

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

Revised  
Not Restricted  
Suitable for Publication

Case No. CI-23-06698

Benjamin Ryder

Plaintiff

v

Transport Accident Commission

Defendant

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JUDGE: Her Honour Judge Sanger  
WHERE HELD: Melbourne  
DATE OF HEARING: 24 July 2024  
DATE OF JUDGMENT: 25 July 2024  
CASE MAY BE CITED AS: Ryder v TAC  
MEDIUM NEUTRAL CITATION: [2024] VCC 1103

**REASONS FOR JUDGMENT**

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Subject: TRANSPORT ACCIDENT  
Catchwords: Serious injury application – injury to the pelvis – proximal hamstring and gluteal tendinosis – pain and suffering damages – range  
Legislation Cited: *Transport Accident Act 1986 (Vic)*, s93  
Cases Cited: *Humphries v Poljak* [1992] 2 VR 129; *Richards & Anor v Wylie* (2001) 1 VR 79; *Jarvie v Sideliner Contracting Pty Ltd* [2024] VSCA 144; *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260; *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1; *Transport Accident Commission v Kamel* [2011] VSCA 110; *Philippiadis v Transport Accident Commission* [2016] VSCA 1; *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181  
Judgment: Leave granted to the plaintiff to bring proceedings to recover damages arising from a transport accident which occurred on 2 December 2021

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J Richards KC with Ms H Donmez	Maxiom Injury Lawyers
For the Defendant	Mr M Clarke with Ms E Golshtein	Hall & Wilcox

## Introduction

- 1 Mr Ryder is a forty-seven year old senior physics teacher and Director of Innovation at Trinity College. He is also an avid cyclist and sportsman. Prior to his injury, he loved road bike riding, particularly endurance road bike riding. He had been training for the Peaks Challenge with an ambition to compete in the Amy's Gran Fondo and the UCI World Series after that. These were realistic ambitions based on his past performance. On 2 December 2021, Mr Ryder was training with other competitors for the Peaks Challenge for the tenth day in a row. While riding on Doncaster Road, a car veered into their group and struck Mr Ryder, causing injuries to Mr Ryder's pelvis, right shoulder, right hip and back.
- 2 Following two lots of surgery, he also developed an injury to his bilateral glutes and hamstrings. He was later diagnosed with both Post Traumatic Stress Disorder and Chronic Adjustment Disorder with depressed mood.
- 3 After a period of rehabilitation, he returned to work and completed a Masters of Education. With a great deal of determination and training, he was able to resume cycling and other sporting activities, and competed at the Noosa Triathlon in 2022 and 2023. Nonetheless, he has been left with restrictions that prevent him from returning to his high level of endurance cycling and other sports performance, and achieving the sporting ambitions that he had prior to his injury.
- 4 Mr Ryder makes an application for leave to proceed with a claim for damages pursuant to s93(4)(d) of the *Transport Accident Act 1986* (Vic) ("the Act") for the injury to his pelvis and glutes,<sup>1</sup> and for his resulting psychological injuries. He relies on paragraph (a) of the Act, as he abandoned his reliance on paragraph (c) at the hearing.

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<sup>1</sup> More specifically gluteal and hamstring tendinitis

5 Neither the injury nor the fact it was long term were in dispute in this case.

6 No issue was taken with Mr Ryder's reliability or credibility as a witness.

7 The sole issue for determination in this case was whether Mr Ryder's consequences met the threshold: that is, could the consequences arising from his impairment be described as being at least very considerable and more than significant or marked when compared with other cases in the range of other possible impairments or losses.<sup>2</sup>

8 For the reasons outlined below, I find that they do, and I grant leave to Mr Ryder to proceed with a claim for damages.

9 In arriving at my decision, I considered Mr Ryder's affidavit and oral evidence, the unchallenged affidavit evidence of his wife, Ms Keturah Haisman, and his daughter, Ms Madeline Ryder, and the medical reports and other material tendered at the hearing.

### **Brief relevant background matters**

10 The background facts were not in dispute. Thus I shall only refer to them briefly.

11 Mr Ryder was born in England on 19 August 1976. He completed secondary school, and then a Bachelor of Engineering specialising in Mechanical Engineering. He obtained a postgraduate Certificate of Education immediately after. He started teaching in or around 1998, with a focus on physics and information technology. In or around 2003, he was promoted to the head of physics at Camp College in Pembury for a couple of years until he joined Sherborne School in Dorset in or around 2005 as the Head of Physics and Housemaster. He remained in this role until he immigrated to Australia in late 2014 with his wife.<sup>3</sup>

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<sup>2</sup> *Humphries v Poljak* [1992] 2 VR 129, [40]

<sup>3</sup> Exhibit P1, Plaintiff's Court Book ("PCB") 11-12 at paragraph [4]

- 12 In or around 2015, he joined Trinity Grammar School. He remains there to date. He is the Director of Innovation, a senior physics teacher and the cycling coach.<sup>4</sup>
- 13 He is married. He lives with his wife and two children in Kew.
- 14 On 3 June 2018, he was involved in a motor vehicle accident. He was riding his bike on Sherbrooke Road in Kallista when a car overtook him and collided with his back wheel.<sup>5</sup> He was treated at Box Hill Hospital and underwent physiotherapy treatment to his right shoulder, right hip bruising, neck and low back pain. He returned to his recreational activities after this accident.
- 15 Outside of work, he loved athletics. He ran, swam and cycled. He exercised daily. Prior to the accident, he ran or cycled many kilometres most mornings. He cycled an average of 200 kilometres each week. Exercise was his release, and it had been for many years. He ran the Paris Marathon in April 2010 which comprised a 42 kilometre run.<sup>6</sup> He participated in the Weymouth Ironman which was 72 kilometres comprising of a 1900 metre swim, a 90 kilometre bike ride and a 21 kilometre run in September 2014. He competed in the Noosa Triathlon annually from 2015 to 2019, which comprised of a 1500 metre swim, a 40 kilometre bike ride and a 10 kilometre run. He participated in the Peaks Challenge held at Falls Creek in 2018 which comprised a 235 kilometre bike ride<sup>7</sup> and includes 4500 metres of elevation gain. He competed in the Geelong Ironman which comprised of a 1900 metre swim, a 90 kilometre bike ride and a 21 kilometre run in February 2020.
- 16 He started training in 2021 for the Peaks Challenge which was going to be held in March 2022.

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<sup>4</sup> Exhibit P1, PCB 12 at paragraph [5]

<sup>5</sup> Exhibit P1, PCB 12 at paragraph [7]

<sup>6</sup> Exhibit P1, PCB 12 at paragraph [9]

<sup>7</sup> *Ibid*

17 All of this leads to the inescapable conclusion that he was a fit man with a love of being in absolute peak physical condition.

### **The incident and medical treatment**

18 There was no dispute regarding the circumstances of the accident.

19 Mr Ryder outlined the circumstances of his accident in his first affidavit sworn on 27 July 2023.

20 Mr Ryder said that on 2 December 2021, he was cycling with other cyclists who were training for the Peaks Challenge along Doncaster Road. It was an early summer morning. As they were riding, a driver was turning into Mitchell Street at the same time, and drove through the cycling group. The rider to the left of Mr Ryder went over the driver's windscreen, and Mr Ryder struck the passenger side window and landed on the floor and under the vehicle. He felt immediate pain in his right hip.

21 He was transported to the Alfred Hospital by ambulance. Whilst there, he had various scans conducted and he was diagnosed with multiple pelvic fractures in his right hip.<sup>8</sup> He underwent surgery on 4 December 2021 and his right hip was stabilised with right side sacroiliac joint screw fixation.<sup>9</sup> Mr Arvind Jain was the operating orthopaedic surgeon.

22 He was discharged from hospital on 7 December 2021.

23 Following the operation, he was able to lightly weight bear for the first four weeks on a Zimmer frame. He then transitioned to crutches and started increasing weight on his right leg thereafter.

24 He initially needed help with toileting and washing. He started noticing pain around the lateral and posterior aspect of his right hip. He was off work after the surgery,

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<sup>8</sup> Exhibit P1, PCB 13 at paragraph [13]

<sup>9</sup> *Ibid*

but as it occurred around the end of year, most of his period off work coincided with school holidays, and subsequently did not interrupt his work too much.

25 He saw Mr David Slattery in about mid-January 2022 for an orthopaedic opinion.<sup>10</sup> He was advised to start rehabilitation, and there was a discussion about whether he needed to remove the metalware in his right hip. Mr Slattery advised that at that point in time, it was not necessary.

26 He returned to see Mr Jain in his private rooms on 27 January 2022 for a second opinion. Mr Ryder had x-rays of his pelvis performed and Mr Jain advised that he was satisfied with Mr Ryder's healing progress.

27 On 23 June 2022, Mr Jain suggested removing the metalware because of the extent of his physical activity.<sup>11</sup> As Mr Ryder was struggling with pain in his sacrum and low back, he agreed to the procedure. He underwent surgery to remove the metalware on 22 July 2022 at the Epworth Hospital in Richmond.

28 Post-operatively, he developed a large hematoma at the site of the surgical scar that took time to settle down. He was reviewed by Mr Jain on 4 August 2022. Mr Jain was happy with how things had gone surgically, and he was discharged from his care.

29 Following the second surgery, he commenced rehabilitative physiotherapy at Restore Physiotherapy. He noticed pain in his glutes and hamstrings.<sup>12</sup> Prior to the transport accident, he had not experienced this pain to his glutes or hamstrings, despite running extensively.

30 In or around February 2022, he started seeing a psychiatrist, Dr Antony Raj, as he was suffering from flashbacks of the accident.<sup>13</sup>

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<sup>10</sup> Exhibit P1, PCB 13 at paragraph [16]

<sup>11</sup> Exhibit P1, PCB 13-14 at paragraph [18]

<sup>12</sup> Exhibit P1, PCB 14 at paragraph [21]

<sup>13</sup> Exhibit P1, PCB 14 at paragraph [22]

31 Because of the persisting pain in his right glute and hamstring, he underwent an ultrasound scan on 7 December 2022 which confirmed tendinopathy in his right hamstring.

32 His general practitioner referred him to Dr Andrew Muir, a pain specialist, who he met with on 20 December 2022. Dr Muir recommended that Mr Ryder trial stronger medication and if that did not assist with his pain, to undergo a series of platelet rich plasma injections.<sup>14</sup> Ultimately, Mr Ryder had these injections. The first injection was administered on 23 January 2023, the second on 2 June 2023 and the third in September 2023.

### **Brief consideration of the medical evidence**

33 Counsel for Mr Ryder submitted that the medical experts were largely in agreement about the diagnosis of the physical and psychiatric injury, referring me to the diagnoses of the physical injury made by Mr Jain,<sup>15</sup> Dr David Love,<sup>16</sup> Dr Clayton Thomas,<sup>17</sup> and Dr Jarrad Stevens,<sup>18</sup> and Dr Steven Adlard<sup>19</sup> regarding his psychiatric injury.

34 No issue was taken with the diagnoses of injury by counsel for the defendant.<sup>20</sup>

35 I accept that the medical evidence was consistent between the experts relied upon regarding the diagnosis of the physical and psychological injuries as referenced by Mr Ryder's counsel and set out above.

36 I therefore find that Mr Ryder sustained the following injuries in his motor vehicle accident of 2 December 2021:

- (a) A lateral compression II pelvic injury which involved an undisplaced right side superior pubic ramus fracture extending into the anterior column with

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<sup>14</sup> Exhibit P1, PCB 14 at paragraph [24]

<sup>15</sup> Exhibit P5, PCB 49

<sup>16</sup> Exhibit P14, PCB 130

<sup>17</sup> Exhibit P9, PCB 73-74

<sup>18</sup> Exhibit P10, PCB 82

<sup>19</sup> Exhibit P13, PCB 124

<sup>20</sup> Transcript ("T") 11, Lines ("L") 20-26

associated posterior ring injury involving the right ilium extending into the S1 joint.<sup>21</sup>

- (b) Right proximal hamstring and adductor tendinopathy, right gluteus medius tendinopathy and persistent right ischial tuberosity pain.<sup>22</sup>
- (c) Chronic adjustment disorder with mixed anxiety and depressed mood and features of traumatisation, some of his injuries arising directly from the psychological impact and some secondary to the ongoing restrictions from the physical injury.<sup>23</sup>

## **Contentions of the parties**

### **The defendant's contentions**

37 Counsel for the defendant contended that Mr Ryder had sustained an injury which produced consequences for him, particularly regarding his sitting tolerance and pain, but when assessed objectively the consequences did not meet the very considerable threshold. This was particularly so when consideration was given to the capacity that Mr Ryder retains.<sup>24</sup>

38 Counsel for the defendant submitted that:

(a) Mr Ryder was a high functioning individual before his accident, and has continued to be a high functioning individual after his accident, notwithstanding his injury. Counsel submitted this was evidenced by:<sup>25</sup>

(i) his employment in a leadership role;<sup>26</sup>

(ii) his completion of a Masters degree with first class honours;<sup>27</sup>

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<sup>21</sup> Exhibit P5, PCB 49  
<sup>22</sup> Exhibit P10, PCB 82  
<sup>23</sup> Exhibit P13, PCB 123  
<sup>24</sup> T43, L21-31  
<sup>25</sup> T44, L1-8  
<sup>26</sup> T44, L10-14  
<sup>27</sup> T44, L15-17



- (iii) his significant athletic training regime whilst working in fulltime employment;<sup>28</sup>
  - (iv) his maintenance of a high level of fitness;<sup>29</sup> and
  - (v) the fact that he continues to compete in triathlons.<sup>30</sup>
- (b) There was no appreciable difference in Mr Ryder’s triathlon performance before and after the transport accident. The raw data of his triathlon results show that his performance at the Noosa Triathlon in 2023 was faster than when he first competed in 2016, and only 10 minutes slower than his performance in 2019.<sup>31</sup> While counsel conceded there may be other variables impacting Mr Ryder’s performance, it was submitted that the difference before and after the transport accident was marginal.
- (c) Mr Ryder’s dip in academic performance as it related to his thesis was of the same magnitude as his reduction in athletic performance, that is, it was “at the margins”.<sup>32</sup> Counsel submitted that Mr Ryder had still performed impressively overall.
- (d) The Court’s assessment must consider Mr Ryder’s very limited treatment and medication usage. Any medication which Mr Ryder uses should be assessed in the context of the activities he is continuing to perform. It is not the case that Mr Ryder is a plaintiff who is sitting at home avoiding activities which may aggravate his injury, instead he is training and competing as an athlete.
- (e) Mr Ryder has not experienced any significant loss of his recreational pursuits or domestic activities. He has experienced a reduction in his capacity to engage in these activities, but still retains a continuing ability to partake in them. Counsel submitted that consideration of what has been retained by Mr

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<sup>28</sup> T44, L26-28

<sup>29</sup> T44, L29-30

<sup>30</sup> T44, L30-31

<sup>31</sup> Exhibit D5, Defendant’s Court Book (“DCB”) 70

<sup>32</sup> T44, L20

Ryder is a significant factor for the Court's consideration, and that once this assessment was undertaken, Mr Ryder would fail to meet the very considerable threshold.

- (f) The fact that Mr Ryder no longer characterises himself as a performance athlete is not an objective loss that the Court can take into account for the purpose of this application.<sup>33</sup> The objective evidence before the Court is that Mr Ryder continues to participate in these sports.
- (g) Although some credit should be given to Mr Ryder's stoicism and that he has pushed on in his activities despite the level of adversity faced, that does not overcome the evidence of Mr Ryder's significant functioning, which is:
  - (i) his performance at work;
  - (ii) his performance in his recreational pursuits; and
  - (iii) his lack of significant reliance on pain medication or treatment.<sup>34</sup>
- (h) No objective evidence had been presented to the Court to support the submission that Mr Ryder's performance in the Noosa Triathlon had reduced by reference to his percentile performance. However, regardless of whether Mr Ryder was in the top 10 per cent or top 26 per cent of participants as deposed to by Mr Ryder, he was still competing at a very high level, which highlighted his significant capacity to perform. Regardless, the percentiles ought not be a determinative factor in the assessment of whether Mr Ryder meets the threshold.

### **The plaintiff's contentions**

39 Counsel for Mr Ryder contended that:

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<sup>33</sup> T46, L27-31; T47, L1-3, 16-21

<sup>34</sup> T47, L25-31; T48, L2-5

- (a) This case was “on all fours”<sup>35</sup> with the recent case of *Jarvie v Sideliner Contracting Pty Ltd* (“*Jarvie*”)<sup>36</sup> and that I should take the same approach as their Honours in that case for this matter before me. Counsel for Mr Ryder submitted that Mr Ryder is in constant pain when he sits, and that sitting is “part and parcel of life”.<sup>37</sup>
- (b) Mr Ryder was able to engage in his social and recreational activities, such as cycling and triathlons, but that this was to a lesser extent than prior to his accident due to the constant pain he experiences. This pain turns into severe pain whilst doing these activities.<sup>38</sup> Although he has a limited capacity to enjoy the activities due to the pain he experiences, he still engages in them because they are a part of his identity.<sup>39</sup>
- (c) Regarding counsel for the defendant cross-examining Mr Ryder on percentiles for his results in the Noosa Triathlon between 2016 and 2023, counsel for Mr Ryder submitted that the triathlon results demonstrated that there was a significant drop-off in Mr Ryder’s results. Mr Ryder deposed to the fact that he has dropped down from being in the top 10 per cent of participants to the top 26 per cent following the accident.<sup>40</sup>
- (d) The significance of the effect of the accident on Mr Ryder was demonstrated psychologically as well, and that those effects should be examined through the lens of the dicta in *Richards v Wylie*,<sup>41</sup> to see the effect on Mr Ryder’s functioning in life.
- (e) Mr Ryder has a poor prognosis, as he has no retained capacity to sit without pain, and seemingly never will, which is a very significant impairment, due to

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<sup>35</sup> T48, L20

<sup>36</sup> [2024] VSCA 144, [68]-[69] (“*Jarvie*”)

<sup>37</sup> T49, L10-16

<sup>38</sup> T50, L3-7

<sup>39</sup> T57, L29-31

<sup>40</sup> T51, L5-15; Exhibit P1, PCB 19 at paragraph [12]

<sup>41</sup> (2000) 1 VR 79

the amount of sitting that he has to engage with throughout his daily life, and especially for recreational activities that he is passionate about.<sup>42</sup>

### **Consideration of Mr Ryder's credit and reliability**

40 There was no issue taken with Mr Ryder's credit and reliability.

41 I nonetheless note that I found him to be an impressive and straightforward witness. He answered the questions he was asked and did his best to assist the Court.

42 I therefore accept Mr Ryder's evidence.

### **Evidence regarding consequences**

#### **Pain and medication**

43 Mr Ryder's evidence was essentially that he is in constant pain that is made worse with sitting and activity.

44 This permeates and affects all aspects of his life.

45 In his first affidavit he said that he remained in constant pain with respect to his right glute and hamstring.<sup>43</sup> The intensity of his pain fluctuates and it impacts his ability to sit for prolonged periods. There is soreness at the scar site, particularly on touch.

46 He repeated this sentiment in his second affidavit.<sup>44</sup>

47 These symptoms and their impact on him were supported by the medical opinion.

48 He said his current medications include Gabapentin, and he takes two tablets twice a day.<sup>45</sup> He also often takes Prodeine, especially when he has to attend events such as a lengthy meeting, concert, or a flight.<sup>46</sup> He takes Voltaren tablets fairly

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<sup>42</sup> T59, L1-9

<sup>43</sup> Exhibit P1, PCB 15 at paragraph [25]

<sup>44</sup> Exhibit P1, PCB 17 at paragraph [2]

<sup>45</sup> Exhibit P1, PCB 17 at paragraph [3]; T34, L23-26

<sup>46</sup> Exhibit P1, PCB 17 at paragraph [3]; T38, L24-26

regularly. He uses Voltaren gel every time he does something physical, like a bike ride or other exercise.<sup>47</sup> He receives massage and myotherapy about once a month, which he pays for himself. He said he would have more sessions but it gets costly.<sup>48</sup> He also undertakes exercises at home to relieve the pain.<sup>49</sup>

### **Sitting**

49 He said that he struggles to sit for longer than 30 minutes. It feels like he is sitting on bone. If he sits on a hard chair, the pain begins to increase at a point much earlier than 30 minutes. He needs to stand up and move around when the pain increases.

50 This has impacted his ability to enjoy going to the Melbourne Symphony Orchestra classical music concerts with his wife. They used to go almost monthly. Now his sitting restrictions impact him attending concerts.<sup>50</sup>

51 It has impacted all activities in his life. An example of this was given by his wife in her affidavit when she recalled his frustration at not even being able to sit and read a book anymore.<sup>51</sup>

### **Cycling and athletics**

52 He said the biggest impact of his injuries was on his athletics. He prefers to run instead of cycle these days. He has changed his riding habits. He has altered his morning rides because of how the collision occurred. He is more aware of the road. He rides on gravel bike trails and the Yarra trails to try and avoid the traffic routes now.<sup>52</sup>

53 He is hypervigilant if he needs to ride on roads.<sup>53</sup>

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47 T39, L28-30  
48 Exhibit P1, PCB 17 at paragraph [3]; T37, L7-19  
49 T18, L6-11  
50 T38, L27-30  
51 Exhibit P2, PCB 24 at paragraph [13]  
52 T16, L13-14  
53 T38, L16

- 54 He rides about 60 kilometres a week in winter, and 100 kilometres a week in summer,<sup>54</sup> the additional 40 kilometres a week being the cycling he does in his role as the cycling coach with his employer.
- 55 He is no longer a part of the morning cycling-and-coffee group which he was involved in previously. Before the transport accident, he rode with this group daily for several months. This was an important social connection for him. He misses the social interaction and the rides that he used to do with this group.
- 56 At the time of the transport accident he was training for the Peaks Challenge, which was held in March 2022. The transport accident prevented him from participating in this challenge. After the Peaks Challenge, he wanted to enter the Amy's Gran Fondo. Depending on how he went in that event, he was hoping to qualify for the UCI World Series. This was his goal and ambition. He said that by reason of his injuries, he could no longer fulfil this ambition. This upsets him greatly because it feels like he has lost a big part of his identity.
- 57 He continues to run and swim but has a reduced capacity for these activities. For swimming, he experiences increased pain afterwards but not during.<sup>55</sup> He feels the pain in his right hip and glute but he tries to push past it. He did not experience this prior to the transport accident.
- 58 He has tried to continue with his athletics since the transport accident. In November 2022, he did the Noosa Triathlon, which involved swimming, running and bike riding. He entered this event before the transport accident and pushed himself to do it, despite his injuries. He injured his Achilles tendon, which he believes was because he could not train properly for the event.<sup>56</sup>
- 59 He trained for and participated in the Noosa Triathlon again in 2023.

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<sup>54</sup> T19, L5-7

<sup>55</sup> T17, L13-18

<sup>56</sup> Exhibit P1, PCB 18 at paragraph [10]

- 60 Mr Ryder deposed to needing to complete these sporting events for his own self esteem and confidence,<sup>57</sup> and it is clear that he is a driven person. Athletics has always been what he has done to make himself feel better.
- 61 He said that despite the fact he has continued with his athletics, he is now in more physical pain when doing these activities. He is slower than he used to be. He said that a three hour event seemed to be his limit. He has to train and prepare more before the event. He said he had to be careful to not further injure his glutes and hamstring.
- 62 Before the transport accident, he was in the top 10 per cent of participants at the Noosa Triathlon. Now, he is in the top 26 per cent of participants. It takes him longer to recover after these events. His wife, Ms Haisman, said that he collapsed after undertaking the Triathlon.<sup>58</sup>
- 63 He continues to do his athletic activity with pain. He is not as good as he used to be. It takes him longer to recover from the event. He has not been able to fulfil his sporting ambitions. His identity as a performance athlete has been taken away from him. This identity made him feel good and confident. He used to be strong, fit and confident in his work and in his personal life. He now has doubts regarding his sporting capacity, and doubts regarding his professional capacity. He finds it hard to be a leader of staff and students and to assist them in their challenges when he is not confident in himself and dealing with his ongoing pain.<sup>59</sup> He now sees himself as someone who tries to keep fit so his condition does not get worse, rather than someone who is a performance athlete.
- 64 He runs more than cycles now. He feels the pain in his right hip and glute, but he tries to push past it.<sup>60</sup> He did not experience this prior to the transport accident.

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<sup>57</sup> Exhibit P1, PCB 19 at paragraph [11]

<sup>58</sup> Exhibit P2, PCB 23 at paragraph [7]

<sup>59</sup> Exhibit P1, PCB 20 at paragraph [20]

<sup>60</sup> Exhibit P1, PCB 16 at paragraph [34]

## Study

65 Despite obtaining an overall H1 average in his masters, he was disappointed that he obtained an H2A for his thesis. He attributed the challenges that he had in completing that thesis to his difficulties with sitting and concentrating.

## Employment

66 Mr Ryder has continued to work full time and there has been no change to his role at Trinity Grammar. He is part of the leadership team, so he participates in a lot of meetings. His sitting limitations impact him during those meetings. He is embarrassed if he needs to get up and stretch during those meetings.

67 He now has a sit stand desk at work to relieve the pressure of sitting. He has tried using a wedge cushion, as well as different chairs, but nothing seems to alleviate his pain.<sup>61</sup>

68 He has continued to coach cycling. There is an expectation that all teachers engage in one sporting activity and thus he has continued with cycling.<sup>62</sup> While he agreed in cross-examination that he could seek to change to another sporting activity, he said he would not enjoy it as much.<sup>63</sup>

69 His work as a cycling coach involves him cycling for about 20 kilometres, two times a week during the summer season, that being last term of the year, Term Four, and then the first term of the next year, Term One.

70 He experiences an increase in pain when coaching cycling as a result of sitting on his bike, consistent with his challenges with recreational cycling. His evidence at the hearing was that there had been two occasions when cycling on the roads with his students where he had “close calls with traffic”.<sup>64</sup> On one of those occasions, he was unable to stand when a car ran a red light, nearly hitting him and one of his students.

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<sup>61</sup> Exhibit P1, PCB 18 at paragraph [5]

<sup>62</sup> T14, L28-30; T15, L12-14

<sup>63</sup> T15, L7-9

<sup>64</sup> T15, L27



## **Travel**

71 While he has continued to travel, his evidence was that it is painful to travel long distances. He travelled back to the UK twice in 2022 because his father was unwell. He did a lot of walking to stretch out on the plane. He said that he paid for it for days after he landed.<sup>65</sup> He takes Prodeine whenever he goes on a flight.

72 As part of his job, he is required to do short courses. He is also required to travel on a plane from time to time. He finds these things difficult due to his pain and his sitting restrictions or sit properly from a postural perspective. He has to prepare for things like meetings, flights and driving by taking pain medication. He now shares driving with his wife and son with any long distance driving, such as on a family road trip.<sup>66</sup>

## **Activities of daily living**

73 He experiences minor difficulties with running and going up and down stairs.<sup>67</sup>

74 While Mr Ryder experiences some pain, he is independent in all activities of daily living.<sup>68</sup> However, there is a modest reduction in energy and endurance to complete the activities of daily living.<sup>69</sup>

## **Sleep**

75 His sleep is impacted. He sleeps on his right side now. The scar is sore to touch.<sup>70</sup>

## **Mood**

76 He finds himself getting irritable and snappy with his wife when she asks about his pain. This impacts on their relationship and their time together. His relationship with his children has been affected because of his pain and irritability. They do not go out as much as they used to, like going out to restaurants.<sup>71</sup> Even if they do go

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<sup>65</sup> Exhibit P1, PCB 15 at paragraph [30]

<sup>66</sup> Exhibit P1, PCB 18 at paragraph [6]

<sup>67</sup> Exhibit P10, PCB 78

<sup>68</sup> Exhibit P10, PCB 78

<sup>69</sup> Exhibit P8, PCB 69

<sup>70</sup> Exhibit P1, PCB 15 at paragraph [31]

<sup>71</sup> Exhibit P3, PCB 27 at paragraph [6]

out, it is not as enjoyable or as relaxing as it used to be and he is reluctant to go. He is not as motivated as he used to be.<sup>72</sup>

77 He avoids stimuli associated with the transport accident, such as busy roads.<sup>73</sup>

78 His intimacy with his wife is affected.<sup>74</sup>

79 These restrictions were supported by the affidavits of his wife and his daughter.

## Findings

80 I find Mr Ryder has the following pain and suffering consequences:

- (a) He has constant pain in his glute and hamstring; and intermittent pain in right hip and low back.
- (b) He has had two lots of surgery. He takes Gabapentin, 2 tablets twice a day, to relieve his pain. He takes Prodeine as required, especially when he needs to sit for prolonged periods such as during lengthy meetings, concerts, or on a flight. He takes Voltaren tablets regularly, and uses Voltaren gel every time he does something physical, like a bike ride or other exercise. He has massage and myotherapy about once a month.
- (c) The platelet rich plasma injections only provided him with short term pain relief, but not long term pain relief.
- (d) There is no further medical treatment available to him that will assist his pain and symptoms.
- (e) He struggles to sit for longer than 30 minutes. If he sits on a hard chair, the pain increases much earlier than 30 minutes and he has to stand up and move around. He experiences a sharp, knife like pain in his glutes after sitting for too long. He suffers from immediate pain when sitting on his bike.

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<sup>72</sup> Exhibit P1, PCB 19 at paragraph [15]

<sup>73</sup> Exhibit P8, PCB 67

<sup>74</sup> Exhibit P1, PCB 19 at paragraph [15]; Exhibit P2, PCB 23 at paragraph [10]

- (f) His ability to enjoy Melbourne Symphony Orchestra concerts with his wife has been impacted by his sitting tolerance. He takes pain relieving medication before he attends.
- (g) He was a high performing individual in all aspects of his life prior to his injury.
- (h) His ability to ride a bike has been reduced because of his reduced sitting tolerance and pain. Prior to the accident, he cycled an average of 200 kilometres a week. He now rides 100 kilometres in the summer months, and 60 kilometres in the winter months, the difference representing the additional cycling he does with his students in the summer months.
- (i) The impact of the injury and his pain has effectively ended his ambition of being able to compete in the Peaks Challenge, the Amy Gran Fondo and the UCI World Series. These were realistic ambitions based on his prior athletic performance.
- (j) He has continued to run and swim but has a reduced capacity for these activities than he did pre-injury.
- (k) He competed in the Noosa Triathlon in 2022 and 2023. He requires greater preparation for these triathlons than he used to. It takes him longer to recover from these events than it used to. He undertakes the riding part of these triathlons in pain due to his reduced sitting tolerance. His performance at the triathlons has been affected.
- (l) His ability to study in his masters was impacted by his reduced sitting tolerance and his pain, and the impact these had on his ability to concentrate.
- (m) He has adjusted the way he undertakes the necessary tasks in his employment to allow him to continue with his role, such as alternating sitting and standing in meetings and the use of a sit/stand desk. He finds it embarrassing and awkward sitting and standing in meetings.

- (n) When travelling on a plane, he takes medication and alternates between sitting and standing to manage his pain.
- (o) He shares the driving with his wife and son on long distance drives such as road trips. If he is going on a drive longer than an hour, he takes pain medication.
- (p) His sleep is disturbed if he rolls onto his right side. He wakes up in pain.
- (q) He has become irritable and snappy with his wife and family because of his pain. His relationship with his wife and children has been adversely impacted. The pain and its impact on his mood has reduced his interest and motivation to go to concerts, restaurants and the movies with his family.
- (r) His intimacy with his wife has been affected.
- (s) His sense of identity as a performance athlete has been taken away from him as a result of the limitations imposed on him by the injury.

## Analysis

- 81 The most significant consequence for Mr Ryder is his inability to sit without pain.
- 82 While this permeates all aspects of his life, he can engage in all activities that he was undertaking prior to his injury.<sup>75</sup> He can work, study, exercise, go to concerts, travel and participate in life with his friends and family because of a combination of his determination and the adjustments he has made to how he undertakes these activities. He alternates between sitting and standing, takes medication, has regular massages and undertakes his own exercises at home. He is able to undertake all activities of daily living, albeit with pain and less enthusiasm and endurance than previously.<sup>76</sup>

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<sup>75</sup> In considering what has been lost, I am also required to consider what has been retained: *Dwyer v Calco Timbers Pty Ltd (No.2)* [2008] VSCA 260, [27]

<sup>76</sup> Exhibit P8, PCB 69

- 83 Mr Ryder has a limited capacity to enjoy the activities he engages in due to pain that he feels, but he still engages with the activities as they are part of his identity.
- 84 However, he has lost the ability to compete at the highest level of endurance cycling that he loved, and aspired to continue to do, prior to his injury.
- 85 He not only loved this activity: it was central to his identity of himself as a performance athlete.
- 86 I have considered the submission of the defendant regarding placing reliance on Mr Ryder's characterisation of himself as no longer being a performance athlete. I have found that as I am obliged to take the impact of the injury on Mr Ryder into account, I must consider this when assessing whether he meets the threshold.
- 87 At the time of the injury, he was training with other competitors for the Peaks Challenge. It was his tenth consecutive day of training. He had undertaken the challenge in 2017 and 2018 at the 'complete' level but was aiming to complete it at the 'advanced' level.<sup>77</sup> This would have required him to finish the challenge in less than 10 hours.
- 88 The Peaks Challenge is a 235 kilometre bike ride, starting and ending at Falls Creek. Mr Ryder said that it was known to be Australia's toughest event due to its 4500m elevation gain. To complete the race is no small effort: to do so under 10 hours requires a very high level of athletic performance. It also requires a commitment to training, a plan for performance and perhaps most importantly, a determined mindset.
- 89 Mr Ryder demonstrated that he had all these qualities prior to sustaining his injury.
- 90 As a result of the injury and his impairment, he was unable to compete in the Peaks Challenge in 2022, and is unlikely to ever be able to compete in this challenge

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<sup>77</sup> Exhibit P8, PCB 62

again. He thus will not ever know whether he could have completed the Peaks Challenge under 10 hours.

91 He was also planning on entering the Amy's Gran Forno and, subject to how he went in that race, to qualify for the UCI World Series.

92 While he believes that he could still ride the 120 kilometre distance of Amy's Gran Forno with regular breaks and while in pain, he believes it would be right at the limit of his capacity. However, the point of entering this race for Mr Ryder was to see what his qualification time was, and to compete against others in his age group. In the absence of being able to compete, the race has lost its appeal.

93 While there was no evidence led at the hearing about the UCI World Series, this is known to be an international cycling event undertaken by cyclists who perform at the very highest athletic level. Mr Ryder held an aspiration to try and qualify for the UCI World Series prior to his injury. This was not a fanciful aspiration. As a result of the injury, he can no longer aspire to compete in this international event. I find this is a significant impairment consequence for this man.

94 Mr Ryder returned to competing in the Noosa Triathlon in 2022 and 2023. This involved a 1500 metre swim, a 40 kilometre bike ride and a 10 kilometre run. He undertook increased training compared with what he previously was required to do to compete in the triathlon in 2022 and 2023. Undertaking triathlons has a much more significant impact on his body now than before. He undertook these triathlons with pain.<sup>78</sup> His wife, Ms Haisman, said that Mr Ryder was euphoric at the time of completing the triathlon, but when he came home he just collapsed.

95 Mr Ryder is of the view that his performance has been affected by his injury. He measures this by his percentile ranking.

96 Counsel for the defendant submitted that on the objective evidence regarding Mr Ryder's time, there was only a marginal difference between his performance in

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<sup>78</sup> T26, L21-22

2019 as compared with 2022 and 2023, and no difference between his time when compared with 2016. Counsel for the plaintiff submitted that the objective material showed there was a deterioration in his ranking.

97 Mr Ryder's evidence was that his performance had reduced from the top 10 per cent of participants to the top 26 per cent of participants.<sup>79</sup> His evidence about this was not disputed and no issue was taken with his credit or reliability. This is objective evidence. While this measure of reduced performance would not concern some plaintiffs, it is a source of great frustration for Mr Ryder. He described this difference as an "appreciable difference".<sup>80</sup>

98 As was conceded by counsel for the defendant, Mr Ryder was, and still is, a very high achieving individual. He has very high standards for himself. In that context, the reduction in his athletic and academic performance was not at the margins. For Mr Ryder, it was material.

99 Mr Ryder takes medication as required, undertakes massage and myotherapy once a month and home exercises to relieve his symptoms. There is no further treatment that has been recommended for him. This is on the background of having surgery to insert metalware to address the pelvic fracture and further surgery to remove the metalware to relieve his symptoms. This requirement so many years after the incident speaks to the ongoing serious nature of his injury.

100 Mr Ryder is clearly a very stoic individual. This was apparent from his evidence, and the unchallenged evidence of Ms Haisman and Ms Ryder.

101 As was said in *Jarvie*:<sup>81</sup>

"While it is correct to point out the applicant has not engaged in an extensive amount of medical treatment, and correct as well to note the relatively modest amounts of medication used by the applicant, it is also to be remembered that the unchallenged evidence of the applicant's partner is that the applicant 'is a very stoic individual', who 'tries to cover it [the effects of his back condition] and get on with things'. That evidence was

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<sup>79</sup> Exhibit P1, PCB 19 at paragraph [12]; T22, L18-27

<sup>80</sup> T24, L19-20

<sup>81</sup> *Jarvie* at paragraphs [68]-[69]

unchallenged at trial. In the context of all of the evidence tendered before the judge, it more than explains any perceived modesty in the applicant's levels of treatment or medication.

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.<sup>82</sup> 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.”

102 I am also conscious of Mr Ryder's age. He was 45 at the time of the accident, and is 47 years old now. He had an ambition to improve his athletic performance and engage in more endurance activities that would continue to test the limits of his physical capacity. He will also need to adjust the way he lives his life each day for the rest of his life because of the pain caused by sitting. The pain and the activity will permeate all that he does for the balance of his life. Given his relatively young age, this makes the consequence of this impairment more pronounced than it might be for someone who may have to put up with it for a shorter period of time.<sup>83</sup>

103 The test I am required to apply is subjective, in that it is the effect on the individual plaintiff that I must consider. While my determination must be made objectively, I am required to consider the subjective impact on Mr Ryder. For a relatively young, high achieving individual like Mr Ryder, I find that, when judged in comparison to other cases in the range of possible impairments, the consequences of the impairment are fairly described as being at least very considerable, and more than significant or marked.

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<sup>82</sup> *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260, [3]; *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1, 5 [13]; *Transport Accident Commission v Kamel* [2011] VSCA 110, [67]; *Philippiadis v Transport Accident Commission* [2016] VSCA 1, [28]

<sup>83</sup> *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181, [43]



## **Conclusion**

104 I therefore grant leave for Mr Ryder to proceed with his claim for damages.

105 I will hear from the parties on the consequent orders and the question of costs.