FOLEY'S | LIST

COUNTY COURT DECISIONS IN PERSONAL INJURIES CASES

JANUARY 2015 – JUNE 2016

Author: Sasha Manova

Date: 20 June, 2016

COUNTY COURT DECISIONS IN PERSONAL INJURIES CASES JANUARY 2015 – JUNE 2016

Written by: Sasha Manova
Barrister, Foley's List

Dated: 20 June 2016

INTRODUCTION - A SNAPSHOT

1. In the 18 month period from January 2015 - June 2016, the County Court of Victoria heard and determined approximately 204[1] serious injury cases involving workplace injuries and transport accidents.

2. Of the 204 applications, leave was granted to the plaintiff in 171[2] cases.

3. The 33 cases in which leave was denied tend to fall into three broad categories:

   (1) Cases where the plaintiff's credibility was significantly challenged[3];

   (2) Cases where the plaintiff retained a capacity to undertake pre-injury or close to pre-injury employment and took little if any ongoing medication[4];

   (3) Cases where the medical and lay evidence failed to disentangle the consequences of the subject injury from the consequences of previous or subsequent unrelated medical conditions[5].

---

[1] Approximate figure based on judgments published in the County Court database on www.austlii.edu.au. The figures do not take into account applications commenced and resolved prior to judgment.
[2] ibid
[3] See for example: *James v Loreto Mandeville Hall Association Inc* [2015] VCC 434, *Schembri v Transport Accident Commission* [2015] VCC 269, *Sahin v Greglea Pty Limited (trading as Mildura Tree Services) and Anor* [2015] VCC 784, *Haider v Transport Accident Commission* [2016] VCC 489; *Kovacic v Transport Accident Commission* [2016] VCC 346.
[4] See for example: *Van Doorn v Transport Accident Commission* [2015] VCC 435, *Quintal v Victorian WorkCover Authority* [2015] VCC 125, *Korf v Collett (Aust) Pty Ltd* [2016] VCC 133, *Tamburro v Victorian WorkCover Authority* [2016] VCC 598, *McMahon v Australian Promotions Company Pty Ltd* [2016] VCC 445.
[5] See for example: *Van Doorn v Transport Accident Commission* [2015] VCC 435, *Donevski v Rodrigues & Transport Accident Commission* [2015] VCC 459, *Inostroza v Melbourne Health and Anor* [2015] VCC 1433, *Gashi v Transport Accident Commission* [2015] VCC 695

4. From the perspective of both plaintiff and defendant legal practitioners, it is helpful to closely review those judgments in which leave was denied to the plaintiff.

5. The case study below has been selected on the basis that it falls within both categories (1) and (3) above, and the judgment gives detailed consideration to the factors that led to an unsuccessful result for the plaintiff.

A CASE STUDY - SERIOUS INJURY

Inostroza v Melbourne Health and Anor [2015] VCC 1433
(10 September 2015) Judge K L Bourke

Background:

The plaintiff was a 59 year old former patient care attendant who suffered injuries to her neck, shoulder and lower back when she attempted to catch a falling patient in August 2003. Her serious injury application was issued in respect of all three injuries. However, the applications relating to the spine and psychiatric impairment were withdrawn prior to the hearing (para 5). At the hearing, the application was limited to the left upper limb, and was focussed on a discrete shoulder injury (paras 4-6). This injury involved a rotator cuff tear and the development of an impingement syndrome following which the plaintiff underwent surgery (para 275).

The matter commenced before Judge Bourke on 3 June 2015. Despite having sworn three affidavits, on the first day of the hearing Her Honour "*indicated that the plaintiff's affidavit material was deficient in that it failed to identify consequences referable to the relevant impairment"* (para 13). In particular, Her Honour stated that it was not possible to delineate the consequences of the compensable injury and other non-related medical conditions. As a consequence, leave was granted to the plaintiff to file further affidavit material. The hearing was adjourned to allow the further affidavit material to be prepared (paras 14-15), and the matter resumed on 10 August 2015.

Despite preparing a fourth affidavit as directed, Her Honour ultimately found that the plaintiff was unable to disentangle the consequences of her left shoulder injury from the consequences of a range of unrelated conditions.

The unrelated conditions included:

- a pre-existing low back injury (which had significantly worsened

since the subject incident);

- a pre-existing right elbow condition requiring ulnar nerve surgery in November 2002 (which worsened post accident, allegedly because she was doing too much with her right arm due to her left arm problems (para 29). This condition required further surgery in 2005, when a plate and screw was inserted (para 30) and an osteotomy in August 2006 (para 87). The condition worsened after an incident in June 2007 when she wrenched her right arm on a train (para 79);
- a pre-existing psychiatric condition resulting in suicide attempts in 2000 and 2001 (para 47) as a consequence of which she was taking anti-depressant medication at the time of the incident (para 45);
- a post-accident very significant problem in the right hip , which started in about 2009 (para 103) and resulted in a total hip replacement in May 2013;
- a post accident plantar fasciitis problem which limited her ability to walk and work (para 135)

<u>The affidavits</u>

- In her first affidavit, the plaintiff did not mention her low back, which had become a very significant problem at the time she swore the affidavit. She said that the barrister who drew the affidavit had made a mistake in omitting the back problems and that she would be very careful as to what was put in subsequent affidavits to ensure they are an accurate record of her pre-injury health (para 56-57). This affidavit also failed to mention any ongoing right arm problems (para 67). Her Honour concluded that save for describing pain and restricted movement, the first affidavit failed to identify the consequences referable to the *shoulder* impairment (para 314). Instead, the plaintiff described "the injury" as involving pain and restricted movement in various body parts including the left shoulder, neck, face, headaches, and a psychiatric condition. She deposed that because of "the injury" she was unable to perform any work save for a failed attempt, and relied heavily on her daughter (paras 314-316).

- In her second affidavit, the plaintiff mentioned that she also suffered an injury to her lower back which over time had become very serious (para 54). Her Honour noted that the second affidavit contained references to pain and restricted movement in the left shoulder and ongoing significant spinal problems. Sleep difficulties were described as waking every few hours through pain in the lower back, neck *and* left shoulder (para 317).

- In her third affidavit, *for the first time* the shoulder became the main injury

and the plaintiff attempted to link that injury to ceasing work in 2003 (para 318).

- In her fourth affidavit, the plaintiff attempted to clarify some matters regarding other medical conditions and to spell out the consequences referable to the claimed left shoulder and arm injury (para 51).

The defendant's case

The defendant did not dispute that the plaintiff had suffered a rotator cuff injury requiring surgery as a consequence of the incident. However, it submitted that:

(i) the plaintiff recovered well following surgical repair, and any present consequences are not serious (para 278);

(ii) given the multiple unrelated medical conditions the plaintiff presently suffered, the principles in *Peak Engineering & Anor v McKenzie*[6] are invoked (para 278);

(iii) as the plaintiff suffers from a 'constellation' of medical conditions which cause her pain and suffering consequences, in accordance with *Peak Engineering*, it is necessary for the Court to make findings about all of the pain and suffering consequences which are operative as at the date of the hearing (para 282).

Her Honour did not accept the plaintiff's submission that the consequences of the shoulder injury are so clearly separate and distinct from the consequences of the other non-incident related conditions that no disentangling is necessary (para 289-290).

Accordingly, Her Honour made various findings open on the evidence as to the nature and extent of the unrelated injuries and impairment consequences. For example:

- In relation to the unrelated back injury, Her Honour noted that Mr Miller reported a reduced capacity for domestic and gardening activities as a result of "orthopaedic injury" but did not specify which injury imposed those restrictions (para 355). Spinal surgery had been suggested but there was no report from the orthopaedic surgeon the plaintiff saw a week before the hearing (para 356).

- In relation to the cervical spine, the plaintiff repeatedly attributed her left shoulder symptoms to the neck, not separating the two conditions (para 358). She had been seeing a Dr Tisch and having further investigations of her spine.

[6] [2014] VSCA 67

However there was no report from Dr Tisch (para 360). She continued to report ongoing neck problems to medico-legal examiners (para 361-362).

- In relation to the right arm, despite deposing that her right arm symptoms resolved, the plaintiff had further surgery and a specialist referral. Mr Tonkin, who treated the plaintiff in relation to the right elbow had not provided a report (para 363-364).

- In relation to the right hip, the plaintiff complained to medico-legal specialist of hip symptoms (para 365-366).

- In relation to the feet, the plaintiff has plantar fasciitis for which she has had specialist referral and cortisone injections every couple of years.

Having made findings as to the unrelated medical conditions based on the limited medical and affidavit evidence available, Her Honour made the following conclusions (at para 368-371):

368 Taking into account all the evidence, I am unable to identify consequences properly referable to the left shoulder that are serious, having excluded the consequences referable to these other conditions.

369 At its highest, the plaintiff has some ongoing left shoulder pain and restriction of movement. I do not however accept her evidence that it is to the level she presently describes for the reasons I have previously stated.

370 The plaintiff's shoulder condition has not required treatment since last seeing Mr Tan in 2013, when he thought it was playing a minor role in her presentation. In relation to her spinal condition however, there is a proposed fusion of both the cervical and lumbar spine and ongoing specialist treatment, including the recent injection.

371 The plaintiff's other conditions all contribute to any difficulties she may have in relation to sleep, housework, employment and daily activities.

372 Taking into account all the evidence, I am not satisfied that any present consequences referable to the left shoulder injury are "serious"

Aside from the issue of disentanglement, the judgment contains a number of comments that provide interesting points of consideration for legal practitioners in this jurisdiction. In particular:

- Her Honour accepted the following criticisms of the plaintiff's evidence as

impacting on her credibility and reliability:

- the plaintiff's initial affidavit understated the true position with respect to her psychiatric health (para 295);
- some of the plaintiff's evidence was contradictory and although she didn't rely on her psychiatric condition at the hearing, she did so at the time she swore the affidavits and para (c) was abandoned very close to trial (para 296);
- the plaintiff failed to mention her ongoing right arm problems in her early affidavits (para 297);
- her affidavit deposed to ongoing shoulder problems post surgery, which differed to her viva voce evidence (para 298);
- there were inconsistencies in her evidence as to whether she had done cleaning work since the accident, and whether this put strain on her shoulder (para 299 -300);
- her affidavit failed to mention the various voluntary work she had done since the accident, including work in an aged care facility and as a receptionist (para 301);
- her evidence as to the use and effects of pain killers was contradictory (para 302);
- the plaintiff's initial affidavit did not mention her back or hip or numerous other health issues (para 304- 305);
- The plaintiff seemed to have a selective memory (para 306).

- In the months leading up to the hearing, the plaintiff had been taking strong narcotic medications including Oxycontin twice a day, Endone once or twice a day, Temazepam daily, an anti-depresant and DiGesic (para 59). Her Honour noted that although the plaintiff's medication regime was significant, she took medication for all of her main conditions, namely the hip, neck, back and shoulder (para 326). Her Honour did not accept the plaintiff's evidence that painkillers are effective for her unrelated conditions yet do not assist her in relation to her shoulder complaints (para 309).

- The plaintiff's evidence lacked corroboration from any lay witnesses; there was no affidavit from her daughter, with whom she had lived almost continuously for the last 10 years (para 313).

- A proper analysis of the veracity of the plaintiff's complaints was made more difficulty due to the absence of any up to date reports from treating general practitioners who have seen the plaintiff in recent times (para 337). As a result of the absence of up to date medical reports, Her Honour drew an inference that a number of treating doctors would not have assisted the plaintiff's case (para 338).

MEDICAL PANEL REFERRALS IN SERIOUS INJURY APPLICATIONS

6. Over the last 18 months or so, there has been an increase in applications, particularly made by defendants, to refer medical questions to the Medical Panel in serious injury applications.

Practice Note (PNCLD 4 – 2016)

7. On 16 May 2016, the County Court issued **Practice Note (PNCLD 4 – 2016),** titled "*Referral of Medical Questions to a Medical Panel*". This Practice Note was authorised by Judge O'Neill and Judge Wischusen, and supersedes paragraphs 66-67 of the Practice Note PNCLD 1 – 2016[7].

8. The introduction of the new Practice Note on 16 May 2016, significantly increased the time by which a party must notify the court of its intention to refer questions to a Medical Panel. Paragraph 2 of the Practice Note states that *"the time by which a party must notify the court of the party's intention to request the court to refer questions to a Medical Panel ("the referral application") is* ***a date 150 days before the trial date fixed for the hearing*** *of the serious injury application"*.

9. The Practice Note also sets out the procedure for giving notice to the court and attaches a form titled *"Notice of Intention to Request that a Medical Question be referred to the Medical Panel"* for this purpose. The proposed medical questions must be attached to this notice (para 5).

10. Once notice has been given, the referral application is allocated a Directions Hearing. At the Directions Hearing, practitioners are required to comply with paragraphs 7 and 9 of the Practice Note, which set out matters that the court expects practitioners to address, and documents that must be provided to the court.

11. All applications in which a party seeks to refer medical questions in the Serious Injury List must comply with the Practice Note. However, the 150 day time limit for giving notice only applies to serious injury applications where the trial date is listed on 28 November 2016 or thereafter (para 3).

---

[7] Prior to 16 May 2016, Practice Note PNCLD 1 – 2016 provided that:
(a) a request to refer medical questions to the Medical Panel must be made to the Judge in charge of the Common Law Division, no later than 14 days prior to the date fixed for hearing (para 66);
(b) where a serious injury application has already been allocated to a particular Judge for hearing, any application for referral of a medical question to the Medical Panel is to be made before that trial Judge (para 67).

Rulings - January 2015 – June 2016

Law v Leftrade Limited and Anor [2015] VCC 1326
(11 September 2015) Judge K.L Bourke

The plaintiff suffered a shoulder injury after falling from a pallet at her employer's fish business. The plaintiff opposed the defendant's application to refer medical questions to a Medical Panel, on the basis of ss 274(3) and 274(5) of the *Workplace Injury and Compensation Act 2013* ("the WIRC Act").

The plaintiff relied on Judge O'Neill's decision in *Amendola v United Doormakers (Vic) Pty Ltd*[8], that within serious injury cases generically, there are a range of factual disputes in every case that can only properly be teased out through cross examination and are best determined by a judge (para 38).

The defendant distinguished *Amendola* on the basis that it involved matters not relevant to the present application such as pre-existing conditions and other work incidents (para 43). Judge Bourke accepted the defendant's submission, and determined that the application *"did not involve questions where credit and the need for cross examination arises, as in Amendola, such that the matter would be more appropriately dealt with by the Court rather than the Panel"*(para 44).

In plaintiff also opposed the referral on the grounds that issues arising from a vocational assessment were matters of evidence, and that considerations such as whether a suggested job is 'light work' or is available for a person of the plaintiff's education and work background are of a non-medical nature that are much better heard by a court (paras 48-50). Judge Bourke also rejected this submission, stating that *"a conflict between vocational assessors is similar to a conflict between doctors and does not depend substantially on the resolution of factual issues. The Panel would come to a conclusion as to fitness for work or for a particular role and the Court would then decide the 40 percent issue. Further, if the Panel required more evidence as to this issue, the convenor could request an occupational physician's report"* (paras 52-53).

Counsel for the plaintiff also submitted there was an abuse of process, due to late notification of the intended referral (i.e two years after the proceedings were issued). The defendant explained that the questions were not provided earlier, as the plaintiff's solicitors did not confirm the final nature of her case (i.e that the neck injury was not a part of the serious injury application) until very recently. Judge Bourke determined that there was no abuse of process in the circumstances, as:

[8] [2012] VCC 1038

(i) the defendant was entitled to know the full ambit of the application before referring questions to a Medical Panel; and
(ii) the defendant had complied with the notice requirements set out in the WIRC Act (para 72).

Pham v Toyota Motor Corporation Australia Limited [2016] VCC 132 (25 February 2016) Judge O'Neill

The plaintiff suffered injuries to various body parts throughout the course of her employment with Toyota. The defendant made two separate applications to refer medical questions to a Medical Panel, both of which the plaintiff opposed.

The first application to refer medical questions to a Medical Panel came on for hearing before Judge Campton on 11 November 2015. Although the defendant had complied with the 14 day time limit set out in s 274(1)(b) of the WIRC Act, the proposed referral would have resulted in the trial date being vacated. Her Honour determined that the application could have been brought earlier, and that the vacation of the trial date stood in contrast to the provisions of the *Civil Procedure Act 2010,* which required proceedings to be determined in a timely manner and without delay (para 8).

The trial date was ultimately vacated for unrelated reasons, and the matter was relisted for hearing on 27 September 2016. As a consequence of the new trial date, the defendant made a second application to refer questions to a Medical Panel. The issue determined by Judge O'Neill was whether the bringing of the second application would constitute an abuse of process, on the grounds that the matter had already been determined by Judge Campton and ought not be re-agitated (para 13).

Judge O'Neill determined that the application ought to be allowed, and the medical questions referred. At paras 26-29 of the ruling, His Honour noted that:

(i) the legislation provides that a court must refer a matter to a medical panel unless one of the exemptions is met. That mandate did not apply when the matter was considered by Her Honour;
(ii) the earlier application was determined on the basis that the trial date would be lost with consequent significant delay were the application to be granted. This was not the case in the present application;
(iii) there is a wide discretion to courts to entertain a second interlocutory application in the interests of justice.

Briggs v Victorian WorkCover Authority [2016] VCC 204 (8 March 2016) Judge O'Neill

The plaintiff suffered a significant psychiatric condition, involving inpatient admission in a psychiatric hospital and suicidal ideation. In the context of earlier statutory benefits proceedings, the plaintiff had twice been referred to a Medical Panel.

In the context of a serious injury application, the defendant sought to refer 9 medical questions, pursuant to s 274(1) of the WIRC Act. The timing of the referral request meant the trial date would have to be vacated.

Counsel for the plaintiff opposed the referral, on the grounds of an alleged abuse of process as contemplated by s 274(3), and on the basis that there were factual issues that would be more appropriately determined by the court than a medical panel.

Paragraph 15 of the Ruling provides a useful summary of the principles applicable in determining whether conduct constitutes an abuse of process; Judge O'Neill referred to an earlier ruling of Judge Saccardo in *Montiero v Tiago Enterprises*[9], which outlined the relevant High Court authorities.

Judge O'Neill refused the defendant's application, stating that *"allowing the matter to be referred to a Medical Panel with the consequent loss of the trial date would lead, in my view, to the Court's procedures having an unfair and oppressive effect upon [the plaintiff]. If a defendant insurer could disrupt a trial date in a case involving a vulnerable person with psychiatric injury for the sake of obtaining a Medical Panel referral, the process would, in my view, be brought into disrepute"* (para 30).

Yianni v Victorian WorkCover Authority [2016] VCC 348 (7 April 2016) Judge O'Neill

The plaintiff was an aviation re-feuler, who suffered a knee injury after tripping over at his employer's premises. In the context of a serious injury application, the defendant sought to refer 10 medical questions, pursuant to s 274(1) of the WIRC Act.

The proposed questions 1 and 2 related to the nature of the medical condition relevant to the alleged injury, and whether the condition was permanent. The remaining questions related to the issue of work capacity. The proposed questions 5 and 7 referred specifically to vocational assessment reports, and asked whether the plaintiff

[9] [2012] VCC 362

was capable of performing suitable employment in the specific job options identified in those reports.

At para 34 of the ruling, Judge O'Neill stated that questions 1 and 2 were appropriate questions for referral to a Medical Panel, noting that *"a worker's 'medical condition' is a question regularly answered by a Medical Panel and includes not only the medical label or diagnosis but the nature and extent of the effect of that injury upon a worker"*.

His Honour refused to refer the remaining questions regarding work capacity, on the basis that *"the facts underlying the determination of [the plaintiff's] capacity for those areas of employment depend substantially on the resolution of factual issues more appropriately determined by the Court"* (para 36). In particular, His Honour determined, inter alia that:

- it may be that the authors of the vocational reports do not have the expertise to say whether the plaintiff has capacity for the areas of employment involved. The admissibility of those opinions will be a matter to be determined by the trial judge (para 37);

- it is necessary to assess the facts which underpin a determination of work capacity…the determination of a plaintiff's credibility is far better undertaken in the court adversarial process (para 38);

- it is unclear at the present time the tasks involved in the various areas of employment said to be suitable. Without particular expertise and knowledge of those tasks, the Medical Panel may have difficulty answering such questions (para 39).

His Honour also refused to refer a question as to whether the plaintiff has "no current work capacity" on the basis that "the question for determination at the serious injury application is whether [the plaintiff's] work capacity, measured by loss of earnings, is reduced by 40 per cent. It is not to the point as to whether he has "no current work capacity" (para 44).

Admissibility of Medical Panel Reasons in a serious injury application, and/or referral to a subsequent Medical Panel

12. In *Ambesi v Wesfarmers Limited*[10], the plaintiff sought to have a certificate and reasons for opinion admitted into evidence in a serious injury application. The defendant opposed the admission of the reasons, on the basis of *Lianos v Inner and Eastern Healthcare Network*[11]. Judge Hogan ruled that both the medical panel opinion and reasons were admissible, stating that *"if am not bound by the medical panel opinion, then in order to have regard to it, in any meaningful way, I need to be informed of the basis of that opinion. Thus I consider that both the medical panel opinion and the reasons for it are admissible in this case"* (para 5).

13. In a recent unpublished ruling at a Directions Hearing in *Bruns v HW Greenham & Sons P/L*, Judge Carmody ruled that a previous Medical Panel opinion and reasons cannot be sent to a Medical Panel in a serious injury application. The ruling has been appealed by the defendant, and is yet to be determined by the Court of Appeal.

OTHER MATTERS

14. It is beyond the scope of this paper to provide any detailed review of County Court decisions over the last 18 months addressing matters other than Serious Injury applications.

15. As a guide only, the following judgments relate to the litigation of personal injuries matters generally in the County Court during 2015:

(1) Jurisdiction issues:

Kynaston v Fink International Pty Ltd [2015] VCC 1182
(jurisdiction under the Accident Compensation Act 1985 where payments were made under the Queensland scheme)

(2) Limitation of Actions applications:

Kaur v Toyota Motor Corporation Australia Limited (Ruling) [2015] VCC 266
(Limitation of Actions application, where plaintiff was successful)

[10] [2015] VCC 1056
[11] (2001) 3 VR 136

Williams v Omeo District Health and Ors (Ruling) [2015] VCC 652
(Limitation of Actions application, where plaintiff was successful)

Saric v Chubb Security Australia Pty Ltd (Ruling) [2015] VCC 271
(Limitation of Actions application, where plaintiff was successful)

(3) Claims for damages

Zepackic v Prime Ceramics Property Services Pty Ltd [2015] VCC 624
(Claim for damages under *Accident Compensation Act 1985* "ACA")

Balassone v Victorian YMCA Community Programming Pty Ltd and Anor; VWA v Nillumbik Shire Council [2015] VCC 766
(Claim for damages, heard together with indemnity proceedings under s 138 of ACA)

Fitzpatrick v Moira Shire Council [2015] VCC 527
(Occupier's liability claim for damages under *Wrongs Act 1958*)

(4) Operation of s 104B(11A) of ACA – extinguishing common law rights

Zepackic v Prime Ceramics Property Services Pty Ltd (in liq) [2015] VCC 197
(Plaintiff precluded from recovering damages by operation of s 104B(11A) – election to receive lump sum)

(5) Limits of grant under s 134AB ACA

Kaltsis v Ice Design Pty Ltd (Ruling) [2015] VCC 28
(Plaintiff limited to pleading causes of action consistent with ambit of leave granted in serious injury application)

(6) Calculation of weekly payments

Tran v Victorian WorkCover Authority (No 2) [2015] VCC 946
(Determination of a PIAWE dispute).

Sasha Manova
Barrister
Foley's List