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

Revised
Not Restricted
Suitable for Publication

Case No. CI-13-01456

NIGEL GROWSE — Plaintiff

v

VICTORIAN WORKCOVER AUTHORITY — Defendant

JUDGE:	HIS HONOUR JUDGE JORDAN
WHERE HELD:	Melbourne
DATE OF HEARING:	27 and 30 June 2014
DATE OF JUDGMENT	1 July 2014
CASE MAY BE CITED AS:	Growse v Victorian WorkCover Authority
MEDIUM NEUTRAL CITATION:	[2014] VCC 973

Subject:	ACCIDENT COMPENSATION
Catchwords:	Serious injury – injury to the low back and impairment of the spine
Legislation Cited:	*Accident Compensation Act* 1985
Cases Cited:	*Acir v Frosster Pty Ltd* [2009] VSC 454; *Smorgon Steel Tube Mills Pty Ltd v Majkic* [2008] VSCA 230
Judgment:	Leave granted to bring proceedings for the recovery of pecuniary loss damages and pain and suffering damages.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr C Harrison QC with Mr R Stanley	Maurice Blackburn
For the Defendant	Ms M Britbart	Hall and Wilcox

HIS HONOUR:

1 This application for leave pursuant to s134AB(16) of the *Accident Compensation Act* 1985 ("the Act") relies on an injury to the low back and the consequential impairment of the spine. Pain and suffering consequences were conceded for the compensable injury suffered on 8 March 2007 when the plaintiff lifted a heavy pane of glass.

2 The only issue for determination is whether the plaintiff has discharged the onus of proving a permanent 40 per cent or more loss of earning capacity. Involved in this is the specific question of whether or not he is satisfied the onus pursuant to s134AB(38)(g) in regard to rehabilitation and retraining.[1]

3 I note the repeal of s134AE of the Act and the Explanatory Memorandum and Second Reading Speech that accompanied the repeal. Nevertheless clear, proper and adequate reasons are required. It is not necessary in this application to describe the medical evidence in great detail as it is largely self-explanatory.

4 The plaintiff is aged 46 years and his background has been work that was essentially physical, including truck driving.[2] He has undergone major treatment. It has involved a number of conservative options. These have seen him taking a lot of different narcotic medications up to the present time. He has undergone two major invasive procedures.

5 After painful discography on 29 June 2009 his first neurosurgeon, Mr P D'Urso, carried out an interbody fusion at L5-S1 on 12 August 2009. The plaintiff has not worked since. The surgery was not successful in terms of pain relief and any real improvement with respect to capacity.

6 The second neurosurgeon, Mr G Malham, then operated and carried out anterior lumbar artificial disc replacements at L3-4 and L4-5 on 3 October

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1 Transcript ("T") 16
2 PCB 39-40

2011. Mr Malham last saw the plaintiff on 19 March 2012.[3] His opinion about the result of the procedure was very optimistic. He considered the plaintiff had only a permanent partial incapacity nevertheless and he did put real restrictions on any employment tasks.[4]

7 His opinion now is well over two years out of date. It seems that apart from a postoperative review in November 2011 following the operation in October, Mr Malham only saw the plaintiff on one further occasion, 19 March 2012. From then on conservative treatment has continued for constant pain.[5] Narcotic medication has been ongoing for over seven years. It causes very nasty side effects.[6]

8 The plaintiff has been told there is little that can be done by way of treatment. His local doctor said he must learn to live with his pain and restrictions.[7] A particularly troubling aspect for the plaintiff and germane to any residual employment capacity is:

> "The unpredictability of my pain is awful. I always have to be on my guard. It makes it so hard to manage my life. I simply do not know what the pain will be like from one day to the next."[8]

9 I had the advantage of hearing the plaintiff give oral evidence. I found him a candid, truthful witness who, if anything, understated the obvious severity of his condition. He volunteered information against interest on a number of occasions. Examples included work he had done around his home. He had fixed a potbellied stove, made a changing table and renovated a cot. In addition, at a friend's engineering shop he had carried out some welding and helped a friend by holding or standing on something while welding work was taking place.

10 At another mate's place where billiard tables were made, the plaintiff had

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3 PCB 65
4 PCB 63 and 65; Defendant's Court Book ("DCB") 28
5 PCB 38a
6 PCB 39c
7 PCB 39c
8 PCB 39b

done woodwork and made a number of breadboards. These activities were freely volunteered in the witness box. They have to be put in context however. For example, he has the facility to lie down at one of those mate's workplaces and he does so most of the time.[9] The tasks were done on good days.[10] As with the driving into Melbourne, he admitted to, he could not do that driving day-in day-out.[11]

11 I accept the evidence of the plaintiff about the level of his symptoms and his disabilities. If anything, he has minimised them and bravely does as much as he can. Unfortunately for him, that is relatively little within the boundaries of relying on when he has good days. Important to the issue of suitability for any employment, I accept the plaintiff's evidence that his medication affects his memory and accuracy.[12]

12 I also observed the plaintiff in court. He had to repeatedly sit, then stand, then sit again, and also hold his back. He needed breaks.[13] Demonstrably, he was suffering pain. I accept he cannot sit or stand for very long at all. At times while standing in the witness box, he supported himself by leaning on the back of the chair or the side of the witness box. When in the body of the court on both days, he had to sit and stand at different times after adopting one position for only quite a short time.

13 This was consistent with the plaintiff's evidence of his difficulties and with the general practitioner's evidence about such problems. I accept the plaintiff cannot maintain the one posture for any sustained period because of back pain. This of itself makes any employment position, sedentary or otherwise, effectively beyond his capacity.

14 These restrictions are as a result of the constant back pain I accept he suffers

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9 T71
10 T60
11 T74
12 T34; PCB 39c
13 T58

in spite of daily ongoing narcotic medication. I find he was a compliant patient who has followed all reasonable treatment avenues advised by his doctors. He accepted his doctor's advice not to undergo a retraining course because of pain.[14]

15 On credit generally, the defendant admitted it had video surveillance of the plaintiff but none was shown. There is no real attack on his credit in this case nor by any of the doctors engaged by the defendant. Dr C Moodie, the plaintiff's general practitioner for over thirty years or so, gave oral evidence. His evidence was clear and consistent. He agreed the first operation did not help the plaintiff. He encouraged the plaintiff to try a computer course in between the two operations.

16 On the suggestion of the insurer, he also sent him to Dr C Thomas to deal with the pain. However, the general practitioner said he has found these pain management courses often very unhelpful.[15] In fact, they were next to useless in most cases to help a patient accept their pain rather than rid them of it.[16] The general practitioner had no doubt about his patient's sincerity or desire to get back to work and a normal life.[17] I agree with that appraisal of the plaintiff.

17 The doctor could not agree the plaintiff was better after the second operation. He was sure Mr Malham thought so after the surgery at his hands, but the general practitioner was not convinced about that.[18] Dr Moodie said most consultant surgeons write similarly optimistic letters such as Mr Malham had written.[19] It was optimism based on only limited consultation by Mr Malham was the impression Dr Moodie gave about the surgeon's post-operative opinion and its optimism.

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14 T60
15 T82
16 T83
17 T85
18 T87
19 T87 and 93

18 Dr Moodie was asked about the different dosages of medication. He had never seen any significant improvement in the plaintiff's function. He had seen his patient twenty or thirty times on a monthly basis since the second operation. The difference in levels of medication did not mean less pain.[20] There could be other reasons why strong medication could be diminished, he said.

19 Dr Moodie did not think the plaintiff could carry out any sedentary employment. The plaintiff was unable to maintain seated or standing position for any length of time, which we take for granted.[21] That was something that led the doctor to consider the plaintiff effectively unable to do any work.[22] Dr Moodie could not imagine any employment position that would suit him or that he would be capable of. The plaintiff does not have the capacity to do it he said. The plaintiff would be a liability.[23] The doctor said he could increase the narcotics to assist pain but there would be other side-effects, for example the plaintiff would be dangerous on the road. He thought the plaintiff could drive for half an hour or an hour.

20 He was told about activities the plaintiff said he carried out but the doctor's opinion was the plaintiff would suffer symptoms as a result of doing these things.[24] This very experienced doctor gave cogent evidence. He thought the plaintiff's situation would remain as it was for the foreseeable future.[25]

21 I accept this doctor's very firm and clear evidence that the reality is his patient is permanently incapacitated for any suitable employment. He has seen the plaintiff now for something like thirty years. He is far and away advantaged over every other doctor in this case in his ability to judge the plaintiff's genuineness and capacity. Dr Moodie had no doubt about either.

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20 T88
21 T89
22 T91-92, 96 and 98
23 T91-92
24 T89
25 PCB 70; T98

22 He also is the medical practitioner with the most up-to-date opinion to assist in the Court's task of judging the plaintiff's earning capacity now in June 2014. He has continued to see his patient every month or so right up to the present time.

23 A number of the medical opinions on both sides are now dated and of little or no assistance. However, I will briefly refer to some salient parts of the evidence. A number of treaters' reports pre-date the two operations. The plaintiff has been referred to a number of different practitioners for treatment. He saw Mr de la Harpe, orthopaedic surgeon, in 2008. He suggested opiate medication.[26] He gave a guarded prognosis, but last saw the plaintiff in January 2009 and his views are not current.[27]

24 The plaintiff also saw a Dr D Vivian, pain management, in June 2008 and apart from a gloomy prognosis that has proved correct with time, that report does not help the task at hand now.[28] The physiotherapy report in 2011 is too dated to be of use, as the last consultation was in August 2008.[29] The same applies to a chiropractor's report that recorded the last attendance being in November 2008.[30]

25 Mr P D'Urso, who operated in August 2009, referred the plaintiff off to other specialists after persisting symptoms followed a technically successful operation. He last saw the plaintiff in 2011 and could not comment on current work capacity as a further evaluation would be needed.[31] He also referred the plaintiff off to Dr C Thomas for pain management. Dr Thomas, consultant in rehabilitation and pain medicine, reported in 2010 that the plaintiff had "failed surgery syndrome" with persistent lower back pain with associated severe

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26 PCB 43
27 PCB 90
28 PCB 95
29 PCB 88
30 PCB 91
31 PCB 86

disability, despite technically successful surgery.[32]

26 He has not seen the plaintiff since 2010 so his opinion is now four years old. As already stated, the second operating surgeon, Mr Malham, provided an optimistic view about work capacity that is out of date. Even then, there were significant restrictions placed on any future employment prospects for a man essentially unskilled and with a history of manual work.

27 The medico-legal witness for the plaintiff was the neurosurgeon, Professor Teddy, who saw the plaintiff in February 2014. He thought the plaintiff came across "… as a direct, sensible man who gave a straightforward history".[33] His conclusion was "He would appear to have no realistic capacity for work at present or for the foreseeable future".[34] I accept this contemporaneous opinion.

28 I do not agree with the defendant's submission that the medical opinions are weakened by the plaintiff giving inadequate accounts of his activities. Similarly, I do not accept that the plaintiff's credit was impeached in any way in this case. I accept that with respect to the activities that might be within his capacity, he is no more than "a day-to-day thing".[35] In other words, I find the plaintiff does not know what he will be like on any given day or at any given time. This makes any realistic job that will satisfy an employer a theoretical possibility only. On the probabilities, this translates into the plaintiff having no real capacity in the employment market for any work.

29 The defendant's reports include the surgeon, Mr P Battlay, in 2010 before the second operation. He said the plaintiff failed to improve following the fusion operation.[36] Mr D Nye, neurosurgeon, said in June 2012 the plaintiff did not

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32 PCB 74
33 PCB 52
34 PCB 53
35 T70
36 DCB 23

have a current capacity for employment.[37]

30 After a vocational assessment report was sent to him, he reported in October 2012 and December 2012. He said that a number of suggested positions "would have potential for the worker".[38] The first job is a light process worker. However, that position and the other positions are not properly described. Mr Nye relied on the 9 August 2012 vocational assessment report which just gives a broad description of the "light process worker" jobs as "perform routine processing tasks in manufacturing plant and factories".[39] It is meaningless. That is all Mr Nye had to go on, but he said the plaintiff had the potential for it. His opinion on the suggested jobs was not well-founded.

31 Nevertheless, he repeated the restrictions on duties he had listed earlier.[40] These included:

> "… avoidance of unrelieved periods of either standing, sitting or motor vehicle travel and a lifting limit of 5kgs will be appropriate and such should not be conducted from below waist level."[41]

32 He commented further on alternative positions in the context of Mr Malham's opinion. He thought retraining would be required.[42] When looked at realistically the limits that this doctor put on the plaintiff's capacity are so widespread and extensive that they effectively amount to no real capacity for employment at all. In any event, Dr Nye's opinions were not based on any proper knowledge of these suggested jobs. His views are also not current.

33 Associate Professor Buzzard, general surgeon specialising in spine and upper and lower limbs, in 2012 was asked to conduct an AMA assessment. He did note the limited success of the second operation:

> "He then had a two-level disc replacement procedure, but that too

37 DCB 42
38 DCB 45
39 DCB 99 and 103
40 DCB 46
41 DCB 42
42 DCB 41 and 43

appears not to have been successful."[43]

34 He thought retraining was important and appropriate.

35 Regarding Dr Nye and Associate Professor Buzzard's views on retraining, I consider their reports are too old to assist the Court now with respect to the plaintiff's retraining prospects. They also do not take sufficient account of the effects of his medication on memory, nor of the postural allowances required.

36 Associate Professor Buzzard spoke of retraining where he can "sit and stand at ease". This is rather unrealistic optimism in my view. I do not accept on all the evidence in this case there is any real prospect of now retraining or rehabilitation altering the plaintiff's work capacity. I also accept the plaintiff has acted reasonably and with compliance in terms of suggestions made to him in this regard in view of his symptoms, medication and the medical advice of his local doctor.

37 The only two reports of recent times for the defendant are from Dr D Barton, occupational physician, and Mr M Dooley, orthopaedic surgeon. Dr Barton saw the plaintiff in 2009 and in 2013. He recorded in 2013 the plaintiff was addicted to opiates.[44] He thought the plaintiff had a lower back dysfunction that led to a guarded prognosis. He did not believe the plaintiff had a capacity for any particular work. This would be for the foreseeable future.[45]

38 He did point to some chronic pain disorder features, but I do not accept on the weight of all the evidence in this case there are any non-organic features that cause any impairment. On the probabilities, it is an organic impairment of the spine that the plaintiff suffers from. Dr Barton commented on a vocational assessment report of 16 August 2013 and in a brief letter said the plaintiff could do certain jobs.[46] These jobs are not sufficiently described in my view.[47]

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43 DCB 52
44 DCB 12
45 DCB 13
46 DCB 14
47 DCB 140-142

They also do not take account of a man on narcotic medication morning and night and whose memory is impaired.[48] His day-to-day unreliability, which I accept, is also not taken into account in this material.

39 Mr M Dooley, orthopaedic surgeon, saw the plaintiff in February 2014. He noted the plaintiff's surgery had not helped. The plaintiff had suffered failed back surgery or failed spine syndrome.[49] He found the plaintiff a sensible and genuine historian. I agree. He was clearly concerned about the morphine-based analgesics and the plaintiff needed to be weaned off them.[50]

40 The prognosis was difficult to estimate and the plaintiff would continue to have ongoing low back pain. His opinion was the plaintiff "would not be ready for work".[51] It is worth noting that comment was after a lapse of some seven years and three months following the injury. In time, Mr Dooley thought he was capable of returning to suitable work and listed some jobs.[52] However, he did not go into any detail about what time when he would be ready or the duties actually required in those jobs. It is not certain where these suggestions came from. He did not list what documents he had been sent, if any, by the defendant's solicitors. The jobs may have come from the vocational assessment document but I cannot conclude that one way or the other.

41 Looking at all the evidence, the plaintiff has a faultless work record since leaving school right up to the time of his first operation in August 2009. On the probabilities I accept he is still a motivated man. He tries to stay active. He potters about at home and at friends' workplaces doing little more than the lightest of tasks, done really at his own pace. I accept if the plaintiff could do more he would. His impaired spine stops him doing more. I accept if he could undertake a course to retrain he would. His pain, inability to sit and stand

48 T34, T63; PCB 39c
49 DCB 69
50 DCB 69
51 DCB 70
52 DCB 71

cause him to constantly have to alter posture which really makes such a course theoretical and no more.

42 His general practitioner supports his complaint about being unable to sit or stand for very long.[53] I accept that if the plaintiff could realistically do some retraining that would make any difference to his work capacity, he would undergo such training. His work capacity has deserted him but I do not accept his genuineness and motivation have.

43 As well as not being current, none of the doctors who suggest some retraining that might be open to him, or indeed the vocational assessors, have had the advantage I have of all the current medical evidence tendered. Perhaps more importantly, they have not heard the persuasive evidence of the doctor who has known and treated the plaintiff now for some thirty years or so. This doctor still sees the plaintiff monthly and in the end I accept his opinion that the plaintiff is not a realistic prospect of being able to do any retraining course that will alter his earning capacity in any meaningful way.

44 The vocational re-education assessment reports the defendant tendered are also too out of date to assist an evaluation now. Some are in 2010 and 2012. The most recent is the 2013 report based on an August 2013 interview. Obviously it could not have the advantage of the 2014 reports from the general practitioner, Professor Teddy and Dr Thomas but it did not even contain a full list of the medical reports as at August 2013.[54]

45 Of more significance, the report noted the plaintiff was currently on Kapanol, Panadol Osteo and Endone. Two of these are narcotic-based drugs. I accept the plaintiff's evidence that his memory is affected by the morphine drugs Kapanol and Endone.[55] Now he takes Kapanol morning and night each day.[56]

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53 T89
54 DCB 137
55 DCB 39c; T34
56 T63

He takes Endone two or three days a week.[57] There are other side-effects such as nausea, constipation and feeling woozy. As to the impact on memory, he clearly stated "My memory is extremely bad" as a result of his medication.[58] These matters are all relevant to an opinion as to what work the plaintiff is capable of, however these factors did not even rate any real mention by the co-authors of the 2013 Nabenet report. Moreover, none of the job suggestions in either the 2010, 2012 or 2013 vocational assessment reports the defendant relies on take a proper account of a man who is simply unreliable. He does not know from one day to the next how he will be. He said "… it's a very much a day to day thing is my back".[59] Activities I accept he can carry out are basically done on his good days.[60] In the end, as to the defendant's retraining or rehabilitation argument, the plaintiff did try a course and I accept he just could not complete it.[61] Back when he was at work on light duties he used to lie down on the office floor from time to time in order to manage pain.

46 On the probabilities he is a man who wants to work if he could. He would do some retraining if he could. I find he tries to do what he is capable of but that is very limited by his final impairment. A job or a course is not within the capabilities of a person if it can only be carried out "on good days". The realities of the labour market are not that generous. A "good day" only job is no job at all.

47 This case is a reminder of the need to keep in mind the "realities of the marketplace".[62] See *Acir v Frosster Pty Ltd*[63] See Acir See *ACIR v. Frosster Pty Ltd* and *Smorgon Steel Tube Mills Pty Ltd v Majkic*.[64] On the evidence in this case I find the plaintiff's condition is unpredictable. If a worker is irregular

57 T72
58 T74
59 T69
60 PCB 58, T60 and 74
61 PCB 39c
62 See *Acir v Frosster Pty Ltd* [2009] VSC 454
63 [2009] VSC 454 at paragraphs [186] and [188]
64 [2008] VSCA 230 at paragraph [11]

in terms of whether or not he can come to work today or maybe tomorrow or maybe not, then he is not capable of working in any job in the real world.

48 I do not accept the emails the defendant tendered about non-attendance at appointments in early 2013 amount to the plaintiff not cooperating or not trying to pursue rehabilitation or retraining. The plaintiff has no realistic capacity for such courses or any retraining. I accept he is the best judge of what he can do and what he cannot do. He was truthful and forthright in that regard. I accept he potters about at home when he is having a good day.[65] He drives for an hour or so to Melbourne with the help of medication but could not do it day in day out.[66] His local doctor supported his complaint about regular driving and the pain it caused.[67]

49 On the probabilities I find the plaintiff has no realistic capacity for any suitable employment nor for any relevant retraining or rehabilitation. This situation is permanent.

50 For the reasons mentioned I grant leave to bring proceedings for the recovery of pecuniary loss damages and it follows leave is granted for pain and suffering damages.

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65 T53 and 60
66 T51-52; T74
67 T89