Establishing serious injury under WorkCover

The first Court of Appeal decision on defining "serious injury" under s134AB of the *Accident Compensation Act* has shifted the parameters on this central component of work-related injury claims. By Harry Gill

The long-awaited first Court of Appeal decision regarding the definition of "serious injury" under s134AB of the *Accident Compensation Act* 1985 (Vic) (the Act) was delivered on 25 February 2005. Section 134AB of the Act essentially governs common law claims for work-related injuries on or after 20 October 1999, when common law entitlements were reintroduced to the WorkCover jurisdiction.

The appeal involved four separate cases: *Barwon Spinners Pty Ltd v Podolak; St Laurence Community Services (Barwon) Inc v Gledhill; Stojanovski v Bartter Enterprises Pty Ltd;* and *Pausak v Barwon Health*.[1] They variously involved plaintiffs with limited pathology, adverse video evidence, physiological/psychiatric mix, uncertain post 19 October 1999 causation and some extraneous factors such as pregnancy complicating issues of incapacity. These cases will be collectively referred to here as *Barwon Spinners*; individual cases will be referred to by the name of the plaintiff.

Two appeals were lodged by plaintiffs and two by defendants. In each case, the plaintiff was unsuccessful, albeit that the *Podolak* decision was remitted for rehearing by another judge due to inadequate reasons in the judgment below. (*Podolak* was reheard on 14 September 2005 and the plaintiff was successful in that matter.)[2]

Statutory background

Section 134AB of the Act details 38 sub-sections which prescribe both procedural and substantive requirements for common law claims. Sub-section 2 provides that a worker may recover damages if the injury is a "serious injury", which is in turn defined under sub-s37. An alternative method of establishing serious injury is set out in sub-s15.[3] The *Barwon Spinners* appeals impact on the method of establishing serious injury under the narrative definition in sub-s37, and do not affect the provisions of sub-s15.

Sub-section 38 elaborates on the definition of serious injury. In order to establish serious injury for the purpose of loss of earning capacity, the plaintiff is required to establish a loss of gross earning capacity of at least 40 per cent "during that part of the period within three years before and three years after the injury as most fairly reflects the worker's earning capacity had the injury not occurred", as well as continuing permanently to have this level of loss of earning capacity. These provisions in sub-s38(e)(f) have received the greatest attention in *Barwon Spinners* and subsequent County Court judgments.

For the first time under a statutory compensation scheme in Victoria, a plaintiff may now establish serious injury for pain and suffering only, in which case they would only be entitled to bring a proceeding for damages for pain and suffering (and not for loss of earning capacity) under sub-s17.

Principles from *Barwon Spinners*

Date of injury

A plaintiff must identify a compensable injury that is referrable to employment on or after 20 October 1999 but not to employment before that date. The Court found that employment on or after 20 October 1999, rather than injury on or after 20 October 1999, must be the precipitating factor.[4] That is, an injury which occurred in employment before 20 October 1999 but deteriorated thereafter without a further cause of action will not enable a common law claim to be made under s134AB.[5] This will make it more difficult for injuries straddling the period before and after 20 October 1999 to be successfully claimed, whether these are gradual process injuries or injuries with multiple causes of action.

Aggravations

Obiter comment in *Stojanovski* strongly suggests that it may no longer be correct to follow the long-standing principle (from *Petkovski v Galletti*)[6] that the aggravation itself must comprise a serious injury. The Court of Appeal seemed to suggest that it would be easier to achieve serious injury for aggravations where the same body part was involved, close in time and while working at the same job with the same employer.[7] In other words, it is possible that all of the consequences that followed from all of the causes of action can be aggregated to determine serious injury. My experience is that this has not been argued in subsequent County Court trials and judges have assumed that *Petkovski v Galletti* is not affected by *Barwon Spinners*.[8] This may be fertile ground for future appeals.

Permanence

The definition of "serious injury" in sub-ss37(a), (b) and (c) requires the impairment, disfigurement, disturbance or disorder to be permanent, as opposed to the previous s135A "long term" requirement. The Court of Appeal found that "permanent" meant "likely to last for, during or through the foreseeable future" and "will last and not mend or repair – or at least not to any significant extent".[9] I believe that this conveys only a slight shift in emphasis and ought not to impact greatly on applications of this nature.

Physiological/psychiatric distinction

The Court of Appeal states simply, as suggested in the legislation, that any psychiatric consequence of a physical injury is to be excluded from consideration as to whether the injury is serious.[10] This is not explored to any great extent, although the discussion in *Pausak* suggests that it will be strictly adhered to. Subsequent County Court decisions

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have consistently adopted this line but have nevertheless on occasion found ways to separate physiological and psychiatric impairment to allow the plaintiff to be successful, even in cases involving chronic pain syndrome (where physiological and psychiatric symptoms are intertwined).[11] I have heard senior counsel argue that it is impossible to entirely ignore emotional reactions to physical injury because pain and suffering and distress are themselves part of that reaction. Only diagnosable psychiatric illness should be excluded, so the argument goes, and ordinary emotional reactions and upset should be taken into account for physical injury. Otherwise, a certificate for serious injury for pain and suffering alone could not be obtained. This argument is to the effect that Parliament has attempted to codify the decision in *Richards v Wiley*.[12] This may have some merit, given that much of sub-s38 does indeed attempt to codify earlier court decisions relating to s135A of the Act and s93 of the *Transport Accident Act* 1986 (Vic). Nevertheless, this provision and interpretation will make it difficult to succeed with cases involving functional overlay or chronic pain syndrome, as the onus is on the plaintiff to unravel the physiological and psychiatric consequences.

Suitable employment

Sub-sections 134AB(38)(g) and (h) import the s5 concept of suitable employment into the serious injury arena. The Court of Appeal held that it is the physical capacity for work, rather than whether or not that work is available, which determines the plaintiff's capacity for suitable employment.[13] There has been much debate as to the degree to which this will restrict a plaintiff's claim to incapacity, particularly given the discussion in paragraph 25 of the judgment. My reading of subsequent County Court decisions also suggests a diversity of opinion on this point. Bear in mind that the s5 definition of "suitable employment" does include the expression "for which the worker is currently suited" having regard to certain factors. On one view, the "odd lot" doctrine of practical availability of employment is still alive, save that economic availability cannot be taken into account. The opposing extreme is that it is only the plaintiff's physical capacity for employment that is relevant, subject to the specific six factors set out in the s5 definition. This is likely to be the most onerous aspect of the decision for plaintiffs, particularly taking into account that s134AB(38)(e) casts the burden on the plaintiff to establish loss of earning capacity after taking into account participation in rehabilitation and retraining.

Onus of proof

Indeed, the Court found that the onus of establishing each element of serious injury that was examined is on the plaintiff. This requires serious injury applications to be well supported by the evidence. Subsequent County Court decisions reveal that an examination of the plaintiff's attempts to obtain employment, even if unsuccessful or partially unsuccessful, can be very useful in pursuing a successful application.[14]

Practical considerations

Indexation of earnings

Although this was not canvassed in *Barwon Spinners*, the onerous nature of the burden on the plaintiff has resulted in a much closer analysis of the plaintiff's pre- and post-accident earnings. My observation of County Court decisions since *Barwon Spinners* is that most County Court judges are allowing indexation of the plaintiff's pre-accident earnings to date of hearing when measuring "without-injury earnings" for the purposes of sub-s38(f).[15]

Credibility

As with serious injury applications prior to *Barwon Spinners*, I believe that credibility will always be the biggest issue in determining the success or failure of the application. Many such applications proceed on affidavit, with only the plaintiff being cross-examined. The plaintiff's presentation is therefore crucial in determining the success of the application.

Pain and suffering

Even though the requirements to establish serious injury for the purpose of loss of earning capacity are more onerous, I believe that there will be many certificates granted for pain and suffering alone. County Court decisions since *Barwon Spinners* seem to support this contention.[16] The requirements for serious injury for pain and suffering have not changed materially from the previous scheme under s135A, save for the physiological/psychiatric dichotomy. Hence, even absent the ability to prove the 40 per cent loss of earning capacity, many plaintiffs with say a "light work back" (a back injury which takes away the capacity to work in heavy work but allows employment in lighter work) could well qualify as seriously injured for pain and suffering because of the loss of capacity to engage in the plaintiff's chosen vocation and a wide variety of other vocations to which they may previously have been suited.[17] The Serious Injury Protocols, which came into force on 1 September 2005 and which encourage negotiation of serious injury certificates and common law damages, are likely to result in a greater number of certificates for pain and suffering only being granted without recourse to trial.

Appeals

The Court of Appeal went to some lengths to describe the factors to be taken into consideration on appeal. It is clear from this that appeals relating to a serious injury certificate for pain and suffering will rarely succeed, because of the advantages the trial judge has in determining the plaintiff's credibility and accuracy as a historian, as well as elements of fact, degree and value judgment.[18] Appeals from serious injury decisions have always been onerous on appellants. I perceive that the main difference under s134AB might be that the Court of Appeal will be less hesitant to substitute its own decision, rather than listing the matter for rehearing.[19]

Preparation of application

It is now crucial that the serious injury application is very well prepared. It would be a rare application that would not include a vocational assessment on behalf of the plaintiff, in an attempt to establish the nature of work they do or do not have the capacity to engage in. The defendant's vocational assessor ought to be required for cross-examination. The plaintiff's full cooperation with attempts at rehabilitation or retraining will assist greatly, as will evidence of genuine attempts by the plaintiff to return to work. The plaintiff ought to be able to provide details of their attempts to seek employment. A calculation of the plaintiff's loss of earning capacity that is supported by the evidence is essential.

Conclusion

While *Barwon Spinners* appears at first blush to significantly restrict workers' rights to access common law remedies, especially for damages for loss of earnings, it is not all doom and gloom for workers. The Court of Appeal commented that these "test cases" were not entirely suitable, as they were fairly clear cut.[20] It is worth noting that the vast majority of County Court decisions on s134AB serious injury applications, both before and after *Barwon Spinners*, have resulted in success for the plaintiff, in the form either of a certificate for pain and suffering and loss of earning capacity or a certificate for the former only. ●

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1. [2005] VSCA 33, Court of Appeal constituted by Ormiston, Chernov and Phillips JJA.
2. *Podolak v Barwon Spinners Pty Ltd* (County Court, 14 September 2005, Hampel J).
3. Sub-section 15 deems the injury to be a serious injury if the worker's degree of impairment is assessed at 30 per cent or more, pursuant to s91 of the Act, under the *American Medical Association Guides to the Evaluation of Permanent Impairment* (4th edition).
4. See *Barwon Spinners*, note 1 above, paras 4–14.
5. Claims can theoretically still be made under the earlier common law scheme under s135A, subject to the limitation period set out in s135AC. Section 135A, broadly speaking, governed work-related injuries which arose between 1 December 1992 and 11 November 1997. From 12 November 1997, no common law remedy was available until the introduction of s134AB for injuries on or after 20 October 1999.
6. [1994] 1 VR 436.
7. *Barwon Spinners*, note 1 above, para 89.
8. See for example *Malina v Venture Industries Australia* (County Court, 18 March 2005, Higgins J).
9. B*arwon Spinners*, note 1 above, paras 17–19.
10. *Barwon Spinners*, note 1 above, para 20.
11. See for example *Bubnic v Uniting Church & Anor* (County Court, 2 June 2005, Millane J); *Boesch v Anthea Crawford (Australia) Pty Ltd* (County Court, 22 July 2005, Jenkins J).
12. [2000] VSCA 50 (19 April 2000).
13. See *Barwon Spinners*, note 1 above, paras 24–27.
14. For an insight into the difficulty that the onus requirement places on the plaintiff, see *Dodds v Institute of the Blessed Virgin Mary* (County Court, 14 April 2005, Morrow J); *Demleitner v FMP Group (Australia) Pty Ltd,* (County Court, 27 May 2005, Morrow J).
15. See, for example, *Hanlon v TGHA Pty Ltd* (County Court, 18 February 2005, Higgins J). This was pre *Barwon Spinners*, but the reasoning appears untouched by *Barwon Spinners*. See also *Demaj v Innovia Films (Australia) Pty Ltd* (County Court, 2 November 2005, Coish J).
16. See *Griffiths v Emmaus Community Project Incorporated* (County Court, 27 May 2005, Morrow J); *Daniels v Euroa Hospital* (County Court, 17 June 2005, Bourke J); *Shaw v WB Hunter Pty Ltd* (County Court, 27 May 2005, Bourke J); *Fletcher v PFD Food Services* (County Court, 11 August 2005, Higgins J), to name but a few examples.
17. See, for example, *Fletcher v PFD Food Services*, note 16 above.
18. *Barwon Spinners*, note 1 above, paras 46–48.
19. *Barwon Spinners*, note 1 above, para 49.
20. *Barwon Spinners*, note 1 above, para 141.