Dwyer v Calco Timbers Pty Ltd (No 2) - [2008] VSCA 260

SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 3787 of 2005

BRETT DWYER	Appellant
v	
CALCO TIMBERS PTY LTD (NO 2)	Respondent

JUDGES:	NETTLE, ASHLEY and DODDS-STREETON JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	1 December 2008
DATE OF JUDGMENT:	17 December 2008
MEDIUM NEUTRAL CITATION:	[2008] VSCA 260

ACCIDENT COMPENSATION – Application under s 134AB(16)(b), *Accident Compensation Act 1985* – Whether pain and suffering consequences of impairment 'more than significant or marked, and at least very considerable' – Permanent injury test in respect of appellant's impairment satisfied.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr J H Kennan SC with Dr P T Vout	Slater & Gordon
For the Respondent	Mr J Ruskin QC with Mr J P Gorton	Wisewoulds

NETTLE JA:

1. I have had the advantage of reading in draft the reasons for judgment of Ashley, JA and I agree with his Honour, for the reasons that he gives, that the injury to the appellant's arm suffered on 27 March 2000 caused such permanent serious impairment or loss of body function as to amount to serious injury as defined in s 134AB of the *Accident Compensation Act 1985* .

2. I wish to add only two things. First, although it does not affect the result in this case, I see no reason to doubt that the appellant's loss of upward and downward movement of his palm constituted disfigurement as much as it did impairment.

3. **Following paragraph cited by:**

Delaney v VWA (04 April 2025) (Beach and Kennedy JJA; J Forrest AJA)

128. The authority relied upon for the proposition is that of an observation by Nettle JA in *Dwyer v Calco Timbers Pty Ltd (No 2)* :

> Secondly, I suspect that, but for the way in which the appellant has been prepared to put up with his pain and suffering and get on with his business as best he can, the respondent may well not have disputed his claim. It is unnecessary for present purposes to reach a concluded view about that and I have not done so. But it would be unfortunate, and in my view wrongheaded, if in future such an applicant were treated less favourably than another who, being of less strength of character, simply resigned himself to his injury. [57]

via

[57] [2008] VSCA 260 , [3] .

Jarvie v Sideliner Contracting Pty Ltd (27 June 2024) (Beach, Macaulay and Lyons JJA)

69. Moreover, the fact that the applicant is stoic and attempts to work (and indeed works), in circumstances where others with the same injury might not, is not a matter which ought to work against him. As this Court has said before, a stoic applicant who has been prepared to put up with pain and suffering and make the best of his or her situation should not be treated less favourably than an applicant who, being of less strength of character, simply resigns himself or herself to the injury. [33] The stoic tends to understate the level of pain experienced and, hence, mask to the observer the true dimension of the pain consequence. In the employment context, the stoic is more likely to persist in performing work, rather than cease work altogether as a less stoic person might do, allowing their employment choices and work practices to be dictated by tolerable levels of pain which are stoically endured. On the evidence in the present case, those observations are apposite to the applicant and inform the question of whether his injury satisfies the very considerable test.

via

[33] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260, [3] ; *Hayden Engineering* (2010) 31 VR 1, 5 [13] ; *Transport Accident Commission v Kamel* [2011] VSCA 110, [67] ; *Philippiadis v Transport Accident Commission* [2016] VSCA 1, [28] .

TTB SMS Pty Ltd v Reading (12 August 2020) (Tate and T Forrest JJA)

11. Her Honour said she accepted that the worker was 'somewhat of a stoic, … continuing to work with a significant disability in his right hand'. Her Honour adopted Nettle JA's remarks in *Dwyer v Calco Timbers Pty Ltd (No 2)* [8] to the effect that it would be 'wrongheaded' if a strong, stoical plaintiff were treated less favourably than a plaintiff of a lesser character who had simply become resigned to his or her injury. [9] Her Honour found the worker to be a very credible witness and she accepted in its entirety his evidence of the level of pain and restriction.

via

[9] Ibid [3] .

TTB SMS Pty Ltd v Reading (12 August 2020) (Tate and T Forrest JJA)

26. Mr Ingram then reviewed the factual findings as they concerned the worker's recreational activities — particularly fishing, water-skiing and golf.[19] He reminded the Court of various passages from the worker's cross-examination in the Court below, particularly those to do with his work and the techniques he had developed to deal with his undoubted right hand impairment. He directed us to the passage cited by her Honour [20] relying upon Nettle JA's oft-cited obiter dicta that it would be 'wrong-headed' to penalise the stoic worker who, through strength of character, pushed on with life where others, of less fortitude, may not. [21]

In response to the employer's submission that the impairment was mitigated by his developing spray painting skills with his left hand, Mr Ingram contended that the fact that the worker had to develop these skills provided a measure by which the impairment of his right hand could be evaluated.

via

[21] *Dwyer* [2008] VSCA 260 , [3] .

Blake Hooley v Transport Accident Commission (19 November 2019) (Tate, Beach and Osborn JJA)

49. Additionally, to the extent that the respondent submitted at first instance, or in this Court, that the applicant's return to work and pre-accident interests, and his commitment to getting on with his life, told against him on the issue of seriousness, [27] it is as well to remember the words of Nettle JA in *Dwyer* , [28] that 'it would be unfortunate, and in my view wrong-headed, if in future such an applicant were treated less favourably than another who, being of less strength of character, simply resigned himself to his injury'.

via

[28] [2008] VSCA 260 [3] .

Demmler v Transport Accident Commission (09 November 2018) (Beach, Kaye JJA and Macaulay AJA)

60. The fact that the applicant was prepared to engage in her current employment, with all of the difficulty that that entailed, was not a matter that told against the granting of her application. To use the words of Nettle JA in *Dwyer* , [29] 'it

would be unfortunate, and in [our] view wrongheaded, 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'.

via

[29] [2008] VSCA 260 [3] .

Wesfarmers Ltd v Lloyd (15 March 2016) (Tate, Osborn and Santamaria JJA)

29. Moreover, his Honour found specifically that Mr Lloyd was a stoic individual who understated his difficulties. [8]

via

[8] See the observations of Nettle JA in *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 [3] ('*Dwyer*').

Philippiadis v Transport Accident Commission (11 February 2016) (Redlich and Kyrou JJA and Ginnane AJA)

28. A stoic applicant who has been prepared to put up with pain and suffering and make the best of his or her situation should not be treated less favourably than an applicant who, being of less strength of character, simply resigns himself or herself to the injury. [6]

via

[6] *Dwyer v Calco Timbers Pty Ltd [No 2]* [2008] VSCA 260 [3] ; *Kamel* [2011] VSCA 110 [67] .

ACN 005 565 926 Pty Ltd v Snibson (29 February 2012) (Mandie and Hansen JJA and Kyrou AJA)

70. A stoic applicant who has been prepared to put up with pain and suffering and make the best of his or her situation should not be treated less favourably than an applicant who, being of less strength of character, simply resigns himself or herself to the injury. [18]

via

[18] *Dwyer v Calco Timbers Pty Ltd [No 2]* [2008] VSCA 260 (17 December 2008) [3] .

Transport Accident Commission v Kamel (20 April 2011) (Warren CJ, Ashley JA and Kyrou AJA)

67. A stoic applicant who has been prepared to put up with pain and suffering and make the best of his or her situation should not be treated less favourably than an applicant who, being of less strength of character, simply resigns himself or herself to the injury. [15]

via

[15] *Dwyer v Calco Timbers Pty Ltd [No 2]* [2008] VSCA 260 (17 December 2008) [3] .

Sutton v Laminex Group Pty Ltd (03 March 2011) (Ashley and Tate JJA and Hargrave AJA)

> 80. The respondent made two submissions with respect to the appellant's stoicism. Stoicism was one of the considerations identified by Maxwell P in *Haden Engineering* as useful in assessing the pain experienced by a plaintiff, drawing upon the remarks of Nettle JA in *Dwyer v Calco Timbers Pty Ltd (No 2)* who said: [22]
>
> I suspect that, but for the way in which the appellant has been prepared to put up with his pain and suffering and get on with his business as best as he can, the respondent may well not have disputed his claim. It is unnecessary for present purposes to reach a concluded view about that and I have not done so. But it would be unfortunate, and in my view wrongheaded, if in future such an applicant were treated less favourably than another who, being of less strength of character, simply resigned himself to his injury.

via

[22] [2008] VSCA 260 , [3] .

Haden Engineering Pty Ltd v McKinnon (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

> 13. As to (d), the cases recognise that some plaintiffs may be more 'stoical' than others. This means that such a plaintiff is, to an unusual degree, prepared to endure pain in order to maintain a desired level of function. The injury suffered by the 'stoical' plaintiff is not to be viewed as any the less serious merely because he/she manages to remain more active than might have been expected given the level of pain. [13] In such a case, the 'objective' evidence of the disabling effect may be of less significance than usual.

via

[13] *Dwyer (No 2)* [2008] VSCA 260 , [3] (Nettle JA) .

Secondly, I suspect that, but for the way in which the appellant has been prepared to put up with his pain and suffering and get on with his business as best he can, the respondent may well not have disputed his claim. It is unnecessary for present purposes to reach a concluded view about that and I have not done so. But it would be unfortunate, and in my view wrongheaded, if in future such an applicant were treated less favourably than another who, being of less strength of character, simply resigned himself to his injury.

ASHLEY JA:

4. The appellant, as will be known by those familiar with the decisions of this Court [1] and of the High Court, [2] failed in an application brought under s 134AB(16)(b) of the *Accident Compensation Act 1985* ('the Act') for a leave to bring a proceeding for the recovery of damages for 'serious injury' as defined by s 134AB (37)(a) and/or (b) of the Act – the serious injury being, as he claimed, permanent serious impairment of his right arm, and/or permanent serious disfigurement of that limb. His unsuccessful application was for leave to bring a proceeding in respect only of the pain and suffering consequences of injury.

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[1] [2006] VSCA 187 .

[2] (2008) 82 ALJR 669 .

Matters of principle

5. The correct approach to an appeal against a determination made under s 134AB(16) , in the circumstances addressed by s 134AD, was described by the High Court in its decision, favourable to the present appellant, in *Dwyer v Calco Timbers Pty Ltd*. [3] This Court has subsequently addressed the working-out of what the High Court there said. [4]

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[3] Ibid .

[4] *Church v Echuca Regional Health* [2008] VSCA 153; *Jayatilake v Toyota Motor Corporation Australia Ltd* [2008] VSCA 167

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6. No new question of principle arises in this case. On remitter from the High Court, the question is whether this Court is or is not persuaded, for the most part on a consideration of the materials which were before the judge who heard the application, that the consequences to the appellant of the compensable injury constitute serious injury. I say 'for the most part' because the appellant, without objection by respondent's counsel, demonstrated to us the extent to which use of his right arm is now restricted and – the other side of the coin – the extent to which use is retained; and showed us his arm, so that we could observe the extent of the residual scarring and other disfigurement.

7. **Following paragraph cited by:**

Transport Accident Commission v Katanas (17 August 2017) (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ)

> 6. As appears from *Humphries v Poljak* , the application of the narrative test entails a two-stage process:

(1) an assessment of whether the nature and symptoms of the injury and the consequences of the injury are, subjectively for the applicant, "serious" or, in the case of mental or behavioural disturbance or disorder, "severe"; and

(2) a determination of whether the injury as thus assessed is objectively "serious" or, in the case of mental or behavioural disturbance or disorder, "severe" when compared with the range or "spectrum" [5] of comparable cases.

via

[5] See, for example, *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 at [7] per Ashley JA (Nettle JA and Dodds-Streeton JA agreeing at [1] , [31]); *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181 at [42] per Ashley JA and Beach AJA; *Sutton v Laminex Group Pty Ltd* (2011) 31 VR 100 at 117 [89] per Tate JA (Ashley JA and Hargrave AJA agreeing at 102 [1], 121 [115]).

No new question of principle arises, also, because the test for what constitutes serious injury – judicially articulated and legislatively expressed [5] - is not in doubt. Whether the consequences of compensable injury for an applicant satisfy the test is to be assessed having regard to the spectrum of all cases, not simply those which end up in litigation. The latter may be supposed to be – which is not to say that they are - cases in which the consequences are not glaringly apparent one way or the other.

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[5] *Humphreys v Poljak* [1992] 2 VR 129 (Crockett and Southwell JJ). See now s 134AB (38)(c) and compare s 134AB(38)(d) . See also s 134AB(38)(h) and (i).

No credit issue

8. **Following paragraph cited by:**

Haden Engineering Pty Ltd v McKinnon (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

12. As to (a), the weight to be attached to the plaintiff's account of the pain experience will, of course, depend upon an assessment of the plaintiff's credibility. [10] The Court will make its own assessment of the plaintiff's credibility if he/she gives evidence , [11] and will also take into account views expressed by examining doctors about the reliability of the plaintiff' s accounts of pain. [12]

via

[10] *Dwyer (No 2)* [2008] VSCA 260 , [8] ; *Sejranovic* [2009] VSCA 108, [171] ; *Sabanovic* [2009] VSCA 143, [142]–[145] .

Haden Engineering Pty Ltd v McKinnon (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

[11] *Dwyer (No 2)* [2008] VSCA 260 , [8] ; *Sabanovic* [2009] VSCA 143, [145] .

In assessing the consequences of the compensable injury for the appellant, this Court can safely rely upon the appellant's evidence – by affidavit and in cross- examination – and (to the extent of its relevance) his history given to examining doctors from time to time. That was the opinion of the judge who heard the application. She described the appellant as 'a straightforward witness who did not seek to embellish or exaggerate either his condition or the impact of the impairment or disfigurement on him'. In this context it is convenient to note that I and the other members of the Court viewed a videotape which depicted the appellant's work activities in October 2004. Nothing there revealed, in my opinion, gainsays the disabling consequences of which the appellant gave evidence – although, clearly enough, it shows that the appellant has retained sufficient use of his dominant right arm to undertake a range of activities to do with operation of the bobcat and excavator business which he established in 2003. Of the videotape, more later.

The compensable injury. Treatment

9. The appellant, a man born 2 February 1964, and so now aged 44, was injured whilst working as a truck driver for the respondent on 27 March 2000. As he was unfolding a crane fitted to the back of his truck the arm of the crane became disengaged. It fell straight down on to his right arm.

10. The limb was seriously injured. The appellant was taken to hospital by ambulance. He had suffered a crushing compound fracture of the proximal right radius. A compartment syndrome developed. At surgery, a pin was inserted to stabilise the fracture, and a fasciotomy of both the flexor and extensor compartments was performed. The fasciotomy wounds remained open for several weeks. Then they were sutured. A full length plaster was then applied. The pin was removed on 11 May 2000. Plaster was removed on 1 June 2000. The appellant was initially hospitalised for several weeks. He returned to hospital to have the pin remitted.

11. After surgical intervention was at an end, the appellant was treated by occupational therapy and painkillers. He continued to use painkillers until 2001. Then he and his general practitioner agreed that he should cease all medication. So, when his application was heard in November 2005, he had not been in receipt of treatment for some four years. This is not to suggest, however, that he no longer had pain or ache in the arm. Rather, on his account, he determined to put up with it, having been told by his surgeon that nothing more could be done.

The impairment consequences of injury

12. The consequences of injury for a particular worker begin with findings of fact. Assessment whether those consequences, in terms of impairment or disfigurement, constitute serious injury involves, as has been said, a value judgment.

13. The judge below described the impairment consequences of the appellant's injury this way:

> . . . the plaintiff gave up the heavier manual type of work he was performing prior to the accident and has since successfully started his own business, where he works as an earthmoving contractor and manages to use the heavy equipment involved in this business at the same time as accommodating the ongoing impairment of his right arm. However, notwithstanding his success in establishing his own business, the plaintiff describes the following consequences, which he asserts are serious to him:
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> • Both in his business and in his domestic environment, pain prevents him from digging holes which require twisting and powerful movement of the right arm. However, the plaintiff agrees that from time to time when he has to, he can shovel out dirt at a worksite for a couple of minutes.
>
> • He is unable to fully extend the elbow of his right arm or, with the arm extended as much as he can, turn his palm fully up or down. These restrictions were demonstrated in Court and are consistent with the medical evidence confirming a fixed flexion deformity of his right elbow and a loss of supination and pronation in the forearm. The most recent medical opinion is that obtained from Mr Huffam, an examining orthopaedic surgeon who measured the plaintiff's movements in September this year, noting that the plaintiff '... *had*
>
> *moderate limitation of movement of the elbow joint with 40 degree loss of flexion and then flexion to 120 degrees. Twisting movements of the forearm, pronation and supination were limited to 40° pronation and 40° supination, that is about half the normal range of movement. These movements were measured with a goniometer. He had a moderate limitation of movement of the right wrist. Dorsiflexion 40°. Palmar flexion 60°. Radial deviation 15°. Ulna deviation 30°. He had a full range of movement of the finger joints. It was noted that the skin of the right hand was quite solid and thickened, indicating that he is using his hand for manual work. Muscle power of flexion and extension of the elbow, pronation and supination of the forearm and flexion and extension of the wrist and fingers all appear to be undiminished. ... Mr Dwyer has made quite a good, although not complete recovery from his injury*'.
>
> • In Court, the plaintiff demonstrated that he is unable to draw his right forearm back up against his bicep to the same extent as he can with his left forearm. The difference is apparent and, according to the plaintiff, it causes him pain to try and push the right forearm further.
>
> • There is a loss of strength and muscle wastage in the plaintiff's right arm. The most recent measurement of the plaintiff's grip strength was undertaken by Mr Henderson in

mid 2003, confirming a significant loss of strength in the plaintiff's right hand. So far as muscle wasting is concerned, this provides objective proof of damage and under-use of the dominant right limb, and in September this year Mr Huffam noted: '*There was some relative wasting of the right arm compared to the left. Circumferences of the right upper arm 35cm, left 36.5cm. Right forearm 30cm, left 32cm.*'.

• There is numbness on either side of both scars. Mr Huffam, in his report, refers to '*an area of diminished sensation posterior to the scar over the extensor compartment of the arm*'. However, Mr Henderson, in his

earlier report, refers to '*... a large elongated triangular area of sensory deficit of the posterior anti-brachial cutaneous nerve branch of the radial nerve. This area extends posteriorly for some 5cm from the scar, below the 10cm-15cm junction; and about 4cm proximal above this site of change of direction of the scar*'.

• Since the accident, the pain and discomfort experienced in his right arm has caused him to give up activities such as motorbike riding at weekends and playing social games of golf as he previously did a dozen or more times a year. Although the plaintiff has ridden a pushbike '*on the odd occasion*' since the accident, he says he is now unable to undertake this activity with his partner and her children without pain. He also finds activities such as personal toileting and reaching with his arm extended to a position behind him awkward and painful. Generally speaking, all of the medical evidence, particularly the most recent medical opinion, supports the plaintiff's complaints concerning the level of restriction the impairment of his right arm imposes on his social, recreational and domestic activities.

• The plaintiff describes the frequency and level of pain in his right arm in his most recent affidavit by saying: 'I continue to have daily pain in my right arm. I wake in the morning with an aching pain in the arm which lasts for approximately 1 hour. By the time I get to work I am generally pain free. However the pain tends to recur in the day due to the physical nature of the work I do. I am right handed and have always favoured the use of my right arm. Activities such as lifting ramps from the bobcat, driving the truck and digging cause an aggravation of my right arm pain. By the end of most working days I experience an aching in my right arm. Additionally I experience short intermittent periods of sharp pain in my right elbow on most days. ... I no longer see any treating doctors or take any medication for my right arm. The doctors have told me that there is nothing more they can do for me'.

• There is a risk of the development of osteoarthritis in the right elbow. Both the hospital report and Mr Davie, in his report in 2004, allude to this possibility.

• The impairment of the plaintiff's right arm precludes him from performing the heavy manual type of work he was doing prior to the accident. The medical evidence supports this view, but also points to the fact that the plaintiff has been able to return to full-time and active employment as an earthmoving contractor. The long segment of video film showing the plaintiff working at various construction sites in October last year confirms that, notwithstanding the restrictions imposed by the permanent impairment of his dominant arm, the plaintiff appears to function well and to use his right arm effectively.

> 17 It is clear that the plaintiff suffers from a permanent impairment of the right upper limb which has impacted on his life in the ways described by him in his affidavit and oral evidence, most of which is supported by the medical opinion tendered in this proceeding.

14. Before us, counsel for both parties took no issue with any of the judge's findings. That does not relieve this Court of the obligation of making findings, but it does simplify the task. Having read the appellant's affidavits, his cross-examination and re-examination, and all the medical reports, I consider that the judge's findings were correct. I adopt them as my own.

The disfigurement consequences of injury

15. The judge described the disfigurement this way:

> 33 As the medical evidence and any visual inspection of the plaintiff's arm reveals, there is disfigurement through scarring and visible deformity of the right upper limb caused by the plaintiff's inability to fully straighten the elbow and the loss of condition and wasting of the upper and lower parts of the limb.
>
> 34 Accordingly, in this case there is permanent disfigurement of the plaintiff's right upper limb by reason of:
>
> • Two long and deep scars located on the plaintiff's right forearm. They are not raised and they appear well healed, although there is "rutting" on the surface. Their colour is consistent with the rest of the plaintiff's lightly tanned forearm. The scars are obvious and unsightly because of their length, their width and their location on a part of the body regularly exposed.
>
> • The deformity of the appearance of the right upper limb caused by a combination of the fixed elbow position and the comparative wasting, flabbiness and loss of tone in the limb.

and

> 36 …In most cases the objective reality of disfigurement will give rise to subjective pain and suffering consequences which include the social impact on the plaintiff as distinct from any psychological or psychiatric consequences.
>
> 37 Accordingly, in a 41-year-old male who in the past prided himself in his appearance pain and suffering consequences include the fact that the plaintiff has a permanent and unsightly disfigurement, the plaintiff's embarrassment and distress and his tendency to cover up the disfigured limb because the disfigurement occurs in an exposed and prominent position. These are relevant consequences in determining, as I have in this case, that the disfigurement is substantial.

16. Her Honour rejected, however an argument advanced for the appellant that his 'loss of upward and downward movement of … the palm' also constituted a disfigurement. She regarded those disabilities as falling within the area of impairment rather than disfigurement.

17. Leaving aside the matter last-mentioned, the evidence which was before the judge, together with the appearance of the appellant's right arm when he showed it to this Court, validates the findings made by the judge which I have set out above. I adopt them as my own.

Serious injury?

18. The area of debate between the parties was confined, but critical. According to counsel for the appellant, the pain and suffering consequences of the impairment were for the appellant, in the language of the Act , 'more than significant or marked, and at least very considerable'.[6] Counsel for the respondent, to the contrary, characterised the pain and suffering consequences of the impairment as 'significant, or marked, but not more'.[7]

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[6] Counsel contended for a similar conclusion in respect of the consequences of the disfigurement.

[7] He made a like submission in respect of the disfigurement.

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19. In support of his general proposition, counsel for the appellant highlighted the various disabilities which the judge identified in her reasons. He submitted, in effect, that any finding other than that the impairment consequences were at least very considerable would be discordant with the identified disabilities; and that it was the same in respect of the consequences for his client of the disfigurement.

20. Opposing a conclusion favourable to the appellant, counsel for the respondent

submitted that –

(1) On the doctors' accounts, the appellant had made 'a good though not complete recovery from his injuries'. There had been 'a remarkably good result overall'

(2) The appellant had received no treatment for many years. That gave an insight into whether the pain which he experienced was particularly disabling.

(3) The appellant was disabled from performing very heavy work. But he was now capable of now undertaking, and was undertaking, heavy work. He was working long hours each week. The videotape showed the kind of work which he performed, and revealed that he had no disability in performing it.

(4) The risk of developing arthritis was relevant, but it was only a risk, not
a probability.

(5) The extent of the impairment consequences of injury for a particular worker must be assessed by reference not only to what the worker is precluded from doing, but also by reference to what he or she can still do.[8]

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[8] Counsel listed things that the appellant was evidently able to do because he did not complain that he could not do them. Thus, he did *not* co mplain that he was in constant pain, that he could not get comfortable, that his sleep was affected, that the extent of his disabilities was affected by heat or cold, that he could not engage in normal social relationships, that he could not drive or cook, that he could not work around the house, or that he was unable to socialise or attend sporting or other events.

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21. Counsel for the appellant took issue with all of those submissions. He took particular issue with the last of them, arguing that one must focus upon impairment, not upon the residue of what remains possible.

22. I have considered whether and to what extent I should accept the various submissions made for the respondent. I will deal with them seriatim.

23. The appellant has evidently made a very good recovery from a grave injury. But that does not gainsay the recovery having nonetheless left the appellant with an impairment which satisfies the serious injury test.

24. **Following paragraph cited by:**

Haden Engineering Pty Ltd v McKinnon (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

11. The evidentiary basis of the pain assessment will ordinarily comprise the following:

(a) what the plaintiff says about the pain (both in court and to doctors); [7]
(b) what the plaintiff does about the pain (eg medication, rest, seeking medical treatment); [8]
(c) what the doctors say about the extent and intensity of the plaintiff's pain; and

(d) what the objective evidence shows about the disabling effect of the pain. [9]

via

[7] *Dwyer (No 2)* [2008] VSCA 260 , [24] ; *Kelso* [2010] VSCA 12, [48] .

Next, the fact that the appellant has not had treatment for many years does not stand, I consider, against a conclusion that his continuing pain, though not 'disabling', is nonetheless a matter of some significance. The appellant gave evidence, in effect, that he abandoned treatment - including the taking of analgesics - when he was told that nothing more that could be done for him. He did not pretend in evidence that the pain was crippling. He said in a forthright way that he suffered aching pain in the morning and after a day's work. There was no reason to disbelieve him.

25. **Following paragraph cited by:**

Poholke v Goldacres Trading Pty Ltd (06 October 2016) (Hansen, Kaye and McLeish JJA)

99. The evidence of the applicant, as to the effect of his back injury on the performance by him of routine daily functions, and as to the loss of his capacity to engage in work which had been a source of enjoyment and fulfilment to him, [20] was an important aspect of the claim by the applicant that the pain and suffering consequence to him, as a result of the back injury, was serious. That evidence was not addressed in the judge's reasons. In particular, the reasons for decision do not elucidate why those matters, together with the level of pain experienced by the applicant as a result of the back injury, were not considered by the judge to be sufficiently substantial to satisfy the statutory threshold test of serious. That evidence was cogent, and was central to the issue whether the pain and suffering consequences of the applicant's lower back injury were serious. In our view, the failure of the judge to address that aspect of the applicant's evidence, and to explain why those matters were insufficient to constitute the applicant's pain and suffering consequences as serious, meant that the reasons given by the judge for her decision on this aspect of the case were not adequate.

via

[20] *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1, 5 [15] (Maxwel l P); *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260, [25] (Ashley JA) .

Ellis Management Services Pty Ltd v Taylor (22 November 2013) (Osborn and Beach JJA)

38. In *Haden Engineering Pty Ltd v McKinnon* ,[33] Maxwell P said:

> In its accepted interpretation, the 'pain and suffering consequence' of an injury encompasses both the plaintiff's experience of pain as such and the disabling effect of the pain on the plaintiff's physical capabilities (including capacity for work) and enjoyment of life. (I will refer to the second element as 'the disabling effect' of the pain.)
>
> …
>
> As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes with the plaintiff's enjoyment of life. As this Court (per Ashley JA) said in *Dwyer (No 2)*: '… [I]mpairment is concerned with what has been lost. But the significance of what has been lost … may be informed, to an extent, by what is retained.' [34]
>
> As to capacity for work, it is necessary to identify whether and to what extent the plaintiff is prevented by the pain from performing the duties of his/her previous employment. The fact that the plaintiff has been able to return to full-time employment does not preclude an affirmative finding of serious injury. It is simply one of the matters to be taken into account. [35] What matters in this regard is the extent to which 'an area of work which [the plaintiff] enjoyed has been closed off to [him or her].' [36]
>
> Capacity for work aside, assessing the extent to which the pain interferes with the ordinary activities of life will typically involve consideration of its effect on the plaintiff's:
>
> · sleep;
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> · mobility;
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> · cognitive functioning (whether directly because of the pain or indirectly because of the effects of pain-relieving medication);
>
> · capacity for self-care and self-management; [37]
>
> · performance of household and family duties;
>
> · recreational activities;
>
> · social activities;
>
> · sexual life; and
>
> · enjoyment of life.

Whether and to what extent the matters listed are relevant to the court's task in a particular case will, naturally, depend on the circumstances of the case. [38]

via

[36] *Dwyer (No 2)* [2008] VSCA 260 [25] .

Hawkins v DHL Express (Australia) Pty Ltd (20 February 2013) (Redlich and Tate JJA)

63. I agree. The analysis in *Haden Engineering Pty Ltd v McKinnon* ,[30] as applied in *Sutton v Laminex Group Pty Ltd* ,[31] demonstrates that, in determining the pain and suffering consequences of an injury, it is necessary to consider not only 'what the plaintiff says about the pain (both in court and to doctors)' but also 'what the plaintiff does about the pain (eg medication, rest, seeking medical treatment)' as well as 'what the doctors say about the extent and intensity of the plaintiff's pain' and 'what the objective evidence shows about the disabling effect of the pain'. [32] The judge was correct to consider all these matters and, in doing so, she did not fall into the error of regarding the failure to take medication, or continue with treatment, as in itself evidence that the pain and suffering consequences of the impairment were less than very considerable. Her Honour properly considered what the worker had done about the pain in the context of his own evidence about its intensity and effect and in the context of what the objective evidence said about the disabling effect of the pain. She was clearly alert to the need, when considering the disabling effect of pain, 'to identify the extent to which the pain limits the [worker's] physical functioning, and interferes with the [worker's] enjoyment of life', [33] that is, the extent to which 'an area of work which [the worker] had enjoyed had been closed off to him'. [34] T he worker had retained a capacity for the general type of work he had always done, albeit in diminished form, without medical restrictions, and this had proved to be sustainable despite his pain.

via

[34] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260, [25] (Ashley JA) .

Haden Engineering Pty Ltd v McKinnon (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

15. As to capacity for work, it is necessary to identify whether and to what extent the plaintiff is prevented by the pain from performing the duties of his/her previous employment. The fact that the plaintiff has been able to return to full-time employment does not preclude an affirmative finding

of serious injury. It is simply one of the matters to be taken into account. [15] What matters in this regard is the extent to which 'an area of work which [the plaintiff] enjoyed has been closed off to [him or her].' [16]

via

[16] *Dwyer (No 2)* [2008] VSCA 260 , [25] .

I turn to the circumstance that, at the time when his application was heard, the appellant had been working in his own business for a few years. He did not say that he could not undertake the work, and the videotape showed that he could perform it. I do not agree that what he was shown to do involved heavy work. So I reject the respondent's submission that the appellant's ability to work had only been reduced from an ability to engage in very heavy work to an ability to undertake heavy work. In any event, so far as the pain and suffering consequences of the impairment were concerned, the appellant was simply asserting that an area of work which he had enjoyed had been closed off to him; and it was not in debate that such an area of work had been closed off to him.

26. I next agree with the submission for the respondent that, in assessing the extent of the present and prospective consequences of injury, the prospect that the appellant may develop arthritis in the elbow should not to be overstated. I have not accounted it a matter of much significance in assessing whether or not the impairment consequences are serious for the appellant.

27. **Following paragraph cited by:**

Kesper v Victorian WorkCover Authority (15 October 2024) (Orr and Kaye JJA; J Forrest AJA)

63. His Honour said:[31]

My findings have also been informed by *Haden Engineering Pty Ltd v McKinnon* ,[32] in which Maxwell P set out various principles to which recourse is invariably had in serious injury applications in an effort to assist in evaluating the 'pain and suffering consequences' in a given set of circumstances. In particular, at paragraphs [14]–[15] under the heading 'The disabling effect of pain', the learned President said:

As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes with the plaintiff's enjoyment of life. As this court (per Ashley JA) said in *Dwyer (No 2)*: '… [I] mpairment is concerned with what has been lost. But the significance of what has been lost … may be informed, to an extent, by what is retained'. [33]

via

[33] *Dwyer [No 2]* [2008] VSCA 260, [27] (Ashley JA, Nettle JA agreeing at [1] , Dodds-Streeton JA agreeing at [31]). See also *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181, [44] (Ashley JA and Beach AJA) ('*Stijepic*').

TTB SMS Pty Ltd v Reading (12 August 2020) (Tate and T Forrest JJA)

(c) In assessing the seriousness of the claimed impairment consequences, a Court is required to consider both the effects of the impairment and those aspects of the affected body function which remain unaffected. [25]

via

[25] *Dwyer* [2008] VSCA 260 , [27] (Ashley JA); *Stjepic v One Force Group Australia Pty Ltd* [2009] VSCA 181, [44] (Ashley JA and Beach AJA); *Tatiara Wheat Co Pty Ltd v Kelso* [2010] VSCA 12, [77] (Ross AJA), quoting *Dwyer* [2008] VSCA 260, [27]).

TTB SMS Pty Ltd v Reading (12 August 2020) (Tate and T Forrest JJA)

(c) In assessing the seriousness of the claimed impairment consequences, a Court is required to consider both the effects of the impairment and those aspects of the affected body function which remain unaffected. [25]

via

[25] *Dwyer* [2008] VSCA 260, [27] (Ashley JA); *Stjepic v One Force Group Australia Pty Ltd* [2009] VSCA 181, [44] (Ashley JA and Beach AJA); *Tatiara Wheat Co Pty Ltd v Kelso* [2010] VSCA 12, [77] (Ross AJA), quoting *Dwyer* [2008] VSCA 260 , [27]).

TTB SMS Pty Ltd v Reading (12 August 2020) (Tate and T Forrest JJA)

20. Mr Gorton reminded us that, in performing the evaluative task, her Honour was required to examine not just what the worker had lost by way of impairment, but also what he had retained. [15] He accepted that the evaluation of the worker's impairment was a question of fact and degree. He submitted that the worker's right hand remained useful; that, by the worker's admission, the only residual damage was to the ring and little fingers and that, whilst the worker's use of his right hand in the workplace had been somewhat limited, the photographs of his calloused hands spoke eloquently of its continued use. The worker ran the paint shop at his place of work; he was in charge of 40 other workers and averaged five to 10 hours' overtime per week. He spent a couple of hours each day using a spray gun and alternated between his right and left hands. He did not have constant pain — in fact, again by his admission, most of the time he was pain-free. Only overuse would result in some aching and cramping.

via

[15] *Dwyer* [2008] VSCA 260 , [27] (Ashley JA) .

Kovacic v Transport Accident Commission (15 June 2016) (Weinberg and Beach JJA)

18. The judge's reasons for rejecting the applicant's case centred on what the applicant had lost by way of social, domestic and recreational activities. [17] While what has been lost by way of social, domestic or recreational activities has the capacity to bear upon the seriousness of the consequences of an injury, [18] it is of course all of the relevant consequences of an injury that must be considered in determining whether or not an applicant has satisfied the 'very considerable' test referred to in *Humphries v Poljak* . [19] In the present case, that required the judge to take into account all of the 'pain and suffering' consequences of the applicant's neck injury in addition to what might have been lost by way of social, domestic or recreational activities.

via

[18] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 [27] ; *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181 [44] .

Wesfarmers Ltd v Lloyd (15 March 2016) (Tate, Osborn and Santamaria JJA)

36. Nonetheless, the trial judge was required to have regard to what was retained by Mr Lloyd in order to ascertain the consequences which the injury had caused by way of a full before and after analysis, and to enable a proper assessment of the relative seriousness of what had been lost. [17]

via

[17] *Dwyer* [2008] VSCA 260 [27] (Ashley JA); *Sutton* (2011) 31 VR 100, 114–116 [75]–[83] .

Ellis Management Services Pty Ltd v Taylor (22 November 2013) (Osborn and Beach JJA)

38. In *Haden Engineering Pty Ltd v McKinnon* ,[33] Maxwell P said:

> In its accepted interpretation, the 'pain and suffering consequence' of an injury encompasses both the plaintiff's experience of pain as such and the disabling effect of the pain on the plaintiff's physical capabilities (including capacity for work) and enjoyment of life. (I will refer to the second element as 'the disabling effect' of the pain.)
>
> …
>
> As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes

with the plaintiff's enjoyment of life. As this Court (per Ashley JA) said in *Dwyer (No 2)*: '… [I]mpairment is concerned with what has been lost. But the significance of what has been lost … may be informed, to an extent, by what is retained.' [34]

As to capacity for work, it is necessary to identify whether and to what extent the plaintiff is prevented by the pain from performing the duties of his/her previous employment. The fact that the plaintiff has been able to return to full-time employment does not preclude an affirmative finding of serious injury. It is simply one of the matters to be taken into account. [35] What matters in this regard is the extent to which 'an area of work which [the plaintiff] enjoyed has been closed off to [him or her].' [36]

Capacity for work aside, assessing the extent to which the pain interferes with the ordinary activities of life will typically involve consideration of its effect on the plaintiff's:

- sleep;
- mobility;
- cognitive functioning (whether directly because of the pain or indirectly because of the effects of pain-relieving medication);
- capacity for self-care and self-management; [37]
- performance of household and family duties;
- recreational activities;
- social activities;
- sexual life; and
- enjoyment of life.

Whether and to what extent the matters listed are relevant to the court's task in a particular case will, naturally, depend on the circumstances of the case. [38]

via

[34] *Dwyer (No 2)* [2008] VSCA 260 [27] ; see also *Stijepic* [2009] VSCA 181 [44] .

Phelan v Transport Accident Commission (18 November 2013) (Ashley, Whelan and Santamaria JJA)

16. The applicant got back to work a week after the accident. Thereafter, up to the time of the hearing below, she was in employment except when

changing jobs; and, on one occasion, when she lost a job. At times, she worked 50-60 hours per week. She gave evidence that her jobs were not easy. She used the description 'full on'. A summary of taxation returns showed that her gross earnings increased from $68,204 in the 2007 tax year to $93,339 in the 2010 tax year. The fact that the applicant maintained employment does not deny, of course, her evidence – of which more later – that she had to make some changes to her work practices to protect her spine. But it is some evidence of what she had retained. [8]

via

[8] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 [27] (Ashley JA) .

Noonan v State of Victoria (18 October 2013) (Osborn and Santamaria JJA)

9. His Honour had regard to the overall relevant impact of the disorder in issue upon the applicant and referred to the observations of Ashley JA in *Dwyer v Calco Timbers Pty Ltd (No 2)*: [3]

Finally, I agree with the submission for the respondent that in assessing whether the impairment consequences of injury are serious, one should consider not only what symptoms there are and what the worker is precluded from doing, but also what limits there are to symptoms and to inhibitions upon activities. It is true that impairment is concerned with what has been lost. But the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained.

via

[3] [2008] VSCA 260 , [27] .

Aburrow v Network Personnel Pty Ltd (07 March 2013) (Maxwell P and Tate JA)

19. As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes with the plaintiff's enjoyment of life. As this Court (Ashley JA) said in *D wyer v Calco Pty Ltd (No 2)*: [20]

[I]mpairment is concerned with what has been lost. But the significance of what has been lost … may be informed, to an extent, by what is retained. [21]

via

[21] Ibid [27] . See also *Haden* (2010) 31 VR 1, 4–5 [9]–[14] .

Hawkins v DHL Express (Australia) Pty Ltd (20 February 2013) (Redlich and Tate JJA)

> 49. The basis of her Honour's reasoning lay primarily in her application of the observation made by Ashley JA in *Dwyer v Calco Timbers Pty Ltd (No 2)* : [15]
>
> the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained.

via

[15] [2008] VSCA 260 [27] .

Sutton v Laminex Group Pty Ltd (03 March 2011) (Ashley and Tate JJA and Hargrave AJA)

> 76. The respondent pointed to the new form of full-time skilful employment which the appellant had secured. While the appellant had particularly enjoyed his previous work, he was now content with his new employment. This was not a case where an occupation on which a plaintiff had thrived was replaced only by a job he or she begrudged; the situation was to the contrary. In this respect, the respondent relied on the observation of Ashley JA in *Dwyer v Calco Timbers Pty Ltd (No 2)*: [19]
>
> I agree with the submission for the respondent that in assessing whether the impairment consequences of injury are serious, one should consider not only what symptoms there are and what the worker is precluded from doing, but also what limits there are to symptoms and to inhibitions upon activities. It is true that impairment is concerned with what has been lost. But the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained.

via

[19] [2008] VSCA 260 , [27] (emphasised also in the extract from Maxwell P in *Haden Engineering* quoted above). See also *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181, [44] ; *Sabo v George Weston Foods* [2009] VSCA 242, [60] .

Haden Engineering Pty Ltd v McKinnon (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

> 14. As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes with the plaintiff's enjoyment of life. As this Court (per Ashley JA) said

in *Dwyer (No 2)*: '… [I]mpairment is concerned with what has been lost. But the significance of what has been lost … may be informed, to an extent, by what is retained.' [14]

via

[14] *Dwyer (No 2)* [2008] VSCA 260 , [27] ; see also *Stijepic* [2009] VSCA 181, [44] .

Tatiara Meat Co Pty Ltd v Kelso (16 February 2010) (Ashley JA, Mandie JA and Ross AJA)

77. In addition to a consideration of the limitations imposed on a worker as a consequence of injury it is also relevant to consider what activities the worker is still able to engage in, post injury. As Ashley JA observed in *D wyer v Calco Timbers Pty Ltd (No 2)*:

…in assessing whether the impairment consequences of injury are serious, one should consider not only what symptoms there are and what the worker is precluded from doing, but also what limits there are to symptoms and to inhibitions upon activities. It is true that impairment is concerned with what has been lost. But the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained. [13]

via

[13] [2008] VSCA 260 , [27] .

Stijepic v One Force Group Aust Pty Ltd (14 August 2009) (Ashley JA and Beach AJA)

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. [14] 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.' [15] 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 the 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'.

via

[15] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 [27].

Finally, I agree with the submission for the respondent that in assessing whether the impairment consequences of injury are serious, one should consider not only what symptoms there are and what the worker is precluded from doing, but also what limits there are to symptoms and to inhibitions upon activities. It is true that impairment is concerned with what has been lost. But the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained.

28. Notwithstanding that I have accepted some of the submissions made on behalf of the respondent, I consider that the pain and suffering consequences of the appellant's injury – consequences which are unquestionably permanent – satisfy the permanent injury test with respect to his impairment. The burden of the evidence is that his right arm is permanently fixed with a substantial flexion deformity at the elbow; but that he cannot fully flex his forearm at the elbow. The movements of his forearm and wrist are significantly reduced. There is muscle wasting of the forearm, and significant loss of the power of grip. There are areas of numbness in the vicinity of the scars. He is at some increased risk of the development of arthritis in the elbow joint. He suffers pain and ache, in the mornings and after work. He has had to desist from work which he enjoyed. Several recreational pursuits are denied to him. He is limited in undertaking another recreational pursuit. He has some difficulty with personal toileting. The respondent's catalogue of symptoms of which the appellant does not complain, and of activities which are not denied him, is a part of the story; but a part only. In this case, I am not at all persuaded that it tells against an affirmative conclusion in the appellant's favour.

29. What I have thus far said makes it unnecessary to decide whether the appellant also made good his contention that he suffered 'serious injury' as defined by s 134AB(37)(b) of the Act. I refrain from expressing a final conclusion about the matter, noting only that I have some doubt whether his disfigurement would satisfy the necessary threshold. The scarring, though extensive, is now very well healed and not very noticeable. The flexion deformity at the elbow, though constituting a disfigurement, in my view has a more significant impact in the context of impairment.

Orders

30. I would allow the appeal and order that the appellant have leave to bring a proceeding for recovery of damages for pain and suffering in respect of injury sustained on 27 March in compensable circumstances.

DODDS-STREETON JA:

31. I have had the benefit of reading in draft the reasons for judgment prepared by Ashley JA. I agree with his Honour's proposed disposition for the reasons he gives.

Cited by:

Delaney v VWA [2025] VSCA 59 (04 April 2025) (Beach and Kennedy JJA; J Forrest AJA)

> 128. The authority relied upon for the proposition is that of an observation by Nettle JA in *Dwyer v Calco Timbers Pty Ltd (No 2)* :
>
> > Secondly, I suspect that, but for the way in which the appellant has been prepared to put up with his pain and suffering and get on with his business as best he can, the respondent may well not have disputed his claim. It is unnecessary for present purposes to reach a concluded view about that and I have not done so. But it would be unfortunate, and in my view wrongheaded, if in future such an applicant were treated less favourably than another who, being of less strength of character, simply resigned himself to his injury. [57]
>
> *via*
>
> [57] [2008] VSCA 260 , [3] .

Delaney v VWA [2025] VSCA 59 (04 April 2025) (Beach and Kennedy JJA; J Forrest AJA)

> *Juma v Kone Elevators Pty Ltd* [2024] VSCA 217, applied; *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 , referred to.

Delaney v VWA [2025] VSCA 59 (04 April 2025) (Beach and Kennedy JJA; J Forrest AJA)

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Kesper v Victorian WorkCover Authority [2024] VSCA 237 (15 October 2024) (Orr and Kaye JJA; J Forrest AJA)

> 9. These provisions and those of its predecessor, s 134AB of the *Accident Compensation Act 1985* , have been the subject of numerous decisions of this Court, upon which both parties relied depending upon the perceived forensic advantage. [1]
>
> *via*
>
> [1] For instance — and to mention only a few — *Dwyer v Calco Timbers [No 2]* [2008] VSCA 260 (' *Dwyer [No 2]*'); *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1; [2010] VSCA 69 ('*Haden*'); *Sutton v Laminex Group Pty Ltd* (2011) 31 VR 100; [2011] VSCA 52 ('*Sutton*'); *Sabanovic v Atco Controls Pty Ltd* [2009] VSCA 143.

Kesper v Victorian WorkCover Authority [2024] VSCA 237 (15 October 2024) (Orr and Kaye JJA; J Forrest AJA)

63. His Honour said:[31]

> My findings have also been informed by *Haden Engineering Pty Ltd v McKinnon* ,[32] in which Maxwell P set out various principles to which recourse is invariably had in serious injury applications in an effort to assist in evaluating the 'pain and suffering consequences' in a given set of circumstances. In particular, at paragraphs [14]–[15] under the heading 'The disabling effect of pain', the learned President said:
>
> > As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes with the plaintiff' s enjoyment of life. As this court (per Ashley JA) said in *Dwyer (No 2)*: '... [I] mpairment is concerned with what has been lost. But the significance of what has been lost ... may be informed, to an extent, by what is retained'. [33]

via

[33] *Dwyer [No 2]* [2008] VSCA 260, [27] (Ashley JA, Nettle JA agreeing at [1] , Dodds-Streeton JA agreeing at [31]). See also *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181, [44] (Ashley JA and Beach AJA) ('*Stijepic*').

Jarvie v Sideliner Contracting Pty Ltd [2024] VSCA 144 (27 June 2024) (Beach, Macaulay and Lyons JJA)

69. Moreover, the fact that the applicant is stoic and attempts to work (and indeed works), in circumstances where others with the same injury might not, is not a matter which ought to work against him. As this Court has said before, a stoic applicant who has been prepared to put up with pain and suffering and make the best of his or her situation should not be treated less favourably than an applicant who, being of less strength of character, simply resigns himself or herself to the injury. [33] The stoic tends to understate the level of pain experienced and, hence, mask to the observer the true dimension of the pain consequence. In the employment context, the stoic is more likely to persist in performing work, rather than cease work altogether as a less stoic person might do, allowing their employment choices and work practices to be dictated by tolerable levels of pain which are stoically endured. On the evidence in the present case, those observations are apposite to the applicant and inform the question of whether his injury satisfies the very considerable test.

via

[33] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260, [3] ; *Hayden Engineering* (2010) 31 VR 1, 5 [13] ; *Transport Accident Commission v Kamel* [2011] VSCA 110, [67] ; *Philippiadis v Transport Accident Commission* [2016] VSCA 1, [28] .

Jarvie v Sideliner Contracting Pty Ltd [2024] VSCA 144 (27 June 2024) (Beach, Macaulay and Lyons JJA)

Barwon Spinners Pty v Podolak (2005) 14 VR 622; *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 ; *Hayden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1; *Transport Accident Commission v Kamel* [20 11] VSCA 110; *Philippiadis v Transport Accident Commission* [2016] VSCA 1; *Sheridan v Victorian Workcover Authority* [2019] VSCA 54, applied.

Randhawa v Transport Accident Commission [2021] VSCA 135 (17 May 2021) (Beach, Kaye and Osborn JJA)

54. The judge noted that the applicant had continued to pursue academic activities. She has been a media freedom advocate for the Centre of Independent Journalism in Malaysia, and has maintained her positions with other relevant organisations. [40] After referring to *Demm ler v Transport Accident Commission* ,[41] and *Dwyer v Calco Timbers Pty Ltd [No 2]* , [42] the judge said:

> The [applicant] sleeps well and retains full mobility. She retains her cognitive ability and was able to complete her PhD, missing approximately four months following the transport accident. She can shop and perform most household activities with limited restrictions. She can garden and cook. Following the transport accident, she home-schooled her children and has fostered children. She has retained the ability to travel interstate and overseas without reported difficulties. The trips have involved work and leisure activities, including hiking and snorkelling. She has published articles widely in her area of expertise.
>
> I accept the [applicant] has suffered some consequences of the physical injury to her lower back as a result of the transport accident. Namely, limited pain, low levels of analgesia, very limited treatment, an inability to participate in camping activities with her family, and a lessening of intimate relationship with her partner. In considering those consequences, I am not satisfied that they are considerable when judged by a comparison with other cases in the range of possible impairments. They certainly cannot be described as being 'more than significant or marked' and as being 'at least very considerable'.
>
> Accordingly, I take the view that the [applicant] has not satisfied the Court that she has suffered a loss of opportunity to obtain an academic position that was more than speculative. [43]

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> The [applicant] sleeps well and retains full mobility. She retains her cognitive ability and was able to complete her PhD, missing approximately four months following the transport accident. She can shop and perform most household activities with limited restrictions. She can garden and cook. Following the transport accident, she home-schooled her children and has fostered children. She has retained the ability to travel interstate and overseas without reported difficulties. The trips have involved work and leisure activities, including hiking and snorkelling. She has published articles widely in her area of expertise.
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>
> Accordingly, I take the view that the [applicant] has not satisfied the Court that she has suffered a loss of opportunity to obtain an academic position that was more than speculative. [43]

via

[43] Ibid [93]–[95] (citation omitted).

Randhawa v Transport Accident Commission [2021] VSCA 135 (17 May 2021) (Beach, Kaye and Osborn JJA)

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> The [applicant] sleeps well and retains full mobility. She retains her cognitive ability and was able to complete her PhD, missing approximately four months following the transport accident. She can shop and perform most household activities with limited restrictions. She can garden and cook. Following the transport accident, she home-schooled her children and has fostered children. She has retained the ability to travel interstate and overseas without reported difficulties. The trips have involved work and leisure activities, including hiking and snorkelling. She has published articles widely in her area of expertise.
>
> I accept the [applicant] has suffered some consequences of the physical injury to her lower back as a result of the transport accident. Namely, limited pain, low levels of analgesia, very limited treatment, an inability to participate in camping activities with her family, and a lessening of intimate relationship with her partner. In considering those consequences, I am not satisfied that they are considerable when judged by a comparison with other cases in the range of possible impairments. They certainly cannot be described as being 'more than significant or marked' and as being 'at least very considerable'.
>
> Accordingly, I take the view that the [applicant] has not satisfied the Court that she has suffered a loss of opportunity to obtain an academic position that was more than speculative. [43]

via

[42] [2008] VSCA 260 .

TTB SMS Pty Ltd v Reading [2020] VSCA 203 (12 August 2020) (Tate and T Forrest JJA)

11. Her Honour said she accepted that the worker was 'somewhat of a stoic, … continuing to work with a significant disability in his right hand'. Her Honour adopted Nettle JA's remarks in *Dwyer v Calco Timbers Pty Ltd (No 2)* [8] to the effect that it would be 'wrongheaded' if a strong, stoical plaintiff were treated less favourably than a plaintiff of a lesser character who had simply become resigned to his or her injury. [9] Her Honour found the worker to be a very credible witness and she accepted in its entirety his evidence of the level of pain and restriction.

via

[9] Ibid [3] .

TTB SMS Pty Ltd v Reading [2020] VSCA 203 (12 August 2020) (Tate and T Forrest JJA)

(c) In assessing the seriousness of the claimed impairment consequences, a Court is required to consider both the effects of the impairment and those aspects of the affected body function which remain unaffected. [25]

via

[25] *Dwyer* [2008] VSCA 260 , [27] (Ashley JA); *Stjepic v One Force Group Australia Pty Ltd* [2009] VSCA 181, [44] (Ashley JA and Beach AJA); *Tatiara Wheat Co Pty Ltd v Kelso* [2010] VSCA 12, [77] (Ross AJA), quoting *Dwyer* [2008] VSCA 260, [27]).

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TTB SMS Pty Ltd v Reading [2020] VSCA 203 (12 August 2020) (Tate and T Forrest JJA)

CIVIL LAW – Application for leave to appeal – Pain and suffering damages – Meaning of serious injury – 'At least very considerable' test – Primary judge's conclusion plainly wrong or wholly erroneous – Impairment consequences of permanent injury – *Accident Compensation Act 1985* s 134AB , *County Court Act 1958* s 74 – *Mobilio v Balliotis* (1998) 3 VR 833, *Humphries v Poljak* (1992) 2 VR 129, *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 , *Haden Engineering Pty Ltd v McKinnon* (2010) 3 VR 1, considered.

TTB SMS Pty Ltd v Reading [2020] VSCA 203 (12 August 2020) (Tate and T Forrest JJA)

26. Mr Ingram then reviewed the factual findings as they concerned the worker's recreational activities — particularly fishing, water-skiing and golf.[19] He reminded the Court of various passages from the worker's cross-examination in the Court below, particularly those to do with his work and the techniques he had developed to deal with his undoubted right hand impairment. He directed us to the passage cited by her Honour [20] relying upon Nettle JA's oft-cited obiter dicta that it would be 'wrong-headed' to penalise the stoic worker who, through strength of character, pushed on with life where others, of less fortitude, may not. [21] In response to the employer's submission that the impairment was mitigated by his developing spray painting skills with his left hand, Mr Ingram contended that the fact that the worker had to develop these skills provided a measure by which the impairment of his right hand could be evaluated.

via

[21] *Dwyer* [2008] VSCA 260 , [3] .

TTB SMS Pty Ltd v Reading [2020] VSCA 203 (12 August 2020) (Tate and T Forrest JJA)

20. Mr Gorton reminded us that, in performing the evaluative task, her Honour was required to examine not just what the worker had lost by way of impairment, but also what he had retained. [15] He accepted that the evaluation of the worker's impairment was a question of fact and degree. He submitted that the worker's right hand remained useful; that, by the worker's admission, the only residual damage was to the ring and little fingers and that, whilst the worker's use of his right hand in the workplace had been somewhat limited, the photographs of his calloused hands spoke eloquently of its continued use. The worker ran the paint shop at his place of work; he was in charge of 40 other workers and averaged five to 10 hours' overtime per week. He spent a couple of hours each day using a spray gun and alternated between his right and left hands. He did not have constant pain — in fact, again by his admission, most of the time he was pain-free. Only overuse would result in some aching and cramping.

via

[15] *Dwyer* [2008] VSCA 260 , [27] (Ashley JA) .

TTB SMS Pty Ltd v Reading [2020] VSCA 203 (12 August 2020) (Tate and T Forrest JJA)

11. Her Honour said she accepted that the worker was 'somewhat of a stoic, … continuing to work with a significant disability in his right hand'. Her Honour adopted Nettle JA's remarks in *Dwyer v Calco Timbers Pty Ltd (No 2)* [8] to the effect that it would be 'wrongheaded' if a strong, stoical plaintiff were treated less favourably than a plaintiff of a lesser character who had simply become resigned to his or her injury. [9] Her Honour found the worker to be a very credible witness and she accepted in its entirety his evidence of the level of pain and restriction.

via

[8] [2008] VSCA 260 (Nettle, Ashley and Dodds-Streeton JJA) (' *Dwyer*').

Blake Hooley v Transport Accident Commission [2019] VSCA 263 (19 November 2019) (Tate, Beach and Osborn JJA)

39. Having made this statement, and then after referring to *Dwyer* and *Haden Engineering* , the judge expressed her ultimate conclusion at Reasons [64] that 'on balance, the pain and suffering and loss of enjoyment of life consequence was not indicative of a serious injury'.

Blake Hooley v Transport Accident Commission [2019] VSCA 263 (19 November 2019) (Tate, Beach and Osborn JJA)

29. The judge then said that two earlier cases 'help illustrate the last-mentioned point'. [16] The judge then referred to *Dwyer v Calco Timbers Pty Ltd [No 2]* [17] and *Haden Engineering Pty Ltd v McKinnon*. [18] After setting out passages from *Dwyer* and *Haden Engineering* , the judge said:

> Having made the comparison required by the Act , I formed the view that in the present case, on balance, the pain and suffering and loss of

> enjoyment of life consequence was not indicative of a serious injury for the purpose of the Act . [19]

Blake Hooley v Transport Accident Commission [2019] VSCA 263 (19 November 2019) (Tate, Beach and Osborn JJA)

49. Additionally, to the extent that the respondent submitted at first instance, or in this Court, that the applicant's return to work and pre-accident interests, and his commitment to getting on with his life, told against him on the issue of seriousness, [27] it is as well to remember the words of Nettle JA in *Dwyer* , [28] that 'it would be unfortunate, and in my view wrong-headed, if in future such an applicant were treated less favourably than another who, being of less strength of character, simply resigned himself to his injury'.

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[28] [2008] VSCA 260 [3] .

Demmler v Transport Accident Commission [2018] VSCA 284 (09 November 2018) (Beach, Kaye JJA and Macaulay AJA)

37. The judge commenced his reasons with a description of the applicant's background, the circumstances of the collision, the applicant's evidence, the evidence of Ms Bird and Ms Haris and the medical evidence. [7] The judge then set out some relevant legal principles, extracting passages from *Humphries v Poljak* ,[8] *Dwyer v Calco Timbers Pty Ltd [No 2]* , [9] *Stijepic v One Force Group Aust Pty Ltd* ,[10] *Sumbul v Melbourne All Toya Wreckers Pty Ltd* ,[11] and *Tatiara Meat Co Pty Ltd v Kelso*. [12]

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60. The fact that the applicant was prepared to engage in her current employment, with all of the difficulty that that entailed, was not a matter that told against the granting of her application. To use the words of Nettle JA in *Dwyer* , [29] 'it

would be unfortunate, and in [our] view wrongheaded, 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'.

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Transport Accident Commission v Katanas [2017] HCA 32 (17 August 2017) (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ)

6. As appears from *Humphries v Poljak* , the application of the narrative test entails a two-stage process:

> (1) an assessment of whether the nature and symptoms of the injury and the consequences of the injury are, subjectively for the applicant, "serious" or, in the case of mental or behavioural disturbance or disorder, "severe"; and
>
> (2) a determination of whether the injury as thus assessed is objectively "serious" or, in the case of mental or behavioural disturbance or disorder, "severe" when compared with the range or "spectrum" [5] of comparable cases.

via

[5] See, for example, *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 at [7] per Ashley JA (Nettle JA and Dodds-Streeton JA agreeing at [1] , [31]); *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181 at [42] per Ashley JA and Beach AJA; *Sutton v Laminex Group Pty Ltd* (2011) 31 VR 100 at 117 [89] per Tate JA (Ashley JA and Hargrave AJA agreeing at 102 [1], 121 [115]).

Poholke v Goldacres Trading Pty Ltd [2016] VSCA 232 (06 October 2016) (Hansen, Kaye and McLeish JJA)

99. The evidence of the applicant, as to the effect of his back injury on the performance by him of routine daily functions, and as to the loss of his capacity to engage in work which had been a source of enjoyment and fulfilment to him, [20] was an important aspect of the claim by the applicant that the pain and suffering consequence to him, as a result of the back injury, was serious. That evidence was not addressed in the judge's reasons. In particular, the reasons for decision do not elucidate why those matters, together with the level of pain experienced by the applicant as a result of the back injury, were not considered by the judge to be sufficiently substantial to satisfy the statutory threshold test of serious. That evidence was cogent, and was central to the issue whether the pain and suffering consequences of the applicant's lower back injury were serious. In our view, the failure of the judge to address that aspect of the applicant's evidence, and to explain why those matters were insufficient to constitute the applicant's pain and suffering consequences as serious, meant that the reasons given by the judge for her decision on this aspect of the case were not adequate.

via

[20] *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1, 5 [15] (Maxwell P); *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260, [25] (Ashley JA) .

Katanas v Transport Accident Commission [2016] VSCA 140 (17 June 2016) (Ashley, Osborn and Kaye JJA)

71. Similarly, in *Dwyer v Calco Timbers Pty Ltd (No 2)* [13] Ashley JA (with whom Nettle JA and Dodds-Streeton JA agreed) stated:

> Whether the consequences of compensable injury for an applicant satisfy the test is to be assessed having regard to the spectrum of all cases, not simply those which end up in litigation. The latter may be supposed to be – which is not to say that they are - cases in which the consequences are not glaringly apparent one way or the other. [14]

Katanas v Transport Accident Commission [2016] VSCA 140 (17 June 2016) (Ashley, Osborn and Kaye JJA)

87. In *Dwyer v Calco Timbers Pty Ltd (No 2)* , [17] Ashley JA (with whom Nettle JA and Dodds-Streeton JA agreed) stated:

> ... I agree with the submission for the respondent that in assessing whether the impairment consequences of injury are serious, one should consider not only what symptoms there are and what the worker is precluded from doing, but also what limits there are to symptoms and to inhibitions upon activities. It is true that impairment is concerned with what has been lost. But the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained. [18]

via

[17] [2008] VSCA 260 .

Katanas v Transport Accident Commission [2016] VSCA 140 (17 June 2016) (Ashley, Osborn and Kaye JJA)

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via

[13] [2008] VSCA 260 .

Kovacic v Transport Accident Commission [2016] VSCA 139 (15 June 2016) (Weinberg and Beach JJA)

18. The judge's reasons for rejecting the applicant's case centred on what the applicant had lost by way of social, domestic and recreational activities. [17] While what has been lost by way of social, domestic or recreational activities has the capacity to bear upon the seriousness of the consequences of an injury, [18] it is of course all of the relevant consequences of an injury that must be considered in determining whether or not an applicant has satisfied the 'very considerable' test referred to in *Humphries v Poljak* . [19] In the present case, that required the judge to take into account all of the 'pain and suffering' consequences of the applicant's neck injury in addition to what might have been lost by way of social, domestic or recreational activities.

via

[18] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 [27] ; *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181 [44] .

Wesfarmers Ltd v Lloyd [2016] VSCA 41 (15 March 2016) (Tate, Osborn and Santamaria JJA)

36. Nonetheless, the trial judge was required to have regard to what was retained by Mr Lloyd in order to ascertain the consequences which the injury had caused by way of a full before and after analysis, and to enable a proper assessment of the relative seriousness of what had been lost. [17]

via

[17] *Dwyer* [2008] VSCA 260 [27] (Ashley JA); *Sutton* (2011) 31 VR 100, 114–116 [75]–[83] .

Wesfarmers Ltd v Lloyd [2016] VSCA 41 (15 March 2016) (Tate, Osborn and Santamaria JJA)

29. Moreover, his Honour found specifically that Mr Lloyd was a stoic individual who understated his difficulties. [8]

via

[8] See the observations of Nettle JA in *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 [3] (' *Dwyer*').

Philippiadis v Transport Accident Commission [2016] VSCA 1 (11 February 2016) (Redlich and Kyrou JJA and Ginnane AJA)

28. A stoic applicant who has been prepared to put up with pain and suffering and make the best of his or her situation should not be treated less favourably than an applicant who, being of less strength of character, simply resigns himself or herself to the injury. [6]

via

[6] *Dwyer v Calco Timbers Pty Ltd [No 2]* [2008] VSCA 260 [3] ; *Kamel* [2011] VSCA 110 [67] .

38. In *Haden Engineering Pty Ltd v McKinnon* ,[33] Maxwell P said:

> In its accepted interpretation, the 'pain and suffering consequence' of an injury encompasses both the plaintiff's experience of pain as such and the disabling effect of the pain on the plaintiff's physical capabilities (including capacity for work) and enjoyment of life. (I will refer to the second element as 'the disabling effect' of the pain.)
>
> ...
>
> As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes with the plaintiff's enjoyment of life. As this Court (per Ashley JA) said in *Dwyer (No 2)*: '... [I]mpairment is concerned with what has been lost. But the significance of what has been lost ... may be informed, to an extent, by what is retained.' [34]
>
> As to capacity for work, it is necessary to identify whether and to what extent the plaintiff is prevented by the pain from performing the duties of his/her previous employment. The fact that the plaintiff has been able to return to full-time employment does not preclude an affirmative finding of serious injury. It is simply one of the matters to be taken into account. [35] What matters in this regard is the extent to which 'an area of work which [the plaintiff] enjoyed has been closed off to [him or her].' [36]
>
> Capacity for work aside, assessing the extent to which the pain interferes with the ordinary activities of life will typically involve consideration of its effect on the plaintiff's:
>
> - sleep;
> - mobility;
> - cognitive functioning (whether directly because of the pain or indirectly because of the effects of pain-relieving medication);
> - capacity for self-care and self-management; [37]
> - performance of household and family duties;
> - recreational activities;
> - social activities;
> - sexual life; and
> - enjoyment of life.
>
> Whether and to what extent the matters listed are relevant to the court's task in a particular case will, naturally, depend on the circumstances of the case. [38]

via

[34] *Dwyer (No 2)* [2008] VSCA 260 [27] ; see also *Stijepic* [2009] VSCA 181 [44] .

Ellis Management Services Pty Ltd v Taylor [2013] VSCA 326 (22 November 2013) (Osborn and Beach JJA)

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via

[36] *Dwyer (No 2)* [2008] VSCA 260 [25] .

Phelan v Transport Accident Commission [2013] VSCA 306 (18 November 2013) (Ashley, Whelan and Santamaria JJA)

Humphries v Poljak [1992] 2 VR 129; *Mobilio v Balliotis* [1998] 3 VR 833; *Hawkins v DHL Express (Australia) Pty Ltd* [2013] VSCA 26; *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 ; *Richards v Wylie* (2000) 1 VR 79; *Stijepic v One Force Group Aust Pty Ltd and Anor* [2009] VSCA 181.

Phelan v Transport Accident Commission [2013] VSCA 306 (18 November 2013) (Ashley, Whelan and Santamaria JJA)

16. The applicant got back to work a week after the accident. Thereafter, up to the time of the hearing below, she was in employment except when changing jobs; and, on one occasion, when she lost a job. At times, she worked 50-60 hours per week. She gave evidence that her jobs were not easy. She used the description 'full on'. A summary of taxation returns showed that her gross earnings increased from $68,204 in the 2007 tax year to $93,339 in the 2010 tax year. The fact that the applicant maintained employment does not deny, of course, her evidence – of which more later – that she had to make some changes to her work practices to protect her spine. But it is some evidence of what she had retained. [8]

via

[8] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 [27] (Ashley JA) .

Noonan v State of Victoria [2013] VSCA 289 (18 October 2013) (Osborn and Santamaria JJA)

9. His Honour had regard to the overall relevant impact of the disorder in issue upon the applicant and referred to the observations of Ashley JA in *Dwyer v Calco Timbers Pty Ltd (No 2)*: [3]

> Finally, I agree with the submission for the respondent that in assessing whether the impairment consequences of injury are serious, one should consider not only what symptoms there are and what the worker is precluded from doing, but also what limits there are to symptoms and to inhibitions upon activities. It is true that impairment is concerned with what has been lost. But the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained.

via

[3] [2008] VSCA 260 , [27] .

Aburrow v Network Personnel Pty Ltd [2013] VSCA 46 (07 March 2013) (Maxwell P and Tate JA)

19. As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes with the plaintiff's enjoyment of life. As this Court (Ashley JA) said in *Dwyer v Calco Pty Ltd (No 2)*: [20]

> [I]mpairment is concerned with what has been lost. But the significance of what has been lost ... may be informed, to an extent, by what is retained. [21]

via

[21] Ibid [27]. See also *Haden* (2010) 31 VR 1, 4–5 [9]–[14].

Aburrow v Network Personnel Pty Ltd [2013] VSCA 46 (07 March 2013) (Maxwell P and Tate JA)

19. As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes with the plaintiff's enjoyment of life. As this Court (Ashley JA) said in *Dwyer v Calco Pty Ltd (No 2)*: [20]

> [I]mpairment is concerned with what has been lost. But the significance of what has been lost ... may be informed, to an extent, by what is retained. [21]

via

[20] [2008] VSCA 260.

Hawkins v DHL Express (Australia) Pty Ltd [2013] VSCA 26 (20 February 2013) (Redlich and Tate JJA)

49. The basis of her Honour's reasoning lay primarily in her application of the observation made by Ashley JA in *Dwyer v Calco Timbers Pty Ltd (No 2)*: [15]

> the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained.

via

[15] [2008] VSCA 260 [27].

Hawkins v DHL Express (Australia) Pty Ltd [2013] VSCA 26 (20 February 2013) (Redlich and Tate JJA)

63. I agree. The analysis in *Haden Engineering Pty Ltd v McKinnon* ,[30] as applied in *Sutton v Laminex Group Pty Ltd* ,[31] demonstrates that, in determining the pain and suffering consequences of an injury, it is necessary to consider not only 'what the plaintiff says about the pain (both in court and to doctors)' but also 'what the plaintiff does about the pain (eg medication, rest, seeking medical treatment)' as well as 'what the doctors say about the extent and intensity of the plaintiff's pain' and 'what the objective evidence shows about the disabling effect of the pain'. [32] The judge was correct to consider all these matters and, in doing so, she did not fall into the error of regarding the failure to take medication, or continue with treatment, as in itself evidence that the pain and suffering consequences of the impairment were less than very considerable. Her Honour properly considered what the worker had done about the pain in the context of his own evidence about its intensity and effect and in the context of what the objective evidence said about the disabling effect of the pain. She was clearly alert to the need, when considering the disabling effect of pain, 'to

identify the extent to which the pain limits the [worker's] physical functioning, and interferes with the [worker's] enjoyment of life', [33] that is, the extent to which 'an area of work which [the worker] had enjoyed had been closed off to him'. [34] The worker had retained a capacity for the general type of work he had always done, albeit in diminished form, without medical restrictions, and this had proved to be sustainable despite his pain.

via

[34] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260, [25] (Ashley JA).

Hawkins v DHL Express (Australia) Pty Ltd [2013] VSCA 26 (20 February 2013) (Redlich and Tate JJA)

49. The basis of her Honour's reasoning lay primarily in her application of the observation made by Ashley JA in *Dwyer v Calco Timbers Pty Ltd (No 2)*: [15]

> the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained.

Hawkins v DHL Express (Australia) Pty Ltd [2013] VSCA 26 (20 February 2013) (Redlich and Tate JJA)

60. The employer responded by arguing that a determination of whether the consequences of an injury are serious 'involves a value judgment, in which matters of fact and degree, and of impression, are operative' [28] and in relation to which no mechanistic formula can provide the answer. [29] The determination requires consideration of the whole of the evidence.

via

[29] See *Humphries v Poljak* [1992] 2 VR 129, 136–7 (Crockett and Southwell JJ), 167 (McGarvie J); *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260; *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1.

ACN 005 565 926 Pty Ltd v Snibson [2012] VSCA 31 (29 February 2012) (Mandie and Hansen JJA and Kyrou AJA)

70. A stoic applicant who has been prepared to put up with pain and suffering and make the best of his or her situation should not be treated less favourably than an applicant who, being of less strength of character, simply resigns himself or herself to the injury. [18]

via

[18] *Dwyer v Calco Timbers Pty Ltd [No 2]* [2008] VSCA 260 (17 December 2008) [3].

Transport Accident Commission v Kamel [2011] VSCA 110 (20 April 2011) (Warren CJ, Ashley JA and Kyrou AJA)

67. A stoic applicant who has been prepared to put up with pain and suffering and make the best of his or her situation should not be treated less favourably than an applicant who, being of less strength of character, simply resigns himself or herself to the injury. [15]

via

[15] *Dwyer v Calco Timbers Pty Ltd [No 2]* [2008] VSCA 260 (17 December 2008) [3].

Sutton v Laminex Group Pty Ltd [2011] VSCA 52 (03 March 2011) (Ashley and Tate JJA and Hargrave AJA)

76. The respondent pointed to the new form of full-time skilful employment which the appellant had secured. While the appellant had particularly enjoyed his previous work, he was now content with his new employment. This was not a case where an occupation on which a plaintiff had thrived was replaced only by a job he or she begrudged; the situation was to the contrary. In this respect, the respondent relied on the observation of Ashley JA in *Dwyer v Calco Timbers Pty Ltd (No 2)*: [19]

> I agree with the submission for the respondent that in assessing whether the impairment consequences of injury are serious, one should consider not only what symptoms there are and what the worker is precluded from doing, but also what limits there are to symptoms and to inhibitions upon activities. It is true that impairment is concerned with what has been lost. But the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained.

via

[19] [2008] VSCA 260 , [27] (emphasised also in the extract from Maxwell P in *Haden Engineering* quoted above). See also *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181, [44] ; *Sabo v George Weston Foods* [2009] VSCA 242, [60] .

Sutton v Laminex Group Pty Ltd [2011] VSCA 52 (03 March 2011) (Ashley and Tate JJA and Hargrave AJA)

80. The respondent made two submissions with respect to the appellant's stoicism. Stoicism was one of the considerations identified by Maxwell P in *Haden Engineering* as useful in assessing the pain experienced by a plaintiff, drawing upon the remarks of Nettle JA in *Dwyer v Calco Timbers Pty Ltd (No 2)* who said: [22]

> I suspect that, but for the way in which the appellant has been prepared to put up with his pain and suffering and get on with his business as best as he can, the respondent may well not have disputed his claim. It is unnecessary for present purposes to reach a concluded view about that and I have not done so. But it would be unfortunate, and in my view wrongheaded, if in future such an applicant were treated less favourably than another who, being of less strength of character, simply resigned himself to his injury.

via

[22] [2008] VSCA 260 , [3] .

Haden Engineering Pty Ltd v McKinnon [2010] VSCA 69 (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

12. As to (a), the weight to be attached to the plaintiff's account of the pain experience will, of course, depend upon an assessment of the plaintiff's credibility. [10] The Court will make its own assessment of the plaintiff's credibility if he/she gives evidence , [11] and will also take into account views expressed by examining doctors about the reliability of the plaintiff's accounts of pain. [12]

via

[10] *Dwyer (No 2)* [2008] VSCA 260 , [8] ; *Sejranovic* [2009] VSCA 108, [171] ; *Sabanovic* [2009] VSCA 143, [142]–[145] .

Haden Engineering Pty Ltd v McKinnon [2010] VSCA 69 (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

14. As to the disabling effect of the pain, it is necessary to identify the extent to which the pain limits the plaintiff's physical functioning, and interferes with the plaintiff's enjoyment of life. As this Court (per Ashley JA) said in *Dwyer (No 2)*: '... [I]mpairment is concerned with what has been lost. But the significance of what has been lost ... may be informed, to an extent, by what is retained.' [14]

via

[14] *Dwyer (No 2)* [2008] VSCA 260, [27]; see also *Stijepic* [2009] VSCA 181, [44].

Haden Engineering Pty Ltd v McKinnon [2010] VSCA 69 (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

11. The evidentiary basis of the pain assessment will ordinarily comprise the following:

(a) what the plaintiff says about the pain (both in court and to doctors); [7]

(b) what the plaintiff does about the pain (eg medication, rest, seeking medical treatment); [8]

(c) what the doctors say about the extent and intensity of the plaintiff's pain; and

(d) what the objective evidence shows about the disabling effect of the pain. [9]

via

[7] *Dwyer (No 2)* [2008] VSCA 260, [24]; *Kelso* [2010] VSCA 12, [48].

Haden Engineering Pty Ltd v McKinnon [2010] VSCA 69 (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

15. As to capacity for work, it is necessary to identify whether and to what extent the plaintiff is prevented by the pain from performing the duties of his/her previous employment. The fact that the plaintiff has been able to return to full-time employment does not preclude an affirmative finding of serious injury. It is simply one of the matters to be taken into account. [15] What matters in this regard is the extent to which 'an area of work which [the plaintiff] enjoyed has been closed off to [him or her].' [16]

via

[16] *Dwyer (No 2)* [2008] VSCA 260, [25].

Haden Engineering Pty Ltd v McKinnon [2010] VSCA 69 (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

· *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 (Ashley JA) ('*Dwyer No 2*');

Haden Engineering Pty Ltd v McKinnon [2010] VSCA 69 (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

13. As to (d), the cases recognise that some plaintiffs may be more 'stoical' than others. This means that such a plaintiff is, to an unusual degree, prepared to endure pain in order to maintain a desired level of function. The injury suffered by the 'stoical' plaintiff is not to be viewed as any the less serious merely because he/she manages to remain more active than might have been expected given the level of pain. [13] In such a case, the 'objective' evidence of the disabling effect may be of less significance than usual.

via

[13] *Dwyer (No 2)* [2008] VSCA 260, [3] (Nettle JA).

Haden Engineering Pty Ltd v McKinnon [2010] VSCA 69 (31 March 2010) (Maxwell P, Buchanan and Nettle JJA)

[11] *Dwyer (No 2)* [2008] VSCA 260, [8]; *Sabanovic* [2009] VSCA 143, [145].

Tatiara Meat Co Pty Ltd v Kelso [2010] VSCA 12 (16 February 2010) (Ashley JA, Mandie JA and Ross AJA)

77. In addition to a consideration of the limitations imposed on a worker as a consequence of injury it is also relevant to consider what activities the worker is still able to engage in, post injury. As Ashley JA observed in *Dwyer v Calco Timbers Pty Ltd (No 2)*:

> ...in assessing whether the impairment consequences of injury are serious, one should consider not only what symptoms there are and what the worker is precluded from doing, but also what limits there are to symptoms and to inhibitions upon activities. It is true that impairment is concerned with what has been lost. But the significance of what has been lost, which bears upon the seriousness of consequences, may be informed, to an extent, by what is retained. [13]

via

[13] [2008] VSCA 260, [27].

Stijepic v One Force Group Aust Pty Ltd [2009] VSCA 181 (14 August 2009) (Ashley JA and Beach AJA)

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. [14] 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.' [15] 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 the 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'.

via

[15] *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 [27] .