# YOU CANNOT BE SERIOUS!

JOHN McENROE'S FAMOUS EDICT CAN STRIKE A SHIVER DOWN THE SPINE OF ANY PLAINTIFF PERSONAL INJURY LAWYER. THIS IS BECAUSE PROOF OF 'SERIOUS INJURY' IS THE THRESHOLD FOR MAKING A COMMON LAW CLAIM FOR DAMAGES UNDER EITHER THE WORKCOVER OR TAC SCHEMES. BY HARRY GILL

**SNAPSHOT**

- Disentanglement is frequently referred to in attempting to prove serious injury, being the threshold for claiming common law damages in WorkCover and transport accident claims. However, there has been much confusion over what exactly is required to be disentangled.
- The Court of Appeal clarified the position on 5 December 2018 in *Noori v Topaz Fine Foods*.
- The criteria for claiming serious injury after the plaintiff returns to work has been clarified by the Court of Appeal in *Demmler v TAC*.

## Disentangling confusion in WorkCover serious injury cases

WorkCover lawyers frequently speak of "disentanglement" in personal injury cases where a plaintiff is attempting to prove "serious injury" within the meaning of the *Accident Compensation Act* (ACA) or the *Workplace Injury Rehabilitation and Compensation Act* (WIRCA).[1] The former applies where the entirety of the cause of the work injury occurred before 1 July 2014 and the latter otherwise. The wording of the relevant provisions of the ACA and WIRCA are identical.

A worker whose injury arises out of, or in the course of, or due to the nature of, employment cannot claim damages at common law unless he or she has a "serious injury".[2] "Serious injury" is defined as:

"(a) permanent serious impairment or loss of a body function; or

(b) permanent serious disfigurement; or

(c) permanent severe mental or permanent severe behavioural disturbance or disorder; or

(d) loss of a foetus."[3]

The vast majority of claims are made under (a) but a significant number are also made under (c) or both (a) and (c). Disentanglement becomes an issue because of the myriad additional requirements for proving serious injury. Relevantly, "the disentanglement provisions" provide that:

"(h) the psychological or psychiatric consequences of the physical injury are to be taken into account only for the purposes of paragraph (c) of the definition of serious injury and not otherwise;

(i) the physical consequences of a mental or behavioural disturbance or disorder are to be taken into account only for the purposes of paragraph (c) of the definition of serious injury and not otherwise".[4]

Some have viewed the disentanglement provisions as requiring disentanglement of physical and psychological consequences whether claiming serious injury under paragraph (a) or (c). However, the wording of the legislation clearly restricts this additional requirement only to claims under paragraph (a). Indeed, (h) and (i) specifically enable physical and mental consequences to be aggregated for the purposes of a claim under paragraph (c).

The confusion has perhaps emanated from the fact that there have been many cases on disentanglement. However, superior court decisions have all been claims under paragraph (a). The test dates back many years to cases such as *Mutual Cleaning and Maintenance v Stamboulakis*[5] and *Jayatilake v Toyota Motor Corporation*[6] but has more recently been best set out in *Meadows v Lichmore*[7] where the Court approved the following approach:

". . . serious injury applications raising issues of this kind are effectively approached in a two-step manner. The first step is to ask whether there is a substantial organic basis for the pain and suffering consequences relied on. If the answer to that question is affirmative – and, of course, the pain and suffering consequence has satisfied the statutory criterion – then the applicant will succeed without the need for any 'disentangling' of the physical contributions to the pain and suffering from the psychological contributions".[8]

The Court continued:

"If, however, that first question is not – or cannot be – answered affirmatively, then the applicant will need to take the next step in 'disentangling'. That is, the applicant will need to be able to separate the physical contribution to the pain and suffering from the psychological, in order to be able to satisfy the Court that the pain and suffering consequences attributable to the physical injury satisfy the statutory test".[9]

My experience is that many have become so entrenched in this two-step approach that the fact that it is only required for claims under paragraph (a) has been overlooked. Thankfully, this has finally been put to rest by the Court of Appeal in *Noori v Topaz Fine Foods*.[10] This was a case involving an Afghan refugee who had a pre-existing psychiatric illness by reason of his traumatic experiences both before and after coming to Australia. He jarred his back when he fell awkwardly from the stepladder during the course of his employment. He later developed a very significant pain syndrome consequent upon his pre-existing psychiatric

condition but triggered by the subject accident.[11] The trial judge disallowed the claim for serious injury made under paragraph (c) alone, including in his reasons the fact that he had difficulty disentangling the work-related symptoms from the totality of the plaintiff's ongoing condition.

The Court of Appeal in *Noori* stated:

"With great respect, no question of disentanglement arises under paragraph (c) of the definition of serious injury. As the decisions of this Court make clear, 'disentanglement' is a task which arises – if at all – only in relation to paragraph (a) of the definition. That is, where the application is based on the 'permanent serious impairment or loss of a body function', the Court is obliged – by s134AB(h) – to exclude from consideration 'the psychological or psychiatric consequences of a physical injury'. Where necessary, that will require the 'disentangling' of the psychological consequences of the injury from the physical consequences".[12]

The confusion has been compounded by the fact that many speak also of disentangling injuries from extraneous causes, which is simply a basic principle of any actionable tort and has nothing to do with "the disentanglement provisions". Further, no such disentanglement can apply to transport accident cases (where the serious injury threshold is also a requirement for a common law claim).[13] Indeed, *Richards v Wylie*[14] still governs cases of mixed organic and psychological injury in that jurisdiction.

Notwithstanding the fact that the plaintiff's credit was not intact, the Court of Appeal saw fit to grant a serious injury certificate. This decision is an emphatic denunciation of the idea that the disentanglement provisions have any relevance to claims under sub-paragraph (c), noting in particular that few serious injury decisions of the County Court are overturned on appeal because much depends upon credit and observation of the plaintiff in the witness box.

## Serious injury where plaintiff returns to work

"Serious injury" is often readily attained if a person generally has little prospect of returning to employment or indeed their previous employment. An unsatisfying uncertainty lingers where a plaintiff returns to work. However, one must look more broadly than employability alone. Many claims involving return to work can still attain the serious injury threshold. The Court of Appeal decision in *Demmler v TAC (Demmler)*[15] on 9 November 2018 appears to vindicate this fact.

First, a brief tour through some of the Court of Appeal cases on this point:

- In *Stijepic v One Force Group Australia* (14 August 2009)[16] the plaintiff suffered aggravation of an asymptomatic pre-existing back injury while labouring to support his life as a student. He went on to become a teacher but could not do heavy work. His serious injury application failed in the County Court and Court of Appeal, despite his loss of potential alternative employment.
- In *Sabo v George Weston Foods* (23 October 2009)[17] the plaintiff, with a permanent "light work back" with a large disc protrusion, nevertheless returned to full-time work as a forklift driver on light duties. He failed in the County Court and Court of Appeal.
- In *Haden Engineering v McKinnon* (31 March 2010)[18] the plaintiff undertook open reduction and internal fixation surgery and was left with osteoarthritis, returning to a different job to his pre-accident one as a rigger. Despite largely being otherwise able to continue with his activities, he succeeded in both courts.
- In *Sutton v Laminex Group* (3 March 2011) [19] the plaintiff suffered aggravation of pre-existing asymptomatic degeneration of the cervical and thoracic spine with mild disc bulges and was unable to return his forklift driving duties but did office work instead. He was unsuccessful in the lower court but succeeded at Court of Appeal, the case being unusual in that it was overturned on appeal.
- In *Ellis Management Services v Taylor* (22 November 2013)[20] the plaintiff was unable to perform a wide range of employment options previously available to him. The Court of Appeal said this was relevant to pain and suffering consequences.
- In *Peak Engineering v McKenzie* (9 April 2014)[21] the Court of Appeal overturned the County Court judge's decision granting serious injury. This case has been relied on frequently by defendants as being a move away from the recent trend. However, a closer look suggests that the hand injury for which he claimed had improved, and despite the subsequent knee injury for which he got an alternative serious injury certificate, he was largely still able to do heavy manual work. On the other hand, a concern is the Court of Appeal's focus only on work that the plaintiff was accustomed to performing, rather than a wide variety of other occupations he might have been able to conduct. Of great significance was the fact that the Court of Appeal appeared at [46] to agree with counsel that *Haden Engineering* was still good law.

The Court of Appeal in *Demmler* has now elucidated more recent thinking in favour of plaintiffs. While this was a transport accident case, it has application to WorkCover as well. The WorkCover serious injury test is fundamentally the same as the test in transport accident cases, save for the fact that it incorporates a number of additional requirements (such as the disentanglement provisions in appropriate cases, as discussed above). It also imports a number of additional technical requirements in order to establish serious injury for loss of earning capacity but these do not apply when proving serious injury for pain and suffering only.

Ms Demmler sustained a back injury with a disc prolapse at C4/5 and annular tear at L5/S1 (with possible future surgery for either) when 21 years old and working in residential leasing in the real estate injury. She was only off work for a week and later commenced employment as a VIP host in the Mahogany Room at Crown Casino. The latter employment was more

difficult because she was required to wear high heels. Despite being "tough and resilient" [22] and losing her capacity for a variety of other activities, the County Court rejected her application, relying significantly on her return to full time duties in a more arduous job [23]. The Court of Appeal was unimpressed and found that the pain and suffering consequences were clearly a serious injury.[24]

Noteworthy points are:

- The pain and suffering consequences for Ms Demmler included the fact that she did suffer pain at work, she no longer rides horses (which was a great passion), she was unable to kickbox or lift weights, her ability to go "clubbing" with her friends was limited, she was unable to dance in a video accompanying her potential singing career (but she had at least digitally released some singles).[25]
- The Court commented on the fact that the Court of Appeal in *Stijepic* considered that case to be borderline [26] whereas the Court in *Demmler* found her to clearly be seriously injured.
- The Court accepted that a 25-year-old such as the plaintiff had many more years to endure her injury,[27] something that was also considered significant in *Stijepic*.[28]
- *Demmler* restated[29] the dictum of Nettle JA in *Dwyer v Calco Timbers* (Court of Appeal, 17 December 2008) that it would be unfortunate and wrong "if in future such an applicant were treated less favourably than another who, being of less strength of character, simply resigned herself to her injury". It was accepted that Ms Demmler was stoic and that this was relevant.
- Even *Stijepic* and *Sabo* did specifically say that return to work by the plaintiff did not necessarily mean she failed to prove serious injury for pain and suffering, merely that it will tend towards that conclusion and the onus clearly becomes firmer on the plaintiff. *Demmler* does not specifically comment on this aspect but appears to support this view.
- The Court of Appeal stated that the pain and suffering consequences were to be combined with any pecuniary loss consequences for the purposes of a *Transport Accident Act* serious injury application. This is to be contrasted with WorkCover serious injury applications because of the specific additional provisions relating to pecuniary loss in s134AB(38)(b).[30] I postulate that there are nevertheless pain and suffering consequences of an inability to return to one's previous employment which can indeed be combined with other pain and suffering consequences. It is only specifically the pecuniary consequences that cannot be combined in WorkCover cases.

The cases suggest that there is a notable degree of consistency in the superior Court of Appeal decisions over this period of about 10 years. While *Stijepic* and *Sabo* were seen as low water marks, they and other cases really reflected the difficulty in succeeding on appeal in serious injury cases. The approach to claiming serious injury where the plaintiff has returned to work often requires attention to "softer" lifestyle factors, frequently assisted by a number of lay witnesses. However, the impact on one's employment should not be ignored. We do always need to recall that proof of a serious injury is only a threshold issue. Hence, the bar should not be, and is not, set too high. ■

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1. This does not apply to the *Transport Accident Act*.
2. ACA s134AB(1) and WIRCA s326.
3. ACA s134AB(37) and WIRCA s325.
4. ACA s134AB(38) and WIRCA s325.
5. [2007] VSCA 46 (22 March 2007).
6. [2008] VSCA 167 (2 September 2008).
7. [2013] VSCA 201 (22 July 2013).
8. Note 7 above, at [21].
9. Note 7 above, at [22].
10. [2018] VSCA 323 (5 December 2018).
11. Note 10 above, at [33].
12. Note 10 above, at [5].
13. *Transport Accident Act 1986* (Vic) s93.
14. (2000) 1 VR 79 (19 April 2000).
15. [2018] VSCA 284 (9 November 2018).
16. [2009] VSCA 181 (14 August 2009).
17. [2009] VSCA 242 (23 October 2009).
18. [2010] VSCA 69 (31 March 2010).
19. [2011] VSCA 52 (3 March 2011).
20. [2013] VSCA 326 (22 November 2013).
21. [2014] VSCA 67 (9 April 2014).
22. [2018] VSCA 284 (9 November 2018), at [27].
23. Note 22 above, at [43].
24. Note 22 above, at [58].
25. Note 22 above, at [40].
26. Note 22 above, at [61].
27. Note 22 above, at [59].
28. Note 22 above, at [61].
29. Note 22 above, at [60].
30. Note 22 above, at [56].