

118 At hearing, the plaintiff essentially reiterated his earlier affidavit evidence when he described pain since working for HOA that fluctuates from a feeling of discomfort up to levels of 7 and 8/10, the latter occurring in the context of work or sporting activities that aggravate lower back pain.[116] Notwithstanding treatment, the plaintiff said his back has never since recovered.[117]

119 I understood from the responses given at hearing that the plaintiff has not used prescription medication since about 2015, nor has he been in the habit of using

[113] PCB 7.
[114] PCB 30.
[115] PCB 7.
[116] TN 80.
[117] TN 75 to 77, 80 to 81.

other pain relief medications.[118]

120 At hearing, the plaintiff indicated that back pain had never interfered with his ability to engage in sporting activity prior to his employment with HOA.[119] The plaintiff acknowledged that he had returned to playing football but said that, whereas he had played many seasons of different sports before employment with HOA, he now only played as a fill-in player for games "here and there" during different seasons.[120]

121 Whilst the plaintiff agreed he enjoyed playing football, he said that when he did play back pain limited his enjoyment of and participation in this sport.[121] In this regard, the plaintiff recalled an occasion when they rolled the ball in a drill at football training. The plaintiff explained that he had tried to grab the ball "and I barely moved forward and couldn't even bend over, and then that's probably the last game I played for that season."[122]

122 The affidavits sworn by his grandmother and by his friend, Mr Cavanagh, generally corroborate the plaintiff's evidence regarding the impact of back problems on his capacity to participate in sporting activities he had previously enjoyed. Among other things, the plaintiff's grandmother swore as follows:[123]

> 21 Matthew doesn't play sports like he used to anymore because of his back pain. He occasionally fills in as an emergency player for a friend's football or basketball game, but it isn't the same for him. After these games I notice his back pain seems to get worse and flare up. I know that this frustrates Matthew because sport is his passion.

123 Under cross-examination the plaintiff agreed he had returned to playing basketball since employment with HOA.[124] In this regard I accept that the plaintiff likely played some 11 games of basketball during the 2015 winter season and that this had reduced to some 4 games played during the season

[118] TN 71.
[119] TN 80.
[120] TN 72 to 73 and 81.
[121] TN 73.
[122] TN 87 to 88.
[123] PCB 11.
[124] TN 72.

in 2016.[125]

124 Mr Cavanagh recalled playing about 16 games with the plaintiff, whom he described as a good player, in each of 4 or 5 seasons of football before the plaintiff stopped playing. As Mr Cavanagh recalled:[126]

> 5. … It was around the time his other friends stopped playing too so I assumed that was the reason why the Plaintiff stopped. Around 4 or 5 years ago I called the Plaintiff to ask him to fill in as we didn't have enough players. He told me that he had a sore back and couldn't play. He mentioned something about work as well. This was the first time I learned that the Plaintiff had a sore back. Since that phone call I have seen the Plaintiff play only a few times. I do not believe he is as fit as or as aerobic as he used to be when we played together.

125 It appears that since July 2018 the plaintiff has undertaken mostly online full-time study from home for a commerce degree from Deakin University, evidently because his back injury precludes heavy physical work. He, however, deposed that he struggles with study because he is not academically-inclined and has failed two of the 7 subjects undertaken in the past year.[127]

126 I note that the evidence of the plaintiff's grandmother already mentioned generally corroborates the plaintiff's claim to the effect that, having given up employment involving manual labour and heavy lifting due to ongoing back pain, the plaintiff has tried to retrain for alternative employment but has found this difficult because academic study "just does not come naturally to him".[128]

Up-to-date medical opinion from treating GP at Guardian Medical Burwood

127 In a report dated 13 May 2019, treating general practitioner Dr Lin reported he had known the plaintiff since March 2017. The doctor described himself as the plaintiff's "regular" doctor at Guardian Medical Burwood since January 2019.[129]

128 It appears that in making his report Dr Lin took into account the plaintiff's

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[125] TN 72.
[126] PCB 14.
[127] PCB 4 and 7.
[128] PCB 11.
[129] PCB 25.

medical record since 2001 as well as his consultations with his patient.

129 The history obtained by Dr Lin was as follows:[130]

> The patient states that in 2012 he worked for an import/export business by the name of Heart of Asia moving goods. During this time was when he developed his symptoms of back pain. Specifically the patient noted lower back pain particularly with movement and limitation in his ability to bend his back. For a period of time after the onset of symptoms the patient attributed these symptoms to muscular strain and tried various adaptive measures to cope with the issue. However the symptoms did not resolve as a result the patient made a decision to seek medical advice.

130 Dr Lin recommended that the plaintiff's solicitors seek specialist opinion on the issue of direct causation. However, he opined that the plaintiff's symptoms were consistent with the diagnosis and findings of the CT imaging.[131] In context, I understood this statement to indicate that the plaintiff's symptoms were consistent with the degenerative lumbar disc disease revealed by the scans obtained on 30 November 2012.

131 In keeping with the medical records to which I have already referred, Dr Lin has confirmed that no complaint of lower back problems was made to Guardian Medical Burwood before November 2012.[132] I infer from this evidence and the chiropractic records that the episode of lower back pain in October 2012 was objectively more serious than the several discrete earlier presentations for chiropractic treatment given that the latter had not warranted further treatment, investigation or medical intervention.

132 Whilst he said the plaintiff's symptoms had partially improved, Dr Lin cautioned against a return to manual labour or activities involving heavy lifting and repetitive bending and twisting. In this regard, Dr Lin noted the plaintiff's report that attempts to return to manual labouring work, even work involving handling much lighter loads, triggered lower back symptoms.[133]

133 Dr Lin has recommended that the plaintiff seek alternative employment that

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[130] Ibid.
[131] PCB 25.
[132] PCB 25 to 26.
[133] PCB 26.

restricts lifting to under 7.5 kgs, with no repetitive bending or lifting or twisting of the lower back. He further recommends that the plaintiff maintain a conservative treatment regime involving intermittent usage of analgesics and physical therapy, the latter consisting of physiotherapy, massage and hydrotherapy at least every 2 to 4 weeks with a view to avoiding a worsening of the plaintiff's condition.[134] Dr Lin predicts a good prognosis if this treatment regime is followed.[135]

The claim for compensation and medico-legal evidence: 2018-2019

134 It appears that the Worker's Injury Claim Form was first submitted in May 2018.[136] The Claim Form alleged work-related injury to the lower back due to duties involving unloading HOA's shipping container. Neither the Claim Form nor an attached typed statement explaining the history of the alleged injury and the reason for the delay in making a claim alluded to pre-existing back problems or treatment for same.

135 By letter dated 27 June 2018 the plaintiff was informed that the claim for weekly payments and medical and like expenses had been accepted for the period between 1 October 2012 and 17 January 2013.[137]

136 According to the correspondence received by the plaintiff, the limited acceptance of the claim had been based on a report of an independent medical examiner, occupational physician Dr Malcolm Brown, dated 18 June 2018, an investigation report dated 22 June 2018 and the plaintiff's statement attached to the Claim Form dated 28 May 2018.[138]

137 Dr Brown's report was tendered.[139] The clinical history recorded by Dr Brown

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[134] PCB 26.
[135] PCB 27.
[136] DCB 1 to 4.
[137] DCB 5 to 9.
[138] DCB 5.
[139] DCB 10 to 12.

included the following:[140]

> Mr Nikoloff-King had played football and other sports in his teenage years but never had any significant injuries and no back injuries. He described onset of low back pain after a few days' work in a warehouse business in October 2012. He has been treated conservatively and continues to have episodic back pain. The main provocative factor is bending, but he is able to do up his shoes most days. He can walk on flat ground and manage stairs reasonably well but has some discomfort on extended sitting and driving after a couple of hours. He can carry a reasonable amount of weight provided there is no significant bending.
>
> Mr Nikoloff-King manages without medication and has seen a physiotherapist on occasions. He continues with an exercise program.
>
> CT scan of the lumbosacral spine on 30 November 2012 was reported as showing minor annular bulging from L3 to S1. Some impingement of the L5 nerve roots, and bilateral facet joint degeneration.
>
> Mr Nikoloff-King has no prior history of back pain and had some mild asthma…

138 I infer from the matters recorded that when he reported Dr Brown probably did so without having understood there was a prior history of several attendances on a chiropractor for treatment of back pain spread out over a twelve-year period, and likely without also appreciating the extent to which the plaintiff had relied on chiropractic treatment for relief of symptoms and back pain since November 2012.

139 Dr Brown did, however, obtain a history of the onset of back pain in employment with HOA undertaking duties involving manual handling of food items, in some cases weighing up to 25kg.[141]

140 Dr Brown concluded that the plaintiff was suffering from a constitutional condition involving "uncomplicated lower back pain with some radiological signs of pathology in the lumbar spine."[142] In Dr Brown's opinion, the duties performed for HOA in October 2012 likely caused temporary aggravation or exacerbation of pre-existing degenerative change in the lumbar spine, the effects of which had likely ceased possibly a couple of months after the plaintiff's employment

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[140] DCB 11.
[141] DCB 10 to 11.
[142] DCB 12.

ended.[143]

141 Dr Brown nonetheless recommended that the plaintiff obtain employment that did not involve frequent bending or heavy lifting.[144]

142 On 21 November 2018 the orthopaedic surgeon retained by the defendant, Mr Dooley, recorded the following under the heading 'Medical History':[145]

> Mr Nikoloff-King said that on October 17, 2012 he began working as a labourer, unloading shipping containers. He said that these contained mainly bags of rice. He said that on his second work day he noted soreness of his back. He thought that this was part of a general soreness he would experience with this type of work. He said however that his back pain persisted. Mr Nikoloff-King said that he took some time off and then started a new job that again involved labouring but was of a lighter nature. Because of his persisting pain, he saw a local doctor. He was referred for CT scanning of the lumbar spine. He said that he was told that he had disc bulges. Subsequently Mr Nikoloff-King said that he had chiropractic and physiotherapy treatment. He said that in time he was taking periods of time off work because of his low back pain. He said that he has carried out a variety of jobs but that at times he has had difficulty doing them because of low back pain.

143 Among other matters, Mr Dooley noted in his report: that the plaintiff had been "generally fit and well in the past"; complaint of intermittent low back pain that can radiate up the spine and into the plaintiff's buttocks and hamstrings; and complaint of difficulty carrying out work and activities that involve a lot of bending, manoeuvring and lifting.[146]

144 Based on the reported results of the CT scans obtained in 2012, Mr Dooley accepted that the radiology demonstrated some early degenerative change involving the lumbar spine. He initially opined (he said this was based on the history received) that the plaintiff had sustained work-related soft tissue injury to his lumbar spine, which may have involved a musculoligamentous strain, in the course of his employment with HOA. He considered it possible that the injury had also involved "some" aggravation of underlying early degenerative disease

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[143] Ibid.
[144] Ibid.
[145] DCB 13.
[146] DCB 14 to 15.

of the spine.[147]

145 Importantly, this report shows that Mr Dooley accepted that injury sustained to the lower back in October 2012 was caused by employment with HOA.[148]

146 It was not clear from either of Mr Dooley's reports what materials additional to the results of the CT scan were available to him when he reported in 2018 and again in 2019. However, after receiving the clinical notes of the Mt Waverley Chiropractic Centre, on 6 May 2019 Mr Dooley proffered a revised opinion.[149] I was informed that these were the notes tendered by the defendant recording attendances between 21 September 2000 and 30 May 2018.[150]

147 Based on the chiropractic clinical notes, which Mr Dooley read as recording prior complaint and treatment of intermittent pain and stiffness affecting the lower, mid and upper back and neck, Mr Dooley surmised that the plaintiff might be pre-disposed to noting intermittent spinal pain and stiffness. It was, he reported "therefore possible that the work-related episode of October 2012" had "triggered such a temporary flare up".[151] In short, Mr Dooley offered this as a possible alternative diagnosis to the initial diagnoses of soft tissue injury to the lumbar spine, possibly also involving aggravation of degenerative disease in the lumbar spine.

148 The plaintiff's medico-legal specialists, neurosurgeon and spinal surgeon Mr Awad and pain physician Dr Meena Mittal, submitted reports to his solicitors dated 22 March 2019 and 30 March 2019 respectively.[152]

149 The solicitor's letter of instruction to each specialist was also tendered.[153] Among other things, these letters confirm that the materials provided for

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[147] PCB 15.
[148] DCB 15.
[149] DCB 18 to 19.
[150] TN 107 to 108
[151] DCB 19.
[152] PCB 31 to 34 and 35 to 39.
[153] PCB 42 to 45.

consideration by these specialists comprised the plaintiff's affidavit affirmed on 8 August 2018; Dr Bonadio's report dated 6 August 2018; the CT scans (it was not apparent from the letters or the doctors' reports whether the film was also made available); the clinical files of Back in Motion, Vermont South Chiropractic, Mt Waverley Chiropractic, Armadale Chiropractic and Dr Lim's progress notes; and Dr Brown's report dated 18 June 2018.

150 I was satisfied that, by reason of the documentation received, both specialists had been well placed, probably better placed than the defendant's specialists, to report on the nature of any lower back injury sustained in employment with HOA and to comment on, among other matters, whether or not any such injury has resolved.

151 More specifically, in view of the documentation to which the plaintiff's specialists had access, I was not satisfied that there was any apparent deficiency in their understanding of the plaintiff's earlier medical history or, for that matter, that these doctors had not also understood and taken into account the nature and impact, if any, of employment commenced with Kelmatt about 8 days before the plaintiff's first attendance for chiropractic treatment of lower back pain on Monday 2 November 2012.[154]

152 The plaintiff's counsel submitted that both Mr Awad and Dr Mittal have diagnosed aggravation of pre-existing lumbar spine disease caused by employment with HOA.[155] For the reasons set out below, I agree.

153 It is not necessary to repeat at length the history of the onset and duration of symptoms recorded by Mr Awad. Suffice to say the history recorded was similar to that recorded by other doctors. It involved back soreness at the end of the plaintiff's second day of unloading shipping containers in employment with HOA, a worsening of his condition in the weeks that followed, and despite

[154] TN 104 to 105 and 123.
[155] TN 148.

conservative treatment, persistent lower back pain in the 6 to 7 years since then.[156]

154 As to the plaintiff's medical history, Mr Awad had the advantage of chiropractic and medical records before and after employment with the defendant. Mr Awad considered the plaintiff's past medical history to be "non-contributory for any previous lumbar spine injuries or any symptoms suggestive of a pre-existing lumbar spine condition".[157]

155 In my view the witness and clinical evidence so far analysed supports Mr Awad's assessment in this regard. In other words, notwithstanding radiological evidence of an underlying degenerative pathology, apart from several discrete episodes of back problems over a twelve year period prior to October 2012, the medical history has not indicated any previous lumbar spine injury or a symptomatic pre-existing lumbar condition.

156 This doctor's record of the plaintiff's account of the level of his pain (ongoing constant lower back pain which is anywhere between 6-7/10 on a bad day), and the impact of pain and impairment on the plaintiff's day-to-day activities, lifestyle and work essentially reiterated the evidence contained in the affidavit and oral evidence.[158]

157 Mr Awad diagnosed aggravation of lumbar spondylosis. In response to a somewhat convoluted question that asked whether the plaintiff's condition was work-related and/or employment was a contributing factor to his condition or to the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease, Mr Awad replied:[159]

> ..., taking into account the absence of any previous history and the nature of his repetitive and heavy work place activities over the two days where he was lifting heavy bags, his employment then has most likely been a dominant contributing factor to aggravation of his lumbar spondylosis. In my opinion, that employment remains a

[156] PCB 31 to 32.
[157] PCB 32.
[158] PCB 32.
[159] PCB 33.

significant contributing factor to his ongoing pain, disability and requirement for treatment.

158 In Mr Awad's opinion whilst the plaintiff is no longer fit for pre-injury labouring work, he remains fit for alternative employment with restrictions on any lifting, pushing, pulling, bending, twisting or repetitive lumbar spine movements. Mr Awad further recommends that the plaintiff seek employment that allows an opportunity to alternate between sitting and standing with a rest in between.[160]

159 Mr Awad has recommended ongoing treatment in the form of intermittent physiotherapy, chiropractic treatment, stretches and exercises. He predicts that the plaintiff is likely to suffer the consequences of the lower back injury into the foreseeable future.[161]

160 On 30 March 2019, Dr Mittal recorded a similar history of the plaintiff's employment with HOA.[162]

161 After reading her report, I was unable to determine whether Dr Mittal had viewed the CT images obtained on 30 November 2012. Her report of the results of this investigation does, however, appear to reiterate the results reported by the radiologist, save for Dr Mittal's statement that there was: "No spondylosis or spondylolisthesis".[163] Importantly, the radiologist reported "No spondylolysis or spondylolisthesis noted".[164]

162 Having read Dr Mittal's complete report, I formed the view that the reference to 'spondylolysis' probably should have read 'spondylosis,' given other doctors' interpretation of the pathology the radiologist said was revealed by the CT scans, and the pain specialist's diagnosis.[165]

163 On examination paravertebral muscle spasm bilaterally with increased

[160] Ibid.
[161] Ibid.
[162] PCB 35 to 36.
[163] PCB 37.
[164] PCB 40.
[165] PCB 38.

tenderness in the midline and paravertebral spaces were among the clinical features noted by Dr Mittal. She attributed the plaintiff's pain to paravertebral muscle pain/muscular sensitisation and facet joint pain.[166] The latter lends weight to the chiropractor's concern that persistent low back issues involve injury-related facet joint strain.[167]

164 Dr Mittal's response to the same question asked of Mr Awad - whether the plaintiff's condition was work-related and/or employment was a contributing factor to his condition or to the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease - was expressed in the following words:[168]

> I believe that Mr Nikoloff-King's condition is related to work and his employment with HoA has been a contributing factor to his condition. It has most likely led to an aggravation of a pre-existent chronic low back pain.

165 Clearly, in responding to this question Dr Mittall did not, as Mr Awad did, emphasise that employment with HOA remained a significant contributing factor to pain, disability and treatment. That said, based on her report as a whole, I was satisfied that Dr Mittal viewed employment with HOA to have caused an aggravation injury that has not since resolved.

166 Dr Mittal has recommended that the plaintiff remain under the care of the general practitioner, as well as attend a pain management specialist who would provide a multidisciplinary paradigm of care. Dr Mittal was reluctant to provide a prognosis until after the plaintiff underwent the treatment program recommended.[169]

167 Dr Mittal has, nonetheless, advised against a return to physically laborious work. Dr Mittal said that the plaintiff should instead seek alternative employment that allows him to avoid: repetitive bending, carrying or lifting more than 5kg;

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[166] PCB 37.
[167] PCB 30.
[168] PCB 38.
[169] PCB 38 to 39.

prolonged sitting, walking or standing (no more than 60 minutes and with opportunities for postural change and rest); and forward reaching, twisting and stooping.[170]

168 It is convenient to address the question of whether the plaintiff has established an injury arising out of his employment next.

Compensable Injury

Did the plaintiff suffer any, and if so what, injury to his lower back in employment with HOA?

169 It was common ground that, as a first step, the plaintiff must establish that he suffered injury and sufficiently establish what the injury is.[171]

170 The decision of the Court of Appeal in *Borazio v State of Victoria*,[172] reaffirms the requirement that the plaintiff also establish a causal relationship between the injury and the employment.[173] Proof on the balance of probabilities that the act or omission of the employer was a cause of the injury will suffice to establish that injury arose out of employment.[174]

171 In *Borazio*, a judge at first instance had not been satisfied of the causal connection between the wearing of a police equipment belt and a discal injury.

172 In that case, the judge ultimately preferred the opinions of several doctors, who addressed the probabilities of a causal connection between the work complained of and the worker's condition at the time of the expression of their opinion. These doctors postulated that there were alternative hypotheses which were at least equally if not more plausible than that for which the worker contended.[175]

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[170] PCB 39.
[171] *Grech v Orica Australia Pty Ltd & Anor* [2006] VSCA 172, per AJA Ashley [45]. See also *Rowe v Transport Accident Commission* [2017] VSCA 377 [82].
[172] [2015] VSCA 131.
[173] Ibid [63].
[174] Ibid, [65]-[66].
[175] Ibid [79].

173 The existence of competing hypotheses did not, however, require the worker in that case to negate all other hypotheses.[176] In *Borazio* the Court of Appeal reaffirmed the proposition that, when faced with competing hypotheses, a judge is obliged to consider whether a worker has satisfied the judge that the inference of injury is more probably than not.[177]

174 The defendant's contention that no injury had been sustained (that is, it is unlikely that employment with HOA had caused some physiological change affecting the plaintiff's lower back[178]), was based on a combination of factors: the evidence of the plaintiff's intermittent attendances in the treatment of back pain in the years preceding employment with HOA; the contemporaneous radiological evidence of pre-existing degenerative disease; and Mr Dooley's revised opinion.

175 As earlier mentioned, I was not satisfied that, other than Mr Dooley having had an opportunity to consider the Mt Waverley Chiropractic Centre records, he and Dr Brown were as well placed as the plaintiff's specialists to consider the implications of clinical records made before and since employment with HOA.

176 The point to be made at this juncture is that, apart from Mr Dooley's initial diagnoses involving soft tissue injury and the possibility of some aggravation of degenerative changes in the lumbar spine, the specialists were of one mind – the plaintiff likely sustained lower back injury in employment with HOA.

177 I did not understand from Mr Dooley's supplementary report that, by raising the possibility that employment had triggered a flare-up of previously intermittent spinal pain and stiffness, Mr Dooley considered this possibility at least equal to if not more plausible than his earlier diagnoses.

178 In any event, in my view, the submission that no injury had been sustained (that

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[176] Ibid [69].
[177] Ibid [67].
[178] *Barwon Spinners Pty Ltd& Ors v Podolak* [2005] VSCA 33, [9]-[10].

is to say there had been no impact on the underlying pathology[179]) is against the weight of the medical and chiropractic evidence so far analysed. In reaching this conclusion I also took into account that when he hypothesised that no injury was sustained, Mr Dooley had not also considered other chiropractic clinical records of treatment, particularly those containing complaints made and treatment sought between December 2012 and April 2013.

179 Moreover, whilst this may be relevant to determining the weight, if any, afforded the admission of liability made through the payment of compensation, speculation on whether Dr Brown would have revised his diagnosis had he also been given earlier clinical notes is unhelpful. His opinion on diagnosis of injury and the nature of the injury aligns with the opinions expressed by the neurosurgeon and the pain management specialist, who did have earlier clinical records.

180 The defendant submitted that the reports of Mr Awad and Dr Mittal were of no assistance to the plaintiff on the question of causation because, when responding to the same question posed in the letters received from the plaintiff's solicitors, they had applied the wrong causal test.

181 The vice in the plaintiff's medical evidence, so the submission went was that Dr Mittal referred to employment with HOA being a contributing factor to his condition.[180] However, as earlier noted, in Mr Awad's opinion employment was a dominant contributing factor to injury and remains a significant contributing factor to the plaintiff's current pain and disability and his treatment requirements.[181]

182 These comments aside, in my view the defendant's submission on whether injury was sustained and on causation in general is misconceived. None of the specialists have postulated any competing hypothesis about other employment

[179] TN 108.
[180] PCB 38.
[181] PCB 33.

causing the onset of back soreness which the plaintiff said had persisted. Whilst their opinions may differ in some other respects, each specialist appears to have accepted that employment with HOA in 2012 caused the onset of lower back symptoms.

183 If I am wrong in my understanding of Mr Dooley's evidence, I nonetheless consider that the combined weight of the evidence I have analysed in some detail, supports an inference that employment with HOA over a two day period likely caused an aggravation injury as alleged. In short, I was satisfied that the inference of injury to the plaintiff's lower back in the course of his employment with HOA was more probable than not.

184 In summary then, based on my analysis of the evidence as a whole, I was satisfied that the plaintiff likely suffered injury in the latter part of 2012 in the nature of aggravation of pre-existing lumbar spondylosis. The history of earlier back symptoms and chiropractic treatment, the history of the onset and persistence of back soreness and worsening pain (complaint of which was corroborated in various contemporaneous medical and chiropractic clinical records) and the opinions express by examining specialists in 2018 and 2019 were among the several matters that informed this finding.

Permanent impairment or loss of function of the lumbar spine

185 I have already indicated my preference for the evidence of the plaintiff's doctors, in particular Mr Awad. Whilst the plaintiff has not consistently sought treatment in the years since sustaining an aggravation injury in employment with HOA, in my view, the evidence as a whole indicates that this injury has not resolved and continues to make a significant contribution to pain, disability and the plaintiff's treatment requirements.

186 In short, the plaintiff has established that injury-related impairment of his lumbar spine and his treatment needs will likely persist through the foreseeable

future.[182]

Rebuttable presumption

187 This issue arose in closing and requires comment before I address whether or not the injury is a serious injury.

188 It is well understood that an admission through the payment of compensation represents significant but not conclusive evidence that a worker suffered injury in compensable circumstances.[183] A defendant may nevertheless establish that such an admission carries less weight than it might otherwise carry in determining, for example, whether injury was sustained in the course of employment.[184]

189 In closing the defendant relied on the absence of information concerning a history of earlier back pain to rebut the presumption that acceptance by the insurer of the plaintiff's claim, albeit on a limited basis, constituted an admission that lower back injury had occurred in compensable circumstances.[185]

190 As I understood the response in closing by counsel for the plaintiff, had the defendant intended to assert that Dr Brown would not have accepted injury arising out of the plaintiff's employment with HOA, the defendant should have, but had not, sought Dr Brown's opinion on any evidence of pre-existing back pain.[186]

191 Where, as in this case, the defendant had the benefit of other evidence such as an investigative report; the plaintiff's credit had not been put in issue; and the medical evidence otherwise largely favoured a finding of injury caused by employment with HOA, I could not be satisfied that any failure to provide Dr

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[182] *Barwon Spinners* op.cit, [111].
[183] *Ansett Australia Ltd & Anor v Taylor* [2006] VSCA 171 and *Fokas v Staff Australia Pty Ltd* [2013] VSCA 230, [32].
[184] *Ifka v Shahin Enterprises Pty Ltd* [2014] VSCA 8, [57] and *Sednaoui v Amac Corrosion Protection Pty Ltd* [2017] VSCA 66, [68].
[185] TN 131 to 133.
[186] TN 154 to 157.

Brown with information about several earlier attendances spread over a twelve-year period in the treatment of back problems, effectively robbed an admission that the plaintiff suffered a compensable injury in the course of his employment with HOA of its significance.

192 However, I make the point that, had I considered it necessary to reduce the weight afforded the admission made, my findings so far do not depend on any admission of compensable injury.

Pain and suffering consequence of the aggravation injury

193 To summarise then, the plaintiff has established compensable and likely permanent impairment of his lumbar spine due to work-related aggravation of lumber spondylosis.

194 The approach to the evaluation of the pain and suffering and loss of enjoyment of life consequence, as set out in *Haden Engineering Pty Ltd v McKinnon*,[187] is well understood.

195 In short, it requires an evaluation of the plaintiff's experience of pain and its disabling effect on his physical capacities (including his capacity for work) and enjoyment of life.[188]

196 Assessment of the pain and suffering and loss of enjoyment of life consequence of the low back injury requires that all of the pain and suffering experienced by the plaintiff to which the compensable injury materially contributes be considered globally as at the date of hearing.[189]

197 I have already referred to extracts of evidence from affidavit and oral evidence and from some of the medical evidence relating to the pain and suffering and loss of enjoyment of life consequence. Answering the various questions posed

[187] [2010] VSCA 69 [9]-[17].
[188] Ibid [9] and[10].
[189] *Sutton v Laminex Group Pty Ltd* (2011) 31 VR 100, [114].

below does not require lengthy repetition of this evidence.

What is the reported experience of pain and symptoms?

198 In summary, the plaintiff said that his back has never recovered. He reported:

- Tightness and a constant feeling of discomfort in the lower back.[190]
- Daily pain that fluctuates from a feeling of discomfort up to levels of 7-8/10 depending on his activities.[191]
- Having to modify and adapt his activities because pain is exacerbated by activities such as work-related lifting, bending, prolonged sitting or participation in sports he previously enjoyed.[192]

199 The plaintiff's description of pain and symptoms generally accords with that given to health professionals and the medico-legal specialists. In this regard, I note the objective clinical evidence of paravertebral muscle spasm bilaterally, recently reported by Dr Mittal.[193]

What, if any treatment, medication or exercise regime is required in the management of pain and symptoms?

200 The plaintiff continues to follow a conservative treatment regime that does not involve using pain relief medications. Rather he attends Dr Bonadio for chiropractic treatment approximately once a month.[194] According to Dr Bonadio the latter usually involves ultrasound, soft tissue therapy and manual manipulation, including advising the plaintiff on ergonomics and exercises.[195]

201 Dr Lin, Mr Awad and Dr Mittal generally advocate avoidance of activities that escalate symptoms and a conservative treatment regime that involves maintenance of physical therapies and exercise. Dr Mittal also believes that the plaintiff would benefit from intervention by a pain management specialist and an occupational rehabilitation specialist. The latter to guide the plaintiff on

[190] PCB 4 and 7.
[191] PCB 7.
[192] PCB 4 and 5.
[193] PCB 37.
[194] PCB 7.
[195] PCB 30.

modification of his work and other activities and encourage the plaintiff to persist with study that will equip him for occupations other than in manual employment.[196]

202 As earlier mentioned the plaintiff presented as a young man who was not given to exaggeration of his symptoms. He appeared prepared to manage at times significant levels of pain through exercise and physical therapies in preference to taking medication.

203 In my view the failure to take medication is of less significance than it might otherwise have been were it not for the plaintiff's evidence of the level and frequency of pain (which I have accepted), his grandmother's observation that he is always in some degree of pain and the frequency with which he likely requires some form of physical therapy.

Whether, and if so, the extent to which the plaintiff is capable of resuming various sporting and social activities enjoyed prior to sustaining injury?

204 In Mr Dooley's opinion, from an orthopaedic view, the plaintiff remains capable of engaging in impact work and sports at times.[197]

205 In my view the plaintiff's capacity to engage in pre-injury contact sports has likely been significantly diminished.

206 For instance, as I understood the evidence, even filling-in in any of the plaintiff's pre-injury sports is no longer enjoyable because sports activities exacerbate symptoms. As the plaintiff explained, he plays because he remains passionate about sport and he wants to retain the camaraderie he experiences from playing sport with his friends.[198] To my mind, these factors, not a residual capacity for impact sports, probably best explain why the plaintiff has persisted in playing from time to time either of these pre-injury contact sports.

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[196] PCB 38.
[197] DCB 16.
[198] PCB 5.

207 Whilst I accept that in the years since the lower back injury the plaintiff has continued to go out and socialise with friends,[199] he said, and (in view of the extent to which most doctors have recommended he modify his activities) I have accepted, that social activities are less enjoyable because his lower back condition requires that he avoid prolonged standing or sitting.[200]

Whether, and if so, the extent to which working in the sporting industry has been closed off to the plaintiff?

208 I accept that a return to alternative employment post-injury is a factor that tends against a conclusion of serious injury.[201]

209 That said, the plaintiff's claim that he can no longer perform heavy lifting work is supported by the evidence of the problems triggered by lifting, bending or twisting activities in later employment (including in his current casual employment as a delivery driver), his grandmother's evidence and by the medical evidence.

210 For instance, whilst there may be some variations in the restrictions they envisage, Drs Brown, Lin, Mittal and Mr Awad have each recommended that the plaintiff seek alternative employment.[202] I have preferred their medical opinion to Mr Dooley's opinion that the plaintiff is fit to perform a wide range of light physical work and clerical duties.[203] As mentioned, the problems reported in association with bending or lifting in employment undertaken since sustaining injury, the fact that the Plaintiff has given up less physically demanding jobs due to back pain and the various reports made to doctors, suggest that even lighter physical work triggers symptoms.[204]

211 Having completed his secondary education, I accept that consistent with his evident passion for sport, the plaintiff had planned a career in the sports

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[199] TN 73.
[200] TN 87.
[201] *Sutton* at [77]-[79].
[202] PCB 26, 33 and 38 to 39 respectively.
[203] DCB 16.
[204] See Dr Lin's report at PCB 26.

industry. To this end, he had taken steps to qualify for a career in sports, in that he had completed a Sports Development course and had commenced but deferred a Sports Science Degree,[205] ostensibly because he was not certain that he wanted to complete this degree. Of itself, the fact that the plaintiff, whom I accept is not academically inclined, deferred this earlier study, does not negate his evidence that he had contemplated pursuing a career in the sports industry after spending some time in the workforce.

212 This evidence and the plaintiff's likely diminished capacity for physical activities, for example for bending and prolonged standing, helped satisfy me that the loss of enjoyment of life component of this application was properly informed by the likely loss of an opportunity to pursue a career in the sports industry.

Whether, and if so, the extent to which the plaintiff's capacity to perform activities of daily living is impaired?

213 Other than referencing problems in, for example, putting on shoes and socks,[206] the affidavit and oral evidence did not specifically address the effect (if any) of pain and disability on the plaintiff's capacity to carry out activities of daily living.

214 Dr Mittal's report did, however, provide some insight into the effect of pain and disability by recording the following matters:[207]

> He is independent with personal activities of daily living. He is independent with domestic activities of daily living. However, he does report that it exacerbates his pain. He generally tries to avoid lifting heavy objects more than 5kg. He also attempts to use his home gym to prevent further deconditioning. He continues to attend walks to maintain his fitness (sic). He has previously engaged in swimming, but has been unable to continue due to lack of funding. ..

215 The impression I formed was that pain and disability likely also required the plaintiff to modify the activities of daily living.

Conclusions

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[205] PCB 1 to 2.
[206] PCB 32 and DCB 11.
[207] PCB 37.

216 The defendant accepts that the plaintiff is a witness of truth.

217 I have already indicated that the plaintiff's approach to pain suggests some degree of stoicism on his part. He clearly needs pain management intervention and if Dr Mittal is correct, the plaintiff would likely benefit from participation in a pain management program.

218 The plaintiff has outlined consequences of injury to his lower back that are subjectively serious.

219 As earlier mentioned the test is whether the plaintiff has established that the pain and suffering consequence of injury to his spine, when judged by comparison with other cases in the range of possible impairments or losses of body function, may be fairly described as being more than significant or marked and at least very considerable.

220 In assessing the plaintiff's case I also had regard to decisions where, as in this case, the youth of the plaintiff was an important consideration.

221 *Davidson v Transport Accident Commission*[208] was one such case. In *Davidson* the 18 year old plaintiff successfully appealed a decision at first instance to refuse leave. As the Court of Appeal there explained:[209]

> 50 As this Court said in Stijepic v One Force Group Australia Pty Ltd, [24] when judging the pain and suffering consequences for a particular applicant by comparison with other cases, it is relevant to look at the likely period for which those consequences will be experienced. All things being equal, impairment consequences which an applicant will have to put up with for decades might well be judged more serious than the same consequences which another applicant may have to put up with for a much shorter period of time. [25] …
>
> 51 While some may describe the present case as borderline, in our view, the applicant's impairment of the function of her left wrist (pain, weakness of grip, restriction of movement and development of traumatic arthritis), her youth and the fact that her impairment and its consequences will be suffered over the whole of an adult lifetime lead us to the conclusion that her impairment of wrist function satisfies the 'very considerable' test.

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[208] [2015] VSCA 12.
[209] Ibid at [50] and [51].

222 However, in *Stijepic*,[210] the 28 year old plaintiff who sustained a back injury, was unsuccessful on appeal. There the Court of Appeal said (omitting footnotes):[211]

> 43 The circumstances of this case, in our opinion, put it on the borderline. The appellant is a young man with low back pathology which has at least been aggravated by the compensable injury. He faces, in the foreseeable future, a continuation of painful symptoms and of consequential inhibitions upon his enjoyment of life. When judging the pain and suffering consequences for the appellant by comparison with other cases, we consider that it is relevant to look at the likely period for which those consequences will be experienced. All things being equal, impairment consequences which a man (or woman) will have to put up with for 40 years might well be judged more serious than the same consequences which a man (or woman) may have to put up with for a much shorter period of time.
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> 44 We do not doubt that the evidence to which we have referred discloses pain and suffering consequences which are both marked and significant. But we are not persuaded that those consequences can be fairly described as being more than significant or marked or as being at least very considerable. ... It is to be remembered that in reaching a conclusion whether a worker has established that he (or she) suffered serious injury 'the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained.' ... We consider it a fair summary of the position that while the appellant has suffered from (and will likely continue to suffer from) inhibitions on his ability to engage in unrestricted physical activity, by and large his ability to engage in activities that are important to him (and will be important to him in the future) is not affected to any great degree. In particular, it does not appear to us that the appellant's enjoyment of life (comprising his social life, his ability to travel and his ability to engage in guitar playing and social sports) has been affected in a way which could be described as more than marked or more than significant – and certainly not 'at least very considerable'.
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> ....
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> 46 In our opinion, the appellant did not establish, on the totality of the evidence, that he was precluded from a career in graphic design and computer design work. Amongst other things, he never put his asserted incapacity to the test....
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> ...
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> 48 Finally, so far as the appellant's pain is concerned, the burden of the evidence is that while he continues to suffer from episodes of pain, and will continue to do so, he does not suffer a continuous substantial level of pain. It is, we consider, confirmatory of this that the appellant's pain appears to be controlled by moderate strength, non-prescription, medication.

223 *Stijepic* is distinguishable from the present case on its facts, in that there was no treatment for many years, pain was described as episodic pain only, the

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[210] [2009] VSCA 181.
[211] Ibid at [43]-[44], [46] and [48].

extent to which he was able to engage in activities that were important to him had not been affected to any great degree and there was no evidence that ongoing impairment precluded pursuit of a chosen career.

224 In my view, bearing in mind the various likely permanent consequences I have already addressed in detail, this case compares favourably with other cases in the range of possible impairments, of which *Davidson* is but one example. The pain and suffering and loss of enjoyment of life consequences to which I have already referred include:

- impairment of function of the lower back;
- lower back discomfort and daily pain that varies in intensity depending on the activity undertaken;
- muscle spasms that require regular hands on physical therapy;
- reduced tolerances particularly for static postures involving standing and sitting;
- the need for ongoing treatment, currently involving chiropractic sessions every 3-4 weeks and the likely need for pain management interventions;
- restrictions on lifting and so on, that limit the plaintiff's capacity to engage in manual occupations and likely impact on activities of daily living;
- an inability to participate in and enjoy contact sports such as football and basketball;
- the loss of an opportunity to pursue a career in the sports industry; and
- the fact that the plaintiff will likely experience these consequences over the balance of a statistically long life.

225 In summary, based on the evidence available, I was affirmatively satisfied that the pain and suffering and loss of enjoyment of life consequences of work-related injury to the plaintiff's lumbar spine could be fairly described as being more than 'significant' or 'marked' and as being at least 'very considerable'.

226 I propose to grant the plaintiff's application for leave under paragraph (a) of the definition of 'serious injury'.