Common Issues in Serious Injury Leave Applications

1. Cause of Injury. Did the injury arise out of or in the course of employment or as a result of a transport accident? For employment injuries from 20 October 1999 to 30 June 2014 – '*Accident Compensation Act* 1985' ("ACA"). For employment injuries sustained on or after 1 July 2014 - '*Workplace Injury Rehabilitation and Compensation Act* 2013' ("WIRCA"). For transport injuries - *Transport Accident Act* 1986 ("TAA").

   (i) Employment injuries: it is sufficient to show that employment was a cause, not the sole or dominant cause of injury. The employment may be a significant contributing factor even if other factors are more significant. See *Zlateska v Consolidated Cleaning Services Pty Ltd & Anor* [2006] VSCA 141.

   (ii) Transport injuries: s. 93(1) provides that the injury must be in respect of a transport accident as defined in s. 3 (1): " an incident directly caused by the driving of a motor car or motor vehicle, a railway train or tram"; the definition was broadened by subsequent amendments (s. 3(1A)) to include injuries from:

   (a) motor vehicle, a railway train or a tram which is out of control;

   (b) collisions by cyclists with stationary cars and open doors of cars;

   (c) involving a collision between a pedal cycle and a motor vehicle while the cyclist is travelling to or from his or her place of employment.

   (iii) The focuses of s. 134AB of the ACA (and s. 328 of the WIRCA) are different to s. 93 of the TAA. The TAA is concerned with the ability of an injured person to recover damages in a proceeding in respect of an injury that is as a result of a transport accident, being a '**specific incident'** caused by the driving of a relevant vehicle. Whereas the ACA and WIRCA focus on any injury arising out of or in the course of, or due to the nature of, '**employment**' – which might be the whole of employment, or some particular aspects of employment, or some specified incident or incidents of employment. See *Belgrave Heights Christian School v Moore* [2020] VSCA 240 at [45 and 46].

2. SI must be to one body part and arise from one incident. Where there are injuries to multiple body parts the focus should be on identifying the impairment to **a** body part - what function or functions have been impacted by the injury? And the serious injury must be as a result of **an** accident or under some circumstances over the

course of employment. It is not permissible to aggregate several impairments, or injuries to several body functions, which are not serious into an overall, serious impairment (*Humphries v Poljak [1992] 2 VR 129, 138; [1992] VicRp 58*).

3. Consequences to a body part. Each impairment must be assessed separately but injury to multiple body parts might produce a single impairment; because the definition of serious injury focuses on the consequences of the injury or injuries and it is possible to have multiple injuries impacting on one bodily function which may produce the requisite consequences to meet the test of serious injury. A good example is provided in *Georgopolous* [2002] VSCA 179 at [61]:

> *"Thus, an impairment or loss of function of the thumb and right hand may result from nerve damage at the spine, shoulder, elbow or wrist coupled with tendon damage at the shoulder, elbow or wrist. If the worker is able to establish impairment in the relevant sense, then he or she is seriously injured. It is not necessary to disaggregate the causal mechanism, provided that the compensable injury results in the impairment which satisfies the serious injury criteria set down by s. 134AB."*

4. Bilateral impairments may be single impairment or may be separate impairments. There are many authorities going both ways but bilateral upper limb injuries are usually accepted to be one bodily function. The spine however is a single body part and should not, for the purpose of paragraph (a) of the definition of serious injury, be divided into separate regions such as the lumbar spine, cervical spine and thoracic spine. See *TAC v Zepic* [2013] VSCA 232.

5. Aggravation of pre-existing injuries. The consequences of the aggravation alone must be assessed to be very considerable. It is not enough that the final impairment after aggravation of the pre-existing injury is serious; see *Petkovski v Galletti* [1994] 1 VR 436.

6. Prior and Other Conditions: raises the issue of whether the consequences complained of are due to the subject injury or other pre-existing condition. This issue arose in *Poholke v Goldacres Trading Pty Ltd* [2016] VSCA 232. The trial judge disallowed the application for both pain and suffering and pecuniary loss mainly because she regarded the prior injuries as being the main cause of the plaintiff's condition.

7. The serious injury application which was the subject of the appeal concerned an

injury to the lower back suffered in 2013 in circumstances where the Plaintiff had previously suffered a neck injury with the same employer in 2011 for which he was granted a serious injury certificate for pain and suffering only because at the relevant time he was still working albeit under considerable disability. By the time the neck injury claim went to trial he had been terminated after also suffering the back injury. The contribution of the neck injury to the loss of employment was an important consequence for the pain and suffering claim. He received a Jury verdict of $290,000 for an un-operated neck injury.

8. At [65] the Court of Appeal noted:

> *"The establishment of these matters, before the primary judge, was complicated by the fact that the applicant had sustained a serious injury to his neck two years before he suffered his back injury, and that the consequences to him as a result of the neck injury had persisted at the time that he sustained the back injury, and up to the time of the hearing of the application for leave before the primary judge. In those circumstances, it was necessary to identify each of the injuries sustained by the applicant, and to delineate the consequences of each injury, in terms of the pain and suffering consequences and loss of earning consequences claimed by him. "*

9. Following the neck injury the plaintiff had been certified medically unfit to perform his normal duties as a steel fabricator and welder. Despite this the plaintiff had continued at work albeit on modified duties often performing a full range of duties including heavy manual work and overtime. The plaintiff's work capacity diminished considerably after the low back injury being restricted to performing light duties often with significant breaks which the Court of Appeal found resulted in a significant reduction in his work capacity due to his back injury even though for two months after the back injury he worked normal hours but on light duties. Ultimately he was terminated when his GP refused to provide a clearance for normal duties.

10. For the purpose of the application the Court was required to determine, inter alia, whether the work performed post injury constituted "suitable employment" for the purpose of s.138AB(38)(f)(i). The Court stated at [91]:

> *"...In order to reach such a conclusion, the judge was required to determine whether the duties, performed by the applicant during that period, consisted*

of carrying out one task at the respondent's premises, which was allocated to him on a temporary basis, or whether it was of itself a form of employment. "
[the Court referring to Richter v. Driscoll [2016] VSCA 142 at [93]]
And later at [143]
The fact that an injured worker is assigned, for a short term, to a particular light task, does not, without more, constitute that task 'suitable employment'.[1] *The evidentiary onus was on the respondent to adduce evidence that the task, to which the applicant was assigned, and which he was performing when his employment was terminated, in fact constituted of itself a form of employment in its business, whether or not that work was available*."

11. The Court of Appeal allowed the appeal and granted leave to bring proceedings for both pain and suffering and loss of earning capacity. The reasons are set out mainly at [110-113]:

the fact that the applicant experienced significant pain and discomfort arising from the injury to his neck did not diminish, or in any way devalue, the degree of pain suffered by him as a result of his back injury. That is, the pain, that the applicant suffered as a result of his neck injury, did not, for the purposes of the evaluation required to be carried out by the court, in any way detract from the significance of the level of pain and discomfort experienced by the applicant as a result of his back injury.[110]

For a person whose life had already been diminished by a serious neck injury, the further disabilities resulting from his back injury deprived him of a significant degree of his residual capacity to engage in recreational activities, impacted heavily on his social life, and interfered significantly with the minutiae of his daily living [113]

12. <u>Course of employment injuries:</u> It is permissible to treat repetitive minor injuries as a single injury if caused by the same or similar system of work; often referred to as course of employment injuries. The injury may involve the progressive build-up over multiple occasions (such as a repetitive strain). The focus is on the question of causation and whether the strains, which take place over a period of time, materially contribute to the relevant impairment consequences. *Grech v Orica*

[2006] VSCA 172. But care must be taken not to aggregate a discrete traumatic injury with the injuries caused over the course of employment.

13. The injury must be permanent/long term, "i.e., likely to last for the foreseeable future" *Barwon Spinners v Podolak* [2005] VSCA 33. This normally does not give rise to problems but care must be taken to ensure that the injury has stabilized. Ongoing significant treatment, such as a further operation, usually calls for the matter to be adjourned until after the procedure because otherwise it invites the Defendant to argue that the injury has not stabilized because the outcome of the procedure is unknown and could be positive.

14. Narrative Test. Other than when the injury gives rise to a 30% WPI impairment we are usually concerned with the narrative test for serious injury which for transport and work injuries is that "the injury must be, in comparison with other cases, fairly described as "very considerable" and certainly more than "significant" or "marked"' *Humphries v Poljak* [1992] 2 VR 129 at [40]. In transport cases the pain and suffering and pecuniary loss consequences can be combined whereas in work injuries they are to be assessed separately see Barwon Spinners at [9].

15. The High Court in *TAC V Katanas* [2017] HCA 32 (the first time it had given leave relating to the serious injury test) reaffirmed the two stage process as set out in *Humphries v Poljak:*

> *"(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" of comparable cases."*

16. Psychological injury must be severe: more significant than "serious". Again the focus must be on the consequences. The plaintiff may have a relatively minor psychological injury not requiring significant treatment but having a very marked impact on the plaintiff's life as was the case in *Katanas.*

17. Disentangling physical and mental injuries:

    (i) Is only necessary if the judge finds there is no substantial organic basis for the condition - *VWA v Nguyen* [2016]

VSCA 284 at [35]

(ii) The court must disregard the mental consequences when assessing the seriousness of the physical injury; *Mutual Cleaning and Maintenance Pty Ltd v Stamboulakis* (2007) 15 VR 649. Nevertheless the upset and psychological consequences of not being able to work are often evidence of the seriousness of the physical injury consequences.

(iii) Disentangling is not as an issue with transport injuries if the psychological consequences arise from a dominant physical injury. In those circumstances the psychological consequences can be considered when assessing the seriousness of the physical injury; *Richards v Wylie* [2000] VSCA 50.

18. Evidence of pain and suffering consequences will ordinarily comprise:

(i) what the plaintiff says about the pain (by affidavit, in court and to doctors);

(ii) what the plaintiff does about the pain (e.g. medication, rest, seeking medical treatment);

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

(iv) what the objective evidence shows about the disabling effect of the pain;

(v) Loss of ability to undertake work can be relevant to assessing pain and suffering consequences;

Abbas v TAC [2015] VSCA 217 at [37]:

"a pecuniary disadvantage is not to be overlooked, in applications of this kind, merely because what would be assessable as the loss of earning capacity over an applicant's life, is not presently productive of actual loss of income at the time of the application. The fact that there may be no actual pecuniary loss to the time of the application does not mean that a loss that may occur in the future, by reason of the relevant injury limiting an applicant's

> *capacity for certain jobs, should not be properly considered as a relevant pecuniary disadvantage. To dismiss the issue of pecuniary disadvantage by reference to the fact that the applicant's income had increased in each year between 2010 and 2012, was to disregard the totality of the applicant's circumstances and, in the circumstances of this case, constituted specific error on the part of the judge. The fact that the applicant might always be able to find and hold down employment notwithstanding his injuries does not preclude proper consideration of the issue of pecuniary disadvantage caused by a real limitation that has been imposed upon the applicant in respect of other employments for which has demonstrated suitability".*

And at [39]:

> *In this case, the applicant was entitled to have his application considered by reference to the consequences that related to both pecuniary disadvantage and pain and suffering. If the consequences of the applicant's injury that relate to pecuniary disadvantage and pain and suffering are such that, when his injury is judged by comparison to other cases in the range of possible impairments or losses, it can be fairly described as at least 'very considerable', then the applicant is entitled to succeed.*

State of Victoria v Glover [1998] VSCA 93 illustrates that the approach taken in *Abbas* has similar application to work injury cases. The worker was a policeman who was not at risk of losing his job as a result of the injury nevertheless the loss of flexibility in the workforce was regarded as being an important impairment:

> *Likewise, the argument appears to overlook the lack of flexibility so far as the respondent was concerned in relation to any future employment. Although he is guaranteed a job, as it were, he cannot change that job, and, if he were to seek other employment, then his capacity for doing so and obtaining that employment would be greatly restricted, not only because of the nature of the work he has done in the past but, more importantly, because his injury has impaired his capacity to do different work in the future. In these unusual circumstances his*

present loss of income, however, is of relatively minor consequence in determining whether there has been impairment of the relevant kind. The impairment may be "serious" although it does not at present result in any substantial loss of income.[37]

(vi) Other personal consequences including impact on:

- 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;
- performance of household and family duties;
- recreational activities;
- social activities;
- sexual life; and
- enjoyment of life.

(Haden Engineering Pty Ltd v McKinnon (2010) 31 VR 1 at [11])

19. Loss of Earning Capacity (LOEC):

(i) Transport accidents: pecuniary disadvantage is to be assessed in combination with pain and suffering consequences and usually any significant loss of earning capacity will result in the grant of a certificate or leave to issue proceedings.

(ii) Work Injury: the plaintiff must demonstrate a permanent 40% loss of gross earning capacity as at the date of the application. The comparison is between:

(a) the pre-injury earning capacity as defined by s.138(38)(f)(ii) (comparator 1).

(b) the post-injury earning capacity as defined by s.138(38)(f)(i) (comparator 2).

(iii) The need to demonstrate a LOEC of 40% does not apply to the following plaintiffs:

(a) worker aged under 26 at date of injury;

(b) an apprentice;

(c) a worker under contract which requires employer to provide training etc to qualify the worker for an occupation (s.134AB(38)(e)).

(iv) Comparator 1:

Pre-injury earnings or earning capacity: the gross earnings from personal exertion the worker was earning or was capable of earning in the 3 years before and after injury which most fairly reflects the worker's earning capacity but for injury.

Too often regard is only had to what the worker was earning whereas as was made clear in *The Herald and Weekly Times Ltd v Jessop* [2014] VSCA 292 the provision needs to be read more broadly. The Court of Appeal held [42] that section 134AB(38)(f)(ii) *is intended to be read as follows:*

the gross income (expressed as an annual rate) that the worker:

- *was earning from personal exertion; or*
- *was capable of earning from personal exertion; or*
- *would have earned from personal exertion; or*
- *would have been capable earning from personal exertion,*

during that part of the period within three years before and three years after the injury, as most fairly reflects the worker's earning capacity had the injury not occurred.

(v) In *Jessop*, the employee worked an average of 19.95 hours per week in the 12 months leading up to her injury, but contended she had the capacity to work 37.25 hours. As the Court held [55]

The actual hours worked by a worker and his or her actual earnings are not always the best evidence of the worker's capacity for the purposes of subpara (ii) of s 134AB(38(f) of the Act. They will be the best evidence under the first scenario – 'the gross income … that the worker was earning' – but they will not necessarily be the best evidence in relation to the other three scenarios. Under those scenarios, ***the court is required to fix a representative figure*** *for earning capacity which may take into account the amount of income earned but will not necessarily equate to that amount.* [emphasis added]

(vi) Often the notional earning capacity 3 years from the injury is likely to optimize the pre-injury earnings but the Court of Appeal has determined that it is only permissible to index the worker's earnings from injury if there is evidence that this would have happened had he or she continued in employment (*Roleff v Chubb* [2011] VSCA 21). To this end a timely request should be made of the defendant for comparable earnings figures if there is any basis for believing the wages of the plaintiff would have increased in the 3 years after injury.

(vii) Comparator 2:

Post-Injury Earnings or Earning Capacity: since the amendment to s.134AB(38)(f) in 2010 to reverse *Smorgan Steel v Majkic* [2008] VSCA 230 the comparator is the greater of:

(a) actual earnings at time of application (whether or not in suitable employment); [problem encountered in *Poholke* 1];

(b) the notional earnings which the worker is capable of earning in suitable employment after retraining if appropriate.

(viii) It is the latter which commonly gives rise to the most controversy. Almost invariably WorkCover will submit vocational evidence of the worker being able to work in a range of jobs paying better than 60% of the pre-injury earnings.

(ix) For this reason it is important to obtain a report from a Vocational expert who not only understands the law but can practically apply the meaning of "suitable employment" to the plaintiff's individual circumstances.

(x) The leading authority on what constitutes "suitable employment" is *Richter v Driscoll* [2015] VSC 457 at [79] which emphasises that the court must look at factors in addition to the plaintiff's post injury physical capacity including the plaintiff's personal circumstances such as age, education, training, skills and location. It is not unusual for WorkCover's vocational experts to opine that the plaintiff has the capacity to perform supervisory work or similar skilled work even though the plaintiff has never worked in such a capacity and demonstrates no skills to do so. That issue should be dealt with by the plaintiff by affidavit and also the expert in a report responding to the defendant's report.

(xi) The expert will need to deal with each of the jobs identified by the defendant and usually in order to do so will need to take full instructions from the plaintiff,

be familiar with the medical evidence and the plaintiff's affidavits in support and to properly apply the test for "suitable employment" which the medical panel failed to do in *Richter*. Sometimes the plaintiff can address some of the proposed jobs by way of supplementary affidavit. See discussion below in 26(x) 'Supplementary affidavits'.

20. Commissions and allowances are included in the gross earnings of both comparators which is fine if the plaintiff received such in his or her pre-injury employment but not if the plaintiff only received such a commission post injury as happened in *Nicholson v VWA* [2016] VSCA 146.

21. The expression 'income from personal exertion' in s 134AB(38)(f) adopts the definition in section 6(2) of the *Transport Accident Act 1986* as meaning:

(a) the amount that is the income of that person consisting of earnings, salaries, wages, commissions, fees, bonuses, pensions, retiring allowances and retiring gratuities, allowances and gratuities received in the capacity of employee or in relation to any services rendered; and

(b) the proceeds of any business carried on by that person either alone or in partnership with any other person.

22. A literal interpretation of those provisions can produce some unfortunate results as was the case in *Nicholson v VWA* [2016] VSCA 146. In that case the plaintiff was injured while working as a labourer in a timber yard. By reason of the injury he was no longer able to work as a labourer but able to work as a part time support worker or personal care assistant for the local shire. In order to do his job he was required to travel to the homes of his clients. As recompense for using his car he received a car allowance. Depending on what expenses he had in any particular year he had either a small net surplus or small loss in relation to travel income, e.g. 2014 he received $6,039 travel allowance and had work related vehicle expenses of $7,718. The following year his car expenses were about $3,000 less than his allowance. The plaintiff argued that for the purpose of calculating his earnings the car allowance should be the net allowance after expenses.

23. The Court of Appeal disagreed at [39]:

> *It is not to be calculated by deducting, from the plaintiff's income, deductions claimed in the plaintiff's income tax returns for work-related motor vehicle and clothing expenses*.

24. Meaning of "proceeds of any business". The outcome in *Nicholson* raises some interesting questions as to the application s.6(2)(b) the *Transport Accident Act*. The Court in *Nicholson* declined to express a view on the proper construction of that provision or the relevance of the term "gross" in that context [38]. There are conflicting County Court decision concerning the construction of that provision and in my view the better view is that gross earnings of a business should be interpreted to be the gross taxable earnings (i.e. after expenses) not the gross revenue of the business. However that approach may not sit comfortably with the decision in *Nicholson*.

25. Procedural Issues. In addition to the relevant legislation (ACA, WIRCA and TAA) procedure content and disclosure requirements regarding serious injury leave applications are also governed by court rules, practice notes and ministerial directions.

(i) Practitioners should be familiar with Court issued **Practice Notes** which outline the expectations of the Courts. Relevant practice notes from the County Court include:

(a) Common Law division PNCLD 2-2020 – which is the principal practice note.

(b) Serious injury applications PNCLD 3-2020 – describes the procedure for preparing and conducting serious injury applications under all the ACA, WIRCA and TAA;

(ii) Likewise, it is important to understand the obligations laid out in the **Ministerial Directions** for ACA and WIRCA applications (see Victorian Government Gazette G16 of 2016, 21 April 2016). They include directions specifying what information is to be included in the affidavit of the applicant. It is important to note that Ministerial Directions are to be subject to the principal Acts (*Pravidur v Scental Pacific Pty Ltd* (2010) 28 VR 60, [78]).

(iii) While there are no binding Ministerial Directions for applications made pursuant to s.93 of the TAA there are protocols which outline required procedures and disclosures that have been agreed by the TAC, Law Institute of

Victoria and Australian Lawyers Alliance (see both the 2016 TAC protocols and the 2020 Supplementary Common Law protocols, which can be accessed on the TAC website).

26. Practical Tips

(i) Facebook: ask your clients for copies of entries since the incident and ask them to carefully consider what if anything they post onto social media.

(ii) From the time of first instructions the solicitor should have the end game foremost in mind. There simply is little or no point in succeeding on the SI application if the common law claim is hopeless. Often the solicitor can make this assessment alone but sometimes this will not be apparent until after further evidence is obtained including from an appropriate work safety expert.

(iii) Evidence goes cold: it is often useful to obtain statements from liability witnesses very early because often by the time the SI certificate is granted the witnesses' evidence is compromised by time. Contemporaneous witness statements help preserve the evidence and importantly can inform the lawyers as to the strength of the case in subsequent negotiations.

(iv) Clinical notes: these are often the main tool used by the Defendant to undermine the plaintiff's case. These must be obtained at the outset to ensure that the plaintiff's evidence is not contradicted by the records. In addition to the history of the incident provided at about the time of the incident these notes will often include relevant reports, referrals and the like. Often they are useful to refresh the plaintiff's memory particularly as to past injuries and sometimes also as to the circumstances of the incident.

(v) In dealing with the clinical notes it is also important to have regard to what the Court of Appeal said in *Woolworths v Warfe* [2013] VSCA 22 at [112]:

> *it is important to bear in mind the limitations which attend the reliance, by a court, on the records by medical practitioners, in their reports, of the histories and symptomatology described by plaintiffs to medical practitioners. Those histories are an important part of the information, upon which the medical practitioner forms a view as to matters such as the diagnosis and prognosis in relation to the plaintiff's injuries. However, rarely, do the histories, contained in medical reports, purport*

to be a verbatim record of what the plaintiff has said to the medical practitioner on examination.

And further on in the same paragraph:

it is important to bear in mind the nature and purpose of the history, recorded by medical practitioners in their reports, and of the limitations on their accuracy which I have just described.

(vi) There will be occasions when the plaintiff instructs that the notes do not accurately reflect what he or she told the doctor. That may need to be taken head-on in the initial affidavit. It is of course entirely unhelpful if the plaintiff attempts to challenge the veracity of the notes of more than one doctor.

(vii) Credibility: it is very difficult to win any application unless the plaintiff is believed. The plaintiff will be the principle source of evidence as to the pain and suffering consequences. Most laypersons will talk in terms of not being able to do things when usually what is meant is that they cannot do so without exacerbating the pain or without difficulty. The affidavit should reflect this approach by attempting to avoid using absolute terms to describe the consequences of injury on the plaintiff. The surveillance film is most damaging when it shows the plaintiff doing things that the plaintiff claimed in evidence could no longer be done. The same goes for exaggerated claims of incapacity. The affidavit should also avoid omitting or minimizing the impact of other injuries or health conditions.

(viii) Folder of Documents for likely inclusion in Court Book: in my experience it is useful to all of plaintiff's lawyers to create a separate folder of documents which are likely to find their way into a combined Court Book. Documents such as all relevant treating and IME medical reports for both parties, vocational reports, claim forms, evidence of earnings and the like. Documents can be added and deleted over time but at least most of the relevant documents will be in one place. Unfortunately there is no easy way to deal with the clinical notes which almost invariably require painstaking perusal, usually by counsel.

(ix) The Contents of Affidavits: This could be a seminar all by itself; while this is largely a matter for counsel, it is useful if the plaintiff can be directed from the outset to the required contents such as his or her employment background,

treatment and both pain and suffering and pecuniary loss consequences. It is useful to include sub-headings in the affidavit (e.g.: background, description of injury, medical treatment, current condition, return to work, etc) to make it more readable for decision makers and the Courts. The more information provided can make it easier for legal representatives of the defendant to recommend to their clients that the application be granted. It can be counter-productive to be too brief for fear of providing too much 'ammunition' to the defendant. This should not be so. If you assess that your client has a strong case then ensure their affidavit tells the reader their full story.

(x) Supplementary Affidavits: The plaintiff's evidence-in-chief is often limited to their adoption of their affidavits. While leave can be granted for the plaintiff to give further relevant evidence-in-chief covering the period between the last affidavit sworn and the date of trial, this will depend on whether it results in any prejudice to the defendant. Supplementary affidavits addressing relevant or significant changes in the plaintiff's situation are therefore important. Ideally, this should be done by conferring with the applicant to assess any changes in their condition, treatment, medication or work capacity and if so, serve a supplementary affidavit within an appropriate time before trial. While often overlooked, supplementary affidavits can also include the applicant's own assessment of proposed suitable jobs that have been provided by the defendant's vocational experts.

(xi) Protocols for serious injury fast track applications. The 2020 Supplementary Common Law protocols include provisions on fast-track applications for clearly demonstrable serious injuries. Examples listed include amputations, joint replacements, significant spinal injuries, moderate or severe acquired brain injuries or gross scarring. The protocols list other requirements including, inter alia, that such applications can only occur if an impairment assessment application form has not been lodged. The process required for making the fast-track applications is also set out. Fast track applications are only available to legal firms that participate in the protocols. The protocols also include important provisions on interim common law payments where parties agree it is appropriate in the circumstances, which appears to have worked well in cases of

catastrophic injuries.

(xii) The Judicial College Serious Injury Manual is an excellent reference which should be your first source whenever in doubt about any legal issue concerning these applications.

18 March 2020

Klaus Mueller
Barrister & Accredited Mediator
DX 92 Melb
Mob: 0412 992 436
Email: kmueller@vicbar.com.au

Nick Dubrow
Barrister
Level 16, Castan Chambers
Mob: 0414 359 131
Email: nickdubrow@vicbar.com.au