

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
SERIOUS INJURY LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-20-00072

MICHELLE MARY DUFF

Plaintiff

v

7-ELEVEN STORES PTY LTD

Defendant

JUDGE: HIS HONOUR JUDGE BOWMAN
WHERE HELD: Melbourne
DATE OF HEARING: 10 July 2020
DATE OF JUDGMENT: 31 July 2020
CASE MAY BE CITED AS: Duff v 7-Eleven Stores Pty Ltd
MEDIUM NEUTRAL CITATION: [2020] VCC 1127

REASONS FOR JUDGMENT

Catchwords: *Workplace Injury Rehabilitation and Compensation Act 2013 – s325(1)(c) – permanent severe mental or permanent severe behavioural disturbance or disorder – plaintiff payroll manager of defendant – pressures associated with publicity concerning alleged underpayment by franchisees – Senate Hearing – ultimate termination of employment – subsequent employment with a different employer in relation to a specific project – issues of earning capacity, existence of unrelated contributory factors, disentanglement, permanence of any work contribution and the like – whether burden of proof discharged – factors to be considered.*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr P O'Dwyer SC with Ms J Zhu	Arnold Thomas & Becker
For the Defendant	Mr D Masel QC with Mr B House	Russell Kennedy

HIS HONOUR:

(a) General background

1 This matter comes before me by way of an application pursuant to s335(2)(b) of the *Workplace Injury Rehabilitation and Compensation Act 2013*, hereinafter referred to as “the Act”. In bringing her application, the plaintiff relies upon s325(1)(c) of the Act – that is, permanent severe mental or permanent severe behavioural disturbance or disorder. The plaintiff asserts that her condition arose as a result of television coverage and a Senate Hearing in relation to what could be described as fair work issues associated with the defendant. The plaintiff was employed by the defendant as its payroll manager and gave evidence at the Senate Hearing. The circumstances alleged by the plaintiff were not the subject of any challenge in the present application and, very sensibly, it proceeded on the basis that the plaintiff’s assertions in this regard were not challenged – see Transcript (hereinafter referred to “T” 63). It was stated by counsel for the defendant in preliminary observations that the issues to be determined concerned “range” (that is, whether the consequences of the injury are of sufficient magnitude to satisfy the statutory definition); disentanglement of the causes of the plaintiff’s mental condition; and whether permanence of any part of her condition that is work-related has been established. In regard to the synopsis of the issues, I would refer to T11.

2 Mr P O’Dwyer SC with Mr J Zhu of Counsel appeared on behalf of the plaintiff. Mr D Masel QC with Mr B House of Counsel appeared on behalf of the defendant. The plaintiff gave evidence and was cross-examined. The balance of the evidence was documentary in nature and was tendered either by consent or without objection.

(b) Factual background

3 The plaintiff is aged 64 years, she having been born in September 1955. She is a married woman with two adult sons. Alleged stresses concerning them were part of the disentanglement argument advanced by the defendant. She is not now working, having last worked in March 2018. This, being the only work which she has performed since being made redundant by the defendant, was with Monash Council.

4 The plaintiff was educated to Year 11 level. She worked in a clerical job in the Department of Social Security, both here and in England, for a couple of years. She then worked in the credit department and in payroll with Lane's Motors for some 10 years, before working for seven years as payroll manager at Lendlease. She then worked in payroll management for 10 years for Pacific Dunlop, also being shared-service manager. Without going through all of her previous employments in detail, she then worked as a consultant, a payroll manager and a remuneration centre manager over approximately the next 12 years. It is apparent that she had acquired significant expertise in work of this type, and in approximately October 2010 she commenced working with the defendant as payroll manager. She became aware of what could be described as payroll problems, which increased in 2015. Essentially these problems related to whether the appropriate salary, including overtime penalties, was being paid to staff by franchisees. There was a "Four Corners" program on the ABC concerning this in early 2016. Ultimately, the plaintiff was made redundant by the defendant on approximately 21 March 2017. As shall be discussed, the plaintiff had been seeing her general practitioner in relation to stress-related problems in 2015 and had been referred to a consultant psychiatrist by April 2016. Thus, medical treatment in relation to stress-related problems had been going on for some considerable time prior to the plaintiff being made redundant.

(c) The plaintiff as a witness

5 I found the plaintiff to be a careful, credible and reliable witness. Indeed, effectively there was no challenge to her credit – see, for example, T66. I note that Dr John Gill, consultant in general and forensic psychiatry, who examined the plaintiff at the request of the defendant, described her as being fully cooperative. There was no evidence of delusional thinking or disturbance of perception. Associate Professor Saji Damodaran, consultant psychiatrist, examining on behalf of the defendant, also described the plaintiff as being cooperative, whilst Dr Matthew Tagkalidis, consultant psychiatrist, examining the plaintiff at the request of her solicitors, described her as being cooperative and very matter-of-fact in demeanour. Her treating psychiatrist, Dr Vinit Mathur, has described her in similar terms. The plaintiff's general practitioner, Dr Loredana Reid, referred to her as being a genuine and cooperative patient.

6 In summary, I found the plaintiff to be a straightforward and reliable witness whose evidence I accept.

(d) The state of the Plaintiff's health prior to the injury

7 The plaintiff had a heart murmur diagnosed when she was pregnant with her first child and visits a cardiologist annually in relation to this. It would also seem that she has suffered a mitral valve prolapse. However, these conditions have not caused her any significant problems. It would also appear that she had a longstanding back condition, although there is no indication that this is of any great magnitude. She has no history of prior psychiatric or psychological problems.

(e) The injury, its treatment and diagnosis

8 Whilst the matters relating to the alleged underpayment of staff and the like existed for some little time prior to the television program and the Senate Hearing, and whilst the plaintiff previously had raised concerns with management about poor behaviour by franchisees in relation to the employment entitlements of staff, her relevant problems seem to have commenced at about the time of the television program, the Senate Hearing and the pressures put upon her in relation to them. Apart from the pressures associated with the publicity, the plaintiff was working long hours in a stressful environment. Without going through it all in detail, I accept that great stress was caused to the plaintiff.

9 The plaintiff's treating general practitioner throughout has been Dr Loredana Reid. As she has stated in her report of 18 July 2018, there were multiple reasons for the plaintiff's medical presentations over the years, but they were "mainly all connected with the diagnosis of Anxiety/Depression caused by work-related stress in regards with Michelle's job at 7Eleven". She described employment with the defendant as the "main culprit" in relation to the plaintiff's inability to maintain employment.

10 In her more recent report of 24 May 2020, Dr Reid stated that the diagnosis was one of Major Depressive Disorder with anxiety, chronic pattern with acute exacerbations and poor prognosis. She referred to the chronic nature of the plaintiff's depression and anxiety and considered her condition to be stable. Dr Reid also commented that the plaintiff's injuries,

“psychological and functional”, are related to her employment with the defendant. She also expressed the opinion that the plaintiff has no current work capacity for any of her pre-injury work or for sustainable work. She referred to limitations in relation to the plaintiff’s capacity to engage in social, functional, recreational or domestic activities. She concluded that the plaintiff’s work-related complex medical condition will continue into the foreseeable future.

11 In her report of 24 May 2020, Dr Reid mentioned that the plaintiff’s treating psychiatrist has been Dr Vinit Mathur. Two reports from Dr Mathur are to be found in the Plaintiff’s Court Book. The earlier of these is dated 1 August 2018. In it, Dr Mathur states that he first saw the plaintiff on 12 April 2016. At that time, the plaintiff was taking Lexapro and Diazepam. Her general practitioner had originally prescribed Lovan, but that had unpleasant side effects. The initial diagnosis of Dr Mathur was that the plaintiff suffered from a Major Depressive Disorder with anxiety due to stress related to workplace and some family issues. He suggested an increase in the dose of Lexapro, with a decrease in Diazepam. The plaintiff was reluctant to see a psychologist.

12 Dr Mathur next saw the plaintiff on 1 May 2017 and saw her regularly thereafter, last reviewing her some 16 days before the report of 1 August 2018. In the preceding three months, he appears to have seen her on four occasions. By my calculations, Dr Mathur had seen the plaintiff on some 15 occasions by the time of his report on 1 August 2018. His diagnosis continued to be one of a Major Depressive Disorder with anxiety and this condition was related to her employment. As at the date of this report, Dr Mathur thought that the plaintiff did not have a capacity for pre-injury employment and was unable to comment about a return to work in any suitable employment. He thought that the plaintiff would require regular treatment from a consultant psychiatrist and a general practitioner. He could not predict the exact duration and frequency of such treatment, stating that it would depend upon her clinical progress.

13 Dr Mathur reported to the plaintiff’s solicitors on 30 March 2019, his earlier report being addressed to the Accident Compensation Conciliation Service. Much of the history taken was similar to that contained in the report of 1 August 2018. Dr Mathur noted that, when seen on 21 August 2018, the plaintiff said that her son had been arrested and was in gaol,

whilst on 18 September 2018 one room of her home had been damaged because of fire. I might add that the plaintiff's evidence was that this fire was of a comparatively minor nature. When seen on 29 October 2018, there was some stress associated with her older son having an upcoming court case, whilst on 22 January 2019 she referred to some stress associated with a Centrelink issue. When Dr Mathur reviewed the plaintiff on 26 February 2019, being the last review prior to the writing of this report, she had increased anxiety symptoms because of the issues relating to the defendant and also reported getting dreams concerning it. Dr Mathur suggested a change of her antidepressant medication and she agreed to change to Cymbalta.

14 The diagnosis of Dr Mathur continued to be one of a Major Depressive Disorder with anxiety, which would require ongoing treatment. However, from a psychiatric point of view, he considered her injuries to have stabilised, although she would require ongoing treatment. He expressed the opinion that her medical condition and injury were related to her employment. Dr Mathur stated that the plaintiff had no capacity for her pre-injury duties and was restricted in relation to social, recreational and domestic activities. His opinion was that the plaintiff's injury/condition would continue into the foreseeable future. I accept the unchallenged assertion of the plaintiff's solicitor that, despite numerous attempts, there have been problems obtaining a more detailed updated report from Dr Mathur – see, for example, T3 and T61.

15 The plaintiff also received treatment from Ms Sue Quartermain, clinical psychologist. This was upon referral from Dr Reid in March 2018. It is apparent that Ms Quartermain had taken a quite detailed history from the plaintiff, this being particularly focussed upon what had occurred in the course of her employment. It included the concern on the part of the plaintiff in relation to the stigma which attached to her, because of her having worked for the defendant. When first seen by Ms Quartermain, the plaintiff described overwhelming anxiety attacks, frequent anger outbursts and difficulties with conversations, socialising and the like. In the opinion of Ms Quartermain, the plaintiff met the diagnoses of depression and anxiety. Ms Quartermain was aware of the plaintiff having some neck problems. She was also aware of health problems experienced by the plaintiff's husband. Whilst it is not

entirely clear, the diagnosis of Ms Quartermain seems to have been one of depression and anxiety. She thought it unlikely that there would be any significant improvement in the plaintiff's circumstances or condition in the foreseeable future.

16 A report from Mr Chris Xenos, adult and paediatric neurosurgeon, dated 11 September 2019 and addressed to Dr Reid, was also placed in evidence. It involves developments a considerable time after the plaintiff's employment with the defendant was terminated, and hence after the injury. It shall be discussed subsequently.

17 The plaintiff has also been examined for medico-legal purposes. Dr Matthew Tagkalidis, consultant psychiatrist, originally saw the plaintiff at the request of her solicitors on 21 February 2019, reporting on the same day. Dr Tagkalidis took a detailed history of the circumstances of the plaintiff's injury up until the time of her being made redundant on 27 March 2017. He also took a history of the plaintiff's subsequent work with Monash Council, stating that she had commenced such work in July 2017, but had moved to part-time duties in December 2017 because she was struggling to cope. The contract with Monash Council finished in March 2018. Dr Tagkalidis also recorded that the plaintiff was on considerable medication.

18 The diagnosis of Dr Tagkalidis was that the plaintiff was suffering from a Major Depressive Disorder with prominent comorbid anxiety, relevant to the claimed injury. He thought that the relevant events contributed approximately 90 per cent of her current emotional stress and the remaining 10 per cent related to her husband's health. He was of the view that the plaintiff had developed a depressive syndrome as a consequence of the incidents described in the history and that this was of a severity which justified a diagnosis of a Major Depressive Disorder. He considered the prognosis to be guarded and thought that further treatment from a psychologist and psychiatrist was warranted. He thought that the plaintiff would require ongoing psychiatric review into the future indefinitely. He did not believe that the plaintiff could perform her pre-injury duties on a reliable and consistent basis and that her current emotional state was likely to continue into the future on an indefinite basis.

19 Dr Tagkalidis reported for a second time on 18 June 2020. The plaintiff had continued on antidepressant medication, although there had been a change to Duloxetine. She had decreased the amount of mood stabiliser taken because of side effects. In late 2019 there was some suspicion that she had suffered from a cerebral aneurism, although this diagnosis was not certain and it was believed that the problem might have been migraines. She had also suffered from viral pneumonia in February 2020. She continued to have poor energy levels and panic attacks. She had disrupted sleep. Thoughts about the perceived injustice that had occurred to her at her workplace currently occupied her. She had largely withdrawn from socialising and the like. Dr Tagkalidis again diagnosed a Major Depressive Disorder with prominent comorbid anxiety, these conditions being relevant to the claimed injuries. He thought that the work-related matters contributed approximately 80 per cent of her current emotional stress, with 10 per cent being related to her husband's chronic conditions and 10 per cent to her recent migrainous issues. He continued to regard the prognosis as being guarded. He thought that the plaintiff would require ongoing psychiatric review into the indefinite future. Dr Tagkalidis considered that the plaintiff's current state had largely stabilised at a low level of functioning. She could not perform her pre-injury duties on a reliable and consistent basis and her current emotional state was likely to continue into the future on an indefinite basis.

20 Ms Dianne Perrett-Abrahams, forensic and health psychologist, saw the plaintiff at the request of her solicitors, reporting on 5 June 2020. A very detailed history was obtained. One aspect of interest is that the plaintiff again stated that, with Monash Council, she had struggled when working full time and this reduced her hours to part time. Her symptoms of anxiety and migraine persisted. She continued to have a propensity to ruminate and relive events concerned with what had occurred when she was employed by the defendant. Her medication consisted of Cymbalta and Diazepam. Psychometric tests undertaken by Ms Perrett-Abrahams indicated that the plaintiff had moderate depression and moderate to severe anxiety. Severe insomnia was also indicated. The testing performed by Ms Perrett-Abrahams produced a result consistent with a DSM-IV diagnosis of Post-traumatic Stress Disorder. Without going through the various tests in detail, the diagnosis of Ms Perrett-Abrahams was one of a significant Post-traumatic Stress Disorder with mixed

affect, including depression and anxiety, this being related to her employment injury. She also expressed the opinion that the consequences would prevail for the foreseeable future. The plaintiff's psychological injuries were consistent with the stated cause. Ms Perrett-Abrahams stated that the plaintiff had no current work capacity and will not have a future work capacity on either a full time or part time basis. She could not engage in sustained work duties, this being entirely due to the severity of her work-derived injuries. Ongoing treatment was indicated.

21 The defendant has also had the plaintiff examined for medico-legal purposes. Associate Professor Saji Damodaran, consultant psychiatrist, saw the plaintiff on two occasions. He reported in relation to the earlier of these on 27 June 2018. A detailed history of events was taken. The conclusion of Associate Professor Damodaran was that, based on the available information, the plaintiff was suffering from an adjustment disorder with mixed anxiety and depressed mood of variable severity, this occurring in the context of the stress that she had been experiencing. At this time, he thought that she did have the capacity for modified pre-injury or alternative duties with a different employer, depending on her progress. Ongoing treatment was required. He considered the plaintiff's condition to be new, rather than being the aggravation of a pre-existing condition. He thought that there were significant issues in relation to her employment with the defendant. Ongoing psychiatric treatment for at least the next six to eight months was required, along with concurrent psychological therapy.

22 Associate Professor Damodaran saw the plaintiff for a second time on 19 November 2018, reporting to the defendant two days later. The history was that she had become more unwell over the six months period since last being seen. She had difficulty sleeping, waking up in the night with bad dreams concerning work-related matters. She was having recurrent panic attacks. She had no sense of enjoyment. She did not believe that she had the capacity to work. To Associate Professor Damodaran, she appeared to look very tired and exhausted.

23 The diagnosis of Associate Professor Damodaran was of an adjustment disorder with mixed anxiety and depressed mood. On this occasion, Associate Professor Damodaran

was of the view that the plaintiff did not have a current work capacity for pre-injury duties, modified pre-injury duties or alternative duties. He thought that her condition had deteriorated over the past six months. With adequate treatment and recovery, she may regain work capacity over the next six to nine months. She required ongoing treatment. Associate Professor Damodaran thought that the plaintiff's incapacity for work was materially contributed to by the claimed injury and currently she did not have the capacity for any other employment. She did not have the capacity for work with modifications or restrictions. He thought that her capacity needed to be reviewed after nine to 12 months. It would not appear that he has seen her again.

24 At the request of the defendant's solicitors, the plaintiff was seen by Dr John Gill, consultant in general and forensic psychiatry. Dr Gill's earlier report was on 3 April 2019. He took an appropriate history. He also recorded that the plaintiff said that, notwithstanding the treatment which she had received, her symptoms had been getting worse. Dr Gill expressed the opinion that the plaintiff had developed a range of anxiety and depressive symptoms in reaction to severe stress and alleged bullying and harassment at her workplace. He diagnosed severe anxiety and depressive symptomatology which was causing "very severe incapacity". The plaintiff reported extreme fatigue, anxiety, sleep disturbance and the like. In the opinion of Dr Gill, the plaintiff had developed an adjustment disorder with mixed anxiety and depressed mood which had evolved into a clinical profile of Major Depressive Disorder. He was of the view that her work remained a materially contributing factor to her psychiatric condition. She required ongoing regular consultations with her treating psychiatrist, with support from a clinical psychologist. Dr Gill thought that appointments every three weeks or so would be appropriate. He regarded the prognosis as guarded. He stated that there appeared to be severe practical difficulties in relation to her successfully being able to obtain future employment. He thought that she had no capacity whatsoever for her pre-injury work duties and it was unlikely that she would have such capacity in the foreseeable future, unless she made a very significant response to ongoing psychiatric treatment. Indeed, Dr Gill expressed the view that the plaintiff had no current capacity for any employment, regardless of restrictions or modifications, and would not become employable unless or until there was a significant clinical response to treatment.

Dr Gill observed that “At this stage, there is nothing to indicate a likely timeframe for future improvement.”

25 Dr Gill saw the plaintiff again on 9 December 2019, reporting on 18 December. On this occasion, the plaintiff told Dr Gill that her anxiety symptoms had gradually worsened since the last interview, but her depression was about the same. She described to him the physical problem which she had suffered, which appeared to be a cerebral aneurism. However, this was too small for surgery. She also suffered some migraines. She had been placed on stronger anti-anxiety medication with no apparent effect. She also had some back pain, having a longstanding back condition. She felt that her mental state had worsened since her previous interview with Dr Gill. She was on quite considerable medication. Dr Gill made the observation that the plaintiff presented as a severely depressed lady who appeared overwhelmed by her multiple stressors. In addition to the impact of her work-related stressors and subsequent loss of employment, there were also the issues of her own ill health and pain, severe financial pressure and family stressors. His diagnosis was of a Major Depressive Disorder, with severe associated anxiety and panic symptoms. Her mental state had not improved since the earlier interview and there had been some worsening with the addition of other stressors. He did not consider that the plaintiff had a current capacity for either her pre-injury or other employment. If she had the appropriate physical capacity, he would consider that she could potentially return to suitable employment if favourable work options became available. However, even excluding pre-existing or other non-work-related factors, Dr Gill stated that he considered that the psychiatric injuries resulting from the plaintiff’s employment with the defendant would preclude her from returning to pre-injury duties or to any other suitable employment as at the time of this report. Her pre-existing and other non-work-related conditions would not preclude her from returning to pre-injury duties or suitable duties. He thought that the reputational damage done to her was a central impediment to rehabilitation. However, her depressive illness was unlikely to substantially improve unless there were some realistic and positive opportunities. Her physical capacity for rehabilitation was a matter outside his area of expertise. There were also the other non-work-related stressors.

26 As shall be discussed, Dr Gill appears to have included a separate letter, also dated 18 December 2019, and addressed to the defendant's solicitors. In it, he answered a specific question which was addressed to him. The question referred to records of the plaintiff's attendance upon Dr Mathur and whether Dr Gill maintained his opinion that the plaintiff's work was still a materially contributing factor to her psychiatric condition. Dr Gill responded that Dr Mathur's records had not persuaded him to alter his opinion that the plaintiff's psychiatric condition remained materially contributed to by the work-related stress which had produced chronic psychiatric symptomatology for the plaintiff. Whilst there were some additional non-work-related factors, they had not been as significant in the development of her psychiatric condition as the original stressors associated with employment with the defendant and the plaintiff's inability to obtain further employment. In summary, his opinion remained unchanged from that expressed in his previous reports.

27 I am satisfied that the injury suffered by the plaintiff is one of a Major Depressive Disorder with anxiety. That is the diagnosis of the treating psychiatrist, Dr Mathur. An almost identical diagnosis has been made by Dr Tagkalidis, consultant psychiatrist. Dr Gill, consultant psychiatrist examining on behalf of the defendant, has arrived at virtually the same diagnosis. The wording of Associate Professor Damodaran, consultant psychiatrist, also examining on behalf of the defendant, is along much the same lines, although he has referred to it as an adjustment disorder with mixed anxiety and depressed mood. This in turn is very similar to the diagnosis of Ms Perrett-Abrahams, forensic psychologist, her diagnosis being severe adjustment disorder with mixed affect in the form of anxiety and depression. The treating general practitioner, Dr Reid, has also diagnosed a Major Depressive Disorder with anxiety. Thus, the diagnoses are close to being unanimous and it seems to me that nothing of significance hinges upon the marginally different wording adopted in some instances.

28 I am not of the view that the injury represents the aggravation of a pre-existing condition. That is not suggested by the various examiners.

29 I am also of the opinion that the consequences of the injury will persist for the foreseeable future. Dr Reid has stated that she has no doubt but that the plaintiff's medical

condition will continue into the foreseeable future. Dr Mathur has said that the long term prognosis for resolution of symptoms appears to be guarded and has further stated in his more recent report that the effects of the plaintiff's injury and condition will continue into the foreseeable future. The plaintiff's treating psychologist, Ms Quartermain, has expressed the opinion that it is unlikely that there will be any significant improvement in the plaintiff's circumstances or condition in the foreseeable future. Dr Tagkalidis has referred to the plaintiff's prognosis as being guarded as a result of the increasingly chronic nature of her depressive condition. In his report of 3 April 2019, Dr Gill stated that the prognosis must be considered guarded at that stage, as the plaintiff continued to have severe symptomatology despite several years of treatment, combined with the fact that there appeared to be severe practical difficulties in successfully being able to obtain future employment. In his later report of 18 December 2019, Dr Gill stated that the plaintiff's mental state had not improved. He also stated that attempts at rehabilitation are probably futile unless the plaintiff can perceive some hope of success in her efforts to gain future employment. In this regard, he referred to realistic, positive opportunities. Ms Perrett-Abrahams, psychologist, who saw the plaintiff for medico-legal purposes, stated her belief that the plaintiff will not have a future work capacity within the accepted meaning of the term, such meaning being that she could maintain consistent, reliable and productive work duty. Ms Perrett-Abrahams believed that this was the situation in relation to either full time or part time work in the foreseeable future. She believed that the plaintiff could not engage in or sustain such work duty, due entirely to the severity of her work derived injuries.

30 Bearing all of the above in mind, I am satisfied that the consequences of the plaintiff's injury are permanent within the meaning of the Act in that they will persist for the foreseeable future.

(f) Other developments since the injury

31 As stated, the plaintiff ceased work with the defendant on 21 March 2017. In July of that year, she commenced her employment with Monash Council. She was doing systems administration and implementation, her employment being pursuant to a contract and for the duration of a particular task. While she commenced working full time hours, I accept

that shortly before Christmas 2017 she was struggling to cope. On 22 December 2017, she moved to part time hours in order to complete the task. Her contract was extended until 31 January 2018, further extended until 28 February and finally extended until 21 March 2018. During this period after 22 December 2017, she was working at a rate of 60 per cent of a full time position and was being paid accordingly. There seems to be little dispute concerning this. I would refer to T15–19, T49–50, T60–61, T67–69 and T72–74. I would also refer to paragraph 5 of the detailed and helpful written submissions on behalf of the defendant, where it is stated that the plaintiff’s working hours were reduced to 60 per cent of full time, with an equivalent pro rata salary. She has not engaged in any employment since 21 March 2018.

32 In the second half of 2019, the plaintiff was diagnosed with a cerebral aneurism. It would appear that she had collapsed and gone to the Emergency Department of Monash Medical Centre. Ultimately she was referred to Mr Chris Xenos, neurosurgeon. As mentioned earlier, he reported to Dr Reid on 11 September 2019. The history taken by Mr Xenos included that the plaintiff had discharged herself from Monash Medical Centre, all the investigations there having been negative. She did return after suffering more symptoms, but again nothing was found. It is also apparent that Mr Xenos was in possession of some correspondence from Dr Reid. In any event, in his report to Dr Reid of 11 September 2019, he stated that the plaintiff was now feeling better. She no longer had weakness or numbness on the left side of the face, was walking well, had mild headache and a poor memory of the whole event. Mr Xenos expressed the view that the plaintiff was certainly very anxious, there having been reference to her being under a lot of stress at the time of this event. Whilst a CT scan of the brain and a subsequent MRI scan did not demonstrate any abnormalities, Mr Xenos was of the view that both investigations in fact demonstrated a small left ICA aneurism. He did not think that the aneurism in fact had anything to do with her presentation, which he thought more likely to be of a transient ischemic nature. The aneurism did not require treatment and there was a risk of less than 1 per cent a year of a rupture. His plan was to “keep an eye on it”, with future scans to be performed. He was in favour of her continuing with aspirin.

33 In relation to the aneurism and the prognosis, I accept the unchallenged evidence contained in the report of Mr Xenos. Whilst there are references to stress in his report, it is not being put in this application that the aneurism is a consequence of stress associated with employment. Similarly, the report of Mr Xenos would not indicate that any incapacity of note is associated with the aneurism.

34 The plaintiff has also had some stress associated with one of her sons in particular. Her older son, Josh, apparently had some problems in relation to drugs and with his partner. He was in gaol for a short period, but this may have been prior to a court hearing. Subsequently he moved back home, but there was then conflict with the younger son, Jordan. Josh has since moved out again, but Jordan remains living with his parents. There have been no further problems. Dr Mathur seems to have been informed concerning these difficulties. Dr Gill, examining on behalf of the defendant, clearly was aware of the fact that the plaintiff's older son had been arrested and gaoled, Dr Gill having been supplied with material from Dr Mathur. Dr Gill specifically stated that the plaintiff's psychiatric injuries sustained with the defendant would preclude her from returning to pre-injury duties or for any other suitable employment. He so found, whilst specifically excluding any pre-existing or other non-work-related factors. Indeed, in a letter which appears to have been appended to his report of 18 December 2019, Dr Gill referred to the behaviour of the plaintiff's sons. He also mentioned the plaintiff's own recent medical complications, such as the brain aneurism and migraines, along with some health problems of her husband. He acknowledged that there were "additional non-work-related factors ... significant in aggravating and perpetuating Ms Duff's condition", but the bottom line was that his opinion remained unchanged from that expressed in what he described as "my previous reports".

35 As referred to in the material of Dr Gill, the plaintiff's husband has also had health problems and is no longer working. Thus, there have been various potentially stressful events occurring in the plaintiff's life. However, I am of the view that, throughout, stresses associated with her employment with the defendant constitute the overwhelming bulk of the causative factors. Whilst it is not a matter of mathematical calculation, I note that that Dr Tagkalidis allocates approximately 80 per cent of the plaintiff's current emotional distress

to work-related events. Dr Gill, examining on behalf of the defendant, was specifically asked to comment upon the involvement of other matters. His comment was that they were not as significant in the development of her psychiatric condition as the original stressors associated with her employment with the defendant. Dr Reid, who has been the plaintiff's treating general practitioner throughout, and who, for example, has described herself as being fully aware of the "family dynamics", has expressed the opinion that it is more probable than not that the conditions from which the plaintiff is suffering were caused as a result of work undertaken with the defendant, further stating that she had no doubt but that the effect of the plaintiff's work-related complex medical condition would continue into the foreseeable future.

36 The plaintiff has also had some pain emanating from degenerative changes in her lumbar and cervical spines. The commencement of these in fact pre-dates the mental health problems which constitute the injury in this application. However, they have continued since the cessation of the plaintiff's employment with the defendant. Her spinal pain was sufficient to necessitate the performance of an MRI and a visit to an orthopaedic surgeon. However, the plaintiff refuted the suggestion that her back pain was something that was affecting her ability to work full time. She described her back and neck problems as follows:

"They were not significant. They were there but not to the point that it would stop me" – see T19.

37 The plaintiff stated that she had had back and neck pain for 24 years. Surgery had never been contemplated. She has had facet joint injections, the most recent being only a couple of months prior to the hearing. She described the injections as being "quite effective".

38 In short, whilst there have been other stressors since the plaintiff ceased employment with the defendant, I am not of the view that they are of great significance in relation to her present condition and her capacity for employment.

Ruling

(a) Loss of earning capacity

39 In order to establish whether or not the plaintiff has discharged the burden of proof in relation to satisfying the statutory test for loss of earning capacity, it is necessary to determine “without injury” earnings. Mr O’Dwyer submitted in his opening that, in her last full financial year with the defendant, the plaintiff earned the gross figure of \$161,195 – see T9. That is also set out in the updated “Summary of Gross Earnings”, which was added to the plaintiff’s court book material and concerning which there was no challenge. I would refer, for example, to the written submissions of the defendant. Essentially, the position of the defendant, put in closing addresses, was that if the plaintiff had the capacity to do full time work at Monash Council, and retained that capacity, she would fail. If it was accepted that she only had a capacity for 60 per cent of the hours originally performed at Monash Council, she would satisfy the statutory test. I would refer again to T67–8. In any event, I accept that in her last full financial year with the defendant, the plaintiff earned the gross figure of \$161,195. This represents her “without injury” earning capacity.

40 Accordingly, for the purposes of the statutory test, 60 per cent of that figure is \$96,717.

41 Turning to the plaintiff’s “after injury” earning capacity, I am satisfied that it is now zero. I am also satisfied that this is because of the plaintiff’s medical condition and not due to any stigma associated with her time of employment with the defendant. She demonstrated that an employer was prepared to take her on in a well paid occupation and hence her employment with Monash Council. In her most recent affidavit of 11 June 2020, she has sworn that she is now hopeless with people and cannot stand people or being around them. In her most recent report, Dr Reid has expressed her opinion that the plaintiff has no current work capacity for any sustainable work, also stating that she has no doubt but that the effects of the work-related complex medical condition will continue into the foreseeable future. Ms Perrett-Abrahams, psychologist, expressed the opinion that, as of 5 June 2020, the plaintiff has no current work capacity and will not have a work capacity within the accepted meaning of the term for work on either a full time or part time basis in the foreseeable future. In his more recent report, Dr Gill has stated that he does not consider that the plaintiff has a current capacity for either a return to pre-injury duties or to other

suitable employment. He goes on to refer to possibilities, bearing in mind the appropriate physical capacity and favourable work options. This is in terms of a potential return to suitable employment. However, in that report, his next answer in relation to a return to work is that he considers that the psychiatric injuries resulting from the plaintiff's employment with the defendant would preclude her from returning to pre-injury duties or for any other suitable employment at this time. However, her pre-existing non-work-related conditions would not preclude her from returning to suitable duties if she had the appropriate physical capacity. These answers could be seen as a trifle confusing, but I understand the impact of them to be that the plaintiff's work-related psychiatric injury has removed her current capacity for any employment. Her non-work-related injuries, both physical and mental, do not so preclude her. When these medical opinions are taken into account, it seems to me that the plaintiff has no work capacity as a result of the work-related injury.

42 Even if this were not so and the capacity which the plaintiff demonstrated for a limited period since the injury was used as the appropriate figure for "after injury" earnings, the plaintiff would still satisfy the statutory test. Had the plaintiff been able to maintain the capacity for full time employment with the Monash Council, and if the amount so earned was treated as representing "after injury" earnings, she would have failed to establish the required 40 per cent reduction. However, the fact of the matter is that she was not able to sustain full time employment with Monash Council. She did not complete her contract within the specified time and the injury forced her to work on a part time (60 per cent) basis. Whilst it is not entirely clear, the plaintiff's salary at Monash Council appears to have been \$121,524. Sixty per cent of this is \$72,950. This, in turn, is well below the figure of \$96,717, which could be described as the "cut off mark" for satisfaction of the test. Of course, for the purposes of this exercise, that is on the assumption that the plaintiff has retained the capacity to earn \$72,914. As stated, I am of the opinion that she has no earning capacity as a result of her work-related injury suffered in the course of her employment with the defendant.

43 I am also satisfied that the severity of the plaintiff's injury and the consequences thereof are sufficient to satisfy the requirements of S.325(2)(d). I would refer to the various diagnoses and observations set out above.

44 In summary, the plaintiff has discharged the burden of proof in relation to loss of earning capacity.

(b) Pain and suffering

45 In view of my finding in relation to loss of earning capacity, a specific ruling in relation to leave in respect of pain and suffering is not required – see *Advanced Wire & Cable Pty Ltd v Abdulle* [2009] VSCA 170. In any event, had it been necessary I would have ruled that the plaintiff had also discharged the burden of proof in that regard. I am satisfied that the pain and suffering consequences which she has suffered are severe within the meaning of the Act. Her ability to perform the type of work at which she had obviously been successful has been totally removed, as has her capacity to engage in any other form of employment. Apart from the economic loss, this is obviously a matter which causes her distress. Her condition causes conflict with her husband. She has become antisocial. She has panic attacks which impact upon outings, such as shopping. There are times when she has been unable to get out of bed. She has difficulty sleeping and at times feels overwhelmed. Apart from being socially withdrawn, she has a very low energy level and has lost motivation. She was described by Dr Gill, examining on behalf of the defendant, as being a severely depressed lady. Were it necessary for me to rule in relation to this, I would have found that the plaintiff had discharged the burden of proof in relation to pain and suffering consequences.

Conclusion

46 The plaintiff is successful. She has discharged the burden of proof. Leave is given to her to bring proceedings for damages in respect of loss of earning capacity and pain and suffering. I shall hear the parties as to any ancillary orders that are required.