

Slide 1

**MONAHAN + ROWELL**  
LAWYERS

**SERIOUS INJURY AND  
WORK CAPACITY**

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Slide 2

**Introduction**

- Victorian Court of Appeal decisions handed down together on 25 February 2005:
  - i. Barwon Spinnders P/L v Podolak;
  - ii. St Laurence Community Services (Barwon) Inc & Ors v Gledhill
  - iii. Stojanovski v Barter Enterprises P/L & Ors.
  - iv. Pausak v Barwon Health & ors.

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Slide 3

**Introduction**

(cont)

- These decisions represented Court of Appeal's first attempt at interpretation of provisions of section 134AB.
- Important interpretations made in regards to loss of earning capacity provisions and the definition of suitable employment.  
Clarification also provided of definitions contained at section 134AB(37) of the Act in respect of "serious injury."

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**Date of Injury**

- Court of Appeal emphasised that no regard whatsoever is to be had to employment pre-20 October 1999 when considering the cause of an injury the subject of a s134AB application.
- Workers need to very clearly articulate both the injuries sustained and the manner in which they arose in the material lodged in support of a serious injury application.
- Very important in "gradual process" cases. 'Serious injury' must be determined to have occurred as a result of injury and impairment arising post-20 October 1999 only

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Slide 5

**Permanent Injury**

- The Court considered the narrative definition of "serious injury" contained at section 134AB(37) of the Act.
- Reference to 2<sup>nd</sup> reading speech in parliament, where stated: "the word 'permanent' is intended to reflect a serious consequence which will persist indefinitely for the foreseeable future."

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Slide 6

**Permanent Injury**

(cont)

- Court of Appeal effectively expressed agreeance with the intention of parliament.
- Contrast with meaning of permanent provided in AMA Guides. Similar in meaning but not one and the same. AMA Guides refer to a deviation of 3% WPI in the next 12 month period.

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**Loss of Earning Capacity Test**

- Provisions contained at section 134AB(e, f & g) of the Act.
- Worker must demonstrate a loss of earning capacity of 40% or greater as at the date of determination with the loss to continue permanently.
- Comparison required of gross income from personal exertion at the date of determination with what was earned or was capable of being earned from personal exertion, or would have been earned or would have been capable of being earned, had the injury not occurred.

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**Loss of Earning Capacity Test**

(cont)

- Test not satisfied where worker is found to have after rehabilitation or retraining a capacity for employment which if exercised would result in them earning 60% or more of pre-injury gross annual income.
- Onus is on worker to prove that they have suffered the required loss.

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**Suitable Employment and Work Capacity**

- The Court discussed the concept of 'suitable employment' at some length.
- Consideration is given to the definition of 'suitable employment' at section 5 of the Act.
- The phrase "if exercised" is interpreted to mean "if exercised in employment."
- Effectively have interpreted that a theoretical work capacity is what is contemplated by the section rather than a practical work capacity.
- Use of Vocational assessments therefore of increased importance in such applications.

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**Work Capacity Test – Weekly Compensation**

- The theoretical work capacity endorsed by the Court of Appeal is to be contrasted with the more practical approach adopted by the lower courts in matters relating to weekly payments.
- Those lower courts are more concerned with the actual practicalities of a worker obtaining employment on the open labour market. Proof of a theoretical work capacity only by a defendant will not be sufficient to uphold their position.

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**Work Capacity Test – Weekly Compensation**

(cont)

- Decision of Judge GD Lewis in Holt v Kleyn Plant P/L delivered on 27 August 2002 contains a very comprehensive discussion of the issues of “work capacity” and “suitable employment.”
- The “odd lot” doctrine is considered by Judge Lewis to have been subsumed by the introduction of the definition of “suitable employment” at section 5 of the Act.

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Slide 12

**Section 134AB Judgements post-Barwon Spinners**

- A number handed down. Still clearly difficulties in assessing the loss of earning capacity provisions.
- Issue of whether or not all possible rehabilitation/retraining avenues have been explored. Difficulty of making a determination as to work capacity where they have not.

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**Section 134AB Judgements  
post-Barwon Spinners**

(cont)

- More detailed decisions delivered by County Court judges, most likely in response to criticism by the Court of Appeal in Barwon Spinners of the judgements before them in those matters. Judgements since have been more detailed and more clearly articulate the reasons for conclusions drawn.

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**Conclusion**

- Significant implications for all concerned re s134AB Applications.
- Relevant definitions clarified and confirmed.
- Emphasis on articulating the injuries sustained and the manner in which sustained.
- Loss of earnings provisions interpreted.

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**Conclusions**

(cont)

- Situation created whereby a worker may fail to satisfy the loss of earnings provisions but be able to prove before a lower Court an ongoing entitlement to weekly payments beyond 104 weeks.
- Judges more careful in their writing of judgements

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