

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2016 0033

SALVATORE PRINCIPE

Applicant

v

TRANSPORT ACCIDENT COMMISSION

Respondent

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JUDGES: HANSEN and BEACH JJA and CAVANOUGH AJA  
WHERE HELD: MELBOURNE  
DATE OF HEARING: 23 August 2016  
DATE OF JUDGMENT: 26 August 2016  
MEDIUM NEUTRAL CITATION: [2016] VSCA 205  
JUDGMENT APPEALED FROM:: *Principe v Transport Accident Commission* (Unreported, County Court of Victoria, Judge Macnamara, 2 March 2016)

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ACCIDENT COMPENSATION - Transport accident - Low back injury - Causation - Whether transport accident was a cause of low back injury - Application conducted on basis that if causation established, then applicant's low back condition constituted serious injury within meaning of s 93 of *Transport Accident Act 1986* - Judge concluded that causation not established - Failure to deal appropriately with lay evidence and evidence of medical witnesses whose opinions favoured applicant's claim - Causation established - Application for leave to appeal granted - Appeal allowed - Applicant granted leave to commence proceeding - *Transport Accident Act 1986, s 93.*

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Mr D F Hore-Lacey SC with Mr C E Hangay	Shine Lawyers
For the Respondent	Mr J Ruskin QC with Mr S D Martin	Solicitor to the Transport Accident Commission

*Introduction*

1 On 22 July 2009, the applicant (Mr Salvatore Principe) was involved in a motor vehicle accident when the parked car he was sitting in was hit from behind by another vehicle. Following the collision, the applicant was taken by ambulance to the Maroondah Hospital.

2 By an originating motion filed in the County Court on 5 June 2014, the applicant sought leave, pursuant to s 93(4)(d) of the *Transport Accident Act 1986* ('the Act'), to commence a proceeding at common law claiming damages for the injuries he alleged he sustained as a result of the collision. The application was heard over four days between 17 and 22 February 2016. At the hearing of the application, the applicant relied upon paragraph (a) of the definition of 'serious injury' in s 93(17) of the Act – namely, 'serious long term impairment or loss of a body function'. The body function relied upon by the applicant was the function of the low back.

3 At the hearing, there was no issue between the parties that the applicant was suffering from a low back condition. Further, in final address, the respondent conceded that the applicant's back condition was serious. The issue between the parties then became whether the collision was a cause of this admitted serious injury. Thus, at the time of final address, it was accepted by the respondent that, if causation was made out, then the applicant's back condition constituted a 'serious injury' within the meaning of the Act.

4 On 2 March 2016, the judge dismissed the applicant's application.<sup>1</sup> The applicant seeks leave to appeal. The matter has been dealt with on the basis that, if leave to appeal is granted, the appeal would be treated as having been heard *instanter*. The

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<sup>1</sup> *Principe v Transport Accident Commission* (Unreported, County Court of Victoria, 2 March 2016, Judge Macnamara) ('Reasons').

applicant's proposed grounds of appeal are as follows:

1. The judge erred in finding that the applicant had suffered back pain prior to his motor vehicle accident.
2. The judge erred in concluding that the condition of the applicant's low back was the same before and after the accident (paragraph [130]).
3. The judge erred in ignoring the opinion of eight doctors and further gave no reason for doing so.
4. The judge erred in accepting the submissions of the respondent as to the significance of the affidavits of the lay witnesses.
5. The judge made a number of key findings which were not open, against the weight of the evidence or irrelevant or which he was not qualified to make a judgment on.
6. The judge erred in not accepting the evidence of the applicant and his lay witnesses in circumstances where the credit of those witnesses was not put in issue.
7. The judge failed to consider the evidence of the eight medical witnesses referred to above and gave no reason at all why their opinions were implicitly ignored or rejected.
8. The judge's reasons failed to disclose a clear path of reasoning.

### *The evidence generally*

5 On the hearing of the application in the County Court, the applicant relied upon three affidavits that he swore on 14 April 2014, 20 August 2015 and 14 January 2016 respectively. He also relied upon an affidavit sworn by his daughter (Alexandra Principe) on 7 January 2016; an affidavit sworn by his wife (Janet Principe) on 17 January 2016; an affidavit sworn by a cousin (Sam Cimino) on 18 January 2016; and an affidavit sworn by a former work colleague (Shane Pappon) on 15 February 2016.

6 The parties tendered various documents, including radiology reports, medical reports, letters, claim forms, extracts from medical records and extracts from the applicant's Facebook page. The only witnesses to give *viva voce* evidence on the application were the applicant, his wife and Mr Paul D'Urso. Mr D'Urso is a neurosurgeon who examined the applicant, at the request of the applicant's

solicitors, in September 2013 and January 2016. What follows is drawn from the evidence and material before the County Court, and an agreed summary filed by the parties.

*The applicant's background*

7           The applicant was born in 1967. At the time of the collision, he was 42 years of age. At the time of hearing he had been married for 25 years and had two children, a daughter then aged 21 and a son then aged 14. As we have already noted, the applicant's wife and daughter swore affidavits in support of the applicant's s 134AB(16)(b) application.

8           The applicant left school at the age of 16 and, after a year's employment at a plumbing supplier, joined the MMBW as a trainee maintenance worker. He became a qualified maintenance worker after two years, and was then employed by the MMBW for another eight years, working on water infrastructure. The applicant took a redundancy package from his employer in approximately 1992, and was then employed by Coles Myer for about 12 years in one of their liquor departments.

9           In about April 2004, the applicant started his own business, 'Aqua Water Services'. In this business, the applicant worked as a maintenance worker on water infrastructure. In reality, the applicant operated solely for Thiess Services Pty Ltd. The applicant was engaged in this work for five years between April 2004 and July 2009. It was at times heavy work.

10          The applicant gave evidence that, despite the heavy nature of his work, he 'generally enjoyed reasonably good health'. In late 2008 or early 2009, the applicant began to experience some tingling pain in his left arm. The pain slowly worsened over a few months. In March 2009, the applicant consulted his general practitioner, Dr Phang. Dr Phang thought the pain might be neck-related, and referred the applicant for a CT scan. After the CT scan, the applicant was referred to a neurosurgeon, Mr Myron Rogers. A letter of Mr Rogers dated 19 May 2009, that was tendered before the judge, stated that as at the time of Mr Rogers' examination of the

applicant in May 2009, the applicant had ‘some low back pain without sciatica’. In the letter, Mr Rogers said that he expected that the heavy work the applicant performed had aggravated degenerative changes. However, in evidence before the judge, the applicant denied experiencing any back pain prior to the collision.

### *The collision*

11 The collision occurred in the course of the applicant’s work with Thiess, when the car he was sitting in was hit from behind. The car he was sitting in was a very small ‘Smart Car’. It was stationary and parked on the side of the road with the hazard lights on. The applicant was not wearing his seat belt at the time. He was working on his laptop, preparing a report for Thiess as he had just finished a maintenance job.

12 The applicant gave evidence that he had a ‘Solsta’ tool-box in the boot of the car. The tool-box was less than two feet wide and over a metre in length. It was filled with heavy brass fittings and similar items. It was heavy and required two employees to lift it out of the vehicle. The Maroondah Hospital Emergency Department notes made on 22 July 2009 noted the presence of the tool-box, which was said to have abutted both the front seat and the tailgate without a crumple zone.

13 The applicant gave evidence that there was no bulkhead between the tool-box and the back of the driver’s seat. He gave evidence that the tool-box was not secured, that it did not move around when driving, and also that it took up almost all of the rear compartment.

14 The applicant gave evidence that the collision was a heavy one. According to the Thiess incident report which was completed a few days after the accident and tendered before the judge, there was extensive damage to both cars and both cars were written off. According to the Victorian Ambulance Service notes, the accident was of moderate speed; and the applicant was ‘hit from behind by another car at approximately 50 kilometres per hour’. These notes also recorded that there was a query as to whether the applicant had hit his head on the steering wheel.

### *Events after the collision*

15 The applicant gave evidence that he got himself out of the car. He felt lower back pain almost immediately after the accident but the pain in his neck was worse at that stage. He said he did not complain to the ambulance driver about back pain. He said that he did not complain to the Maroondah Hospital about back pain because he was more concerned about his neck. He said he was generally sore all over at the time. He gave evidence that he did not remember clearly what he told the ambulance officers. He did not remember them arriving at the scene.

16 The applicant returned to work about a week after the accident, but he said it was lighter work as he stopped work in the reactive department and was transferred to a different department which required less physical work. He was able to cope with those duties albeit that he was experiencing pain in his back. The applicant stated that his pain was two to three out of ten when he went back to work until it worsened and he developed sciatica.

17 The applicant said that he completed a WorkCover claim form in 2009, but that it was lost after he gave it to Thiess. He said that Thiess initially refused to submit the claim and did not want to know about it. He said that after the surgery in 2012 he submitted the claim directly to the insurer and went over Thiess' head to lodge the claim.

18 The applicant gave evidence that he was too proud to complain of back pain initially, and could not afford to take the time off work to have it looked at.

19 The applicant said he experienced flank pain a month or two after the accident. After a period of some months, he sought investigation and treatment regarding his flank pain. Initially investigations were directed towards a hernia and his kidneys as possible causes of his flank pain.

20 The applicant gave evidence that he continued to experience neck pain including referred symptoms of tingling and numbness down his left arm for about six months after the accident. He saw a general practitioner on 30 December 2009 and was

referred back to Mr Rogers, whom he saw in February 2010.

21 In February 2010, the applicant also travelled to Las Vegas. He said he coped with great difficulty. He said he spent a lot of time at the back of the plane walking up and down the aisles. He said that, while he was in Las Vegas, all the others who were with him were doing rollercoaster rides and the like, but that he avoided those activities because of his back pain.

22 On 7 April 2010, the applicant attended the Emergency Department of Dandenong Hospital complaining of left sided chest pains. He said he believed that these were related to his flank pain because it started about two months after the accident.

23 On 5 May 2010, the applicant attended his general practitioner complaining of pain in the abdomen. An ultrasound investigation of his abdomen was arranged.

24 The applicant again attended his general practitioner on 12 October 2010 complaining of flank pain the night before.

25 In November 2010, the applicant flew with his daughter to Italy. They spent 17 days in Italy. When cross-examined about this flight, the applicant said that they had stopovers to break up the flight.

26 On 18 July 2011, the applicant attended his general practitioner reporting abdominal pains which had been present for a long time on and off. That doctor's impression was of a hernia and an ultrasound was arranged to investigate. On 22 July 2011 the applicant returned to his general practitioner and the results of the ultrasound were discussed. He was referred to a gastric surgeon, Mr Anthony Clough, for specialist assessment and treatment.

27 The applicant first saw Mr Clough on 22 July 2011. Mr Clough obtained a history of intermittent flank pain for up to a year. A CT scan of the applicant's abdomen and pelvis was ordered. The applicant was reviewed a fortnight later on 5 August 2011 and the results of the CT scan were discussed. The scan was reported to be

normal. According to a letter to the general practitioner, Mr Clough considered the cramping discomfort the applicant had been experiencing was musculoskeletal in nature and may be caused by referred back ache. Mr Clough advised the applicant to take anti-inflammatory medication such as Nurofen.

28 In August/September 2011, the applicant travelled to Batemans Bay. He said he struggled to drive there and back with his pain. He drove himself up there with stops along the way. He was not able to drive back because of his back pain so he left his vehicle up there and returned as a passenger at around the time of the grand final week in September 2011.

29 On 8 December 2011 the applicant attended his general practitioner reporting a three week history of lower back pain with radiation down both legs to the knees with mild numbness. When cross-examined the applicant said that he had experienced the radiation of pain for three weeks, not the back pain which had been long-standing. The attendance of 8 December 2011 is the first record of back pain made by any medical practitioner following the collision.

30 On 22 December 2011, the applicant attended the Emergency Department of Knox Private Hospital, reporting severe low back pain and a history of right sided sciatica for four weeks. He reported that the painkilling medications Panadeine Forte and Endone were not helping. A CT scan was arranged. That CT scan took place later that day and was reported as showing widespread degenerative change, but no cause could be seen to account for the applicant's symptoms. The applicant was discharged to the care of his local doctor.

31 Two days later, the applicant again attended the Knox Private Hospital Emergency Department. He complained of severe pain. On this occasion an MRI scan of the applicant's lumbar spine was performed. That MRI scan showed a large extruded disc fragment from the L1/2 level. Disc desiccation was also noted at L2/3, L3/4 and L4/5. According to a neurosurgeon who saw the applicant at the time, Mr Wang, the scan findings correlated with the applicant's clinical symptoms.



32 On 26 December 2011, the applicant returned to Knox Private Hospital Emergency Department where the results of the MRI were discussed and he was told he would be referred to a neurosurgeon. The following day, 27 December 2011, the applicant went back again to Knox Private Hospital where he was seen and assessed by Mr Wang. It was decided to proceed with surgery in the form of a L1/2 micro-discectomy. The applicant was transferred to St Vincent's Private Hospital to undergo the procedure. On 29 December 2011, the applicant underwent surgery, micro-discectomy and spinal rhizolysis, performed by Mr Wang. According to the operation record, there was an obvious extruded disc prolapse which was removed entirely.

33 In cross-examination, the applicant said that he told both Mr Wang and the surgeon who was in the emergency ward in December 2011 that he had experienced back pain since the motor car accident. The applicant, however, acknowledged that this was not recorded in any of the relevant notes.

34 On 20 January 2012, the applicant completed a Worker's Injury Claim Form in respect of the injury to his back and neck which was said to have occurred in the collision.

35 On 8 February 2012, the applicant was reviewed by Mr Wang post operatively. At that stage he was said to be recovering satisfactorily from the surgery. He had complete resolution of his sciatic pain, but was continuing to experience persistent back pain. The applicant was encouraged to participate in swimming and hydrotherapy. At that time, the applicant was discharged from Mr Wang's care.

36 On 27 February 2012 the applicant was examined by Dr Clive Kenna, physical medicine physician, on behalf of Thiess' WorkCover insurer in response to the WorkCover claim that the applicant had submitted. Dr Kenna considered that the applicant's back and neck injuries were consistent with the history given. On 13 March 2012, the applicant's WorkCover claim was accepted by Thiess' WorkCover insurer, CGU Workers Compensation.

37 On 3 April 2012 the applicant commenced physiotherapy treatment post-surgery.  
He returned to light duties in the office in August 2012.

38 On 1 March 2013, the applicant underwent a follow-up MRI scan. This scan  
showed multilevel disc degeneration, evidence of the previous surgery at the L1/2  
level and a small central disc protrusion without neural compromise. There was a  
disc protrusion at L4/5 that was also identified. The radiologist commented that  
compared with the previous study the appearances at L1/2 had dramatically  
improved. Otherwise there was no appreciable change in the lumbar spine.

39 On 3 June 2013, the applicant was made redundant. He had been working light  
office based duties up until that point of about 20 to 25 hours per week.

40 On 18 June 2013, the applicant attended the Emergency Department of Knox  
Private Hospital complaining of pain in the lower back. He reported he had been  
walking and felt a crack in his lower back and had been unable to stand up straight  
since. On 20 June 2013, an MRI scan was performed. The MRI showed a right  
paracentral disc protrusion at L4/5 with moderate right subarticular recess stenosis  
and mild compression of the descending right L5 nerve root. There was also a  
posterior disc bulge at L3/4 containing a posterior or central annular tear.

41 On 26 June 2013, the applicant was reviewed by Mr Wang. According to  
Mr Wang, the MRI of the applicant's lumbar spine revealed a right focal L4/5 disc  
prolapse that was causing significant pressure on the traversing L5 nerve root. As  
his symptoms were acute, it was considered the applicant should continue with  
conservative measures initially and be reviewed in six weeks whereby consideration  
could be given to an epidural steroid injection or surgery.

42 On 6 August 2013, the applicant was again reviewed by Mr Wang. The applicant  
reported a complete resolution of his sciatic symptoms. He reported that his back  
pain continued, however Mr Wang considered no specific intervention was required.  
The applicant was advised to lose weight to protect his spine in the future. The  
applicant has remained incapacitated since that time.

*The lay evidence called by the applicant*

43 As we have already said, the applicant relied upon affidavits sworn by his wife, his daughter, a cousin and a former work colleague. Of these witnesses, only the applicant's wife gave *viva voce* evidence and was cross-examined.

44 The applicant's wife swore that she recalled the applicant commencing to complain of soreness in his back and flank area not long after the collision. She could not recall the exact date when these complaints commenced, but believed they commenced about one to two months after the accident. The applicant's wife described the applicant holding and rubbing his back, and making groaning noises and holding on to furniture or needing to sit or lie down. Additionally, the applicant's wife described the applicant being unable to participate fully in Auskick after the accident, and that the applicant told her that this was because of pain he was experiencing in his back and flank area.

45 The applicant's daughter deposed to her observations of the applicant's pain following the collision. She said:

My dad rarely complained to me about his injuries, but I could notice a difference in his posture after the accident and he would struggle to walk and bend down. When he bent down he would often hold his lower back in pain and you could see it in his face when he was in pain or something wasn't right. I noticed this happening more often as time went on. I understand in 2011 his complaints worsened. He was in so much pain and he could not stand, sit or walk. I recall dad having back surgery in December 2011.

46 In respect of the flight to Italy in November 2010, to which we have already referred, the applicant's daughter said:

Dad was really struggling during and after the plane flight. He was sore sitting in the seat and he got up and walked around a lot. He didn't sleep for long on the flight which he told me was due to discomfort with his back. When we arrived to our family in Italy they wanted to take my dad to the local chemist and get an injection to put in his spine or back to relieve the pain but dad declined as he did not trust the chemist or type of medication that it was.

47 The applicant's cousin (Sam Cimino) deposed to having been a volunteer at Auskick with the applicant in 2009. Mr Cimino's evidence was:

In 2009 I recall one particular session when [the applicant] was standing back and not volunteering as he would normally do. I recall that I asked him why he was not participating. He replied that he could not. He explained that he was in pain. He told me that he has been involved in a car accident. After the session we had coffee and he told me a bit more about what happened. It is difficult for me to now recall the precise details of the conversation, but I recall that he told me he was very sore and that he had suffered some sort of whiplash injury as a result of the accident.

In early 2010 I recall a conversation I had with [the applicant] when we were due to begin the Auskick season for that year. The Auskick season starts in March. I recall [the applicant] telling me that he would not be coming back to volunteer at Auskick that year. He explained that he was sore in his back.

48 The remaining affidavit tendered by the applicant was the affidavit of the applicant's former work colleague, Shane Pappon. Mr Pappon swore that prior to the accident in July 2009, he did not observe the applicant to have any physical restrictions or difficulties doing his job. As to the position after the collision, Mr Pappon deposed:

[The applicant] and I worked together after his accident. I did not observe [the applicant] to dig any holes after his accident. The work that we did after [the applicant's] accident was lighter work. ... The hardest part was opening and shutting valves and that did not happen often. We also worked well together and would help each other out if one bloke was struggling with any part of the job.

After his accident, I would see [the applicant] probably about once per month. I obviously knew about his accident and would ask him how he was going. His response was always the same. He would say 'my back's fucked'.

I can't be exact about [the] dates and times that these discussions took place. However, I am very clear that [the applicant] was unrestricted in his job before his accident and didn't complain to me about any back pain. After his accident, he was restricted in his job and often complained to me about his back pain.

### *The medico-legal opinions*

49 Relevant medico-legal opinions were tendered from nine medical specialists who had examined the applicant on various occasions after the collision between 27 February 2012 and 28 January 2016.<sup>2</sup> Four of the specialists had examined the

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<sup>2</sup> A report from a tenth specialist, Associate Professor Peter Doherty, a psychiatrist, who examined the applicant on 2 June 2015, was also tendered. However, this report did not contain a relevant opinion on the issues in dispute before the judge.

applicant at the request of the applicant's solicitors; another four, at the request of the WorkCover agent or its solicitors; and the remaining one at the request of the respondent. In summary, the four specialists retained on behalf of the applicant accepted that the collision was a cause of the plaintiff's back condition; at least three (if not all four) of the specialists retained on behalf of WorkCover accepted that the collision was a cause of the applicant's back condition; and only the specialist retained by the respondent (Mr Dooley) expressed the contrary opinion that the applicant's back condition was not causally related to the collision. It was Mr Dooley's opinion that the judge chose to accept.

50 Mr D'Urso, a neurosurgeon, examined the applicant, at the applicant's solicitors' request on 24 September 2013 and again on 2 February 2016. Following his first examination, Mr D'Urso recorded the applicant's history as follows:

On 22 July 2009 [the applicant] stated that he was in a stationary vehicle. It was a small smart car. In the back of the vehicle was a large tool-box. [The applicant] was working in his duties as a maintenance worker and while sitting in the vehicle a second vehicle struck him from behind and the large tool-box wedged his seat into the dashboard. [The applicant] stated that he was taken to the Maroondah Hospital by ambulance complaining of neck pain and soreness all over. He had lacerations to his scalp. [The applicant] was discharged on the same day. [The applicant] took one week off work and then returned to his duties as a maintenance worker ... . [The applicant] stated that when returning to work he noticed persistent neck pain and increasing back pain and then right sciatic symptoms. [The applicant] reported that the back and right leg pain became progressively worse such that he ceased employment on 28 December 2011 and proceeded to surgery on 29 December 2011.

51 As to causation, Mr D'Urso expressed the opinion:

It would appear that the motor vehicle accident precipitated symptoms and was at least an aggravating and possibly contributing factor to the multi-level disc degeneration and prolapse which has now been identified. I would consider the motor vehicle accident to be a materially contributing factor to the development of [the applicant's] lumbar condition and his subsequent incapacity.

52 Following his second examination of the applicant, Mr D'Urso expressed the opinion:

It would appear that a motor vehicle [accident] sustained on 22 July 2009 precipitated the onset of symptoms that [the applicant] continues to suffer

from. [The applicant] stated that after the accident he developed progressive worsening of back and right leg pain, which culminated in a lumbar discectomy procedure. There would appear to be a relationship between the onset of symptoms and the motor vehicle accident in which [the applicant] was involved.

It is likely that a degree of degenerative changes were present prior to the motor vehicle accident. The motor vehicle accident appears to have created a significant trauma to the spine and can well have also injured the L4-5 motion segment allowing subsequent degenerative change and prolapse to occur.

53 In cross-examination, Mr D'Urso accepted that if there had been no complaint of abdominal and flank pain until October 2010 then it would be very difficult to link the condition causing that pain to the collision more than 12 months earlier. Mr D'Urso also accepted that the event described by the applicant as a severe episode of pain in December 2011 could have been the time that the applicant suffered a disc prolapse. Additionally, Mr D'Urso accepted that if the applicant suffered a disc prolapse in 2011 then this would make the relationship between the applicant's back condition and the collision 'more tenuous'.

54 In re-examination, Mr D'Urso said that the cause of the applicant's back condition was 'likely to be multi-factorial'. Mr D'Urso said:

There's the constitutional factors and susceptibility that people have on a genetic basis. There's the nature of their daily activities, whether they do heavy physical work or not, and then the third aspect tends to be trauma, whether there's been a traumatic incident which might have caused an injury.

55 Mr John O'Brien, an orthopaedic surgeon, examined the applicant, at the applicant's solicitors' request on 16 October 2013. Mr O'Brien recorded a history of the applicant attending the Maroondah Hospital after the collision, and then continuing to experience 'quite a significant neck pain, which [the applicant] stated was associated with some pain radiating into the left arm and also ... continuing generalised pain in the thoracic and lumbar region'. As to causation, Mr O'Brien said:

[The applicant] ... describe[s] a rear-end motor vehicle accident in July 2009, precipitating neck pain, in addition to generalised low back discomfort. He reports the neck pain to have resolved, but describes continuing lumbar spine problems until an acute exacerbation of pain occurred in November 2011. Investigation has defined a very large right-sided L1/2 disc herniation, which

responded reasonably to surgery, although [the applicant] reported persistent low back pain, for which there have now been several exacerbations of pain.

...

I would consider [the applicant's] ongoing pain relates to discogenic pain, but without nerve root involvement which would correlate with the investigation findings.

I would therefore conclude that [the applicant] now has a chronic discogenic low back pain. The history would indicate that the problem emanates from the July 2009 incident, and indeed is a continuing problem.

56 Mr Thomas Kossmann, an orthopaedic and trauma surgeon, examined the applicant, at the applicant's solicitors' request on 7 October 2014 and 7 January 2016. Following his first examination, Mr Kossmann recorded the applicant's history as follows:

In the course of his employment, [the applicant] was injured. He told me that he was sitting in a parked car owned by the company. The car was small and in the back was a large and very heavy tool-box, which apparently took up the entire rear compartment. [The applicant] was sitting in the driver's seat of his car when he was hit from behind by another car at high speed. He told me that he was shaken about and suffered from pain throughout his entire body, involving both his cervical and lumbar spine.

57 As to causation, following his first examination, Mr Kossmann said:

On the balance of probabilities, I believe that [the applicant's] accident from 22 July 2009 was a contributing factor to his lower back injury and his present condition.

58 Following his second examination, Mr Kossmann said:

[The applicant] suffers from disc desiccation at the L2/3, L3/4 and L4/5 levels, and an acute disc prolapse at the L1/2 level. As a result of [a] motor vehicle accident on 22 July 2009 he has suffered an acute disc prolapse at the L1/2 level and aggravation, acceleration [and] exacerbation of the degenerative changes in his lumbar spine. The accident was the initial trigger of the subsequent flare ups, which now occur on a regular monthly basis. Therefore, I believe that the motor vehicle accident from 22 July 2009 is responsible for the regular occurrence of flare ups and most likely [the applicant] will continue to suffer from such flare ups in future.

59 Professor Richard Bittar, a consultant neurosurgeon, examined the applicant, at the applicant's solicitors' request on 15 December 2014 and 22 December 2015. Following his first examination, Professor Bittar recorded the applicant's history as

follows:

His work was of a heavy physical nature, and included jack hammering, digging with a shovel and crowbar, cutting pipes with a power saw, repetitive bending and heavy lifting.

He was injured in a motor vehicle accident whilst at work on July 22, 2009. He had just returned to his parked vehicle, and sat down in the driver's seat. He had not yet applied his seat belt when he was struck from behind by another vehicle travelling at unknown speed. The impact was severe enough to 'write off' both vehicles. A large heavy tool-box which occupied the entire rear compartment of his vehicle was thrown forward, striking the back of the driver's seat with considerable force. He complained of pain in a number of regions, particularly his neck, and was taken by ambulance to Maroondah Hospital. He remained there for several hours before discharging himself. He saw his general practitioner the following day and it was noted that he had cuts and bruises on his head as well as tenderness at the base of his skull and neck.

He experienced ongoing neck pain associated with left arm pain and numbness ... . He also experienced lower back pain as part of more generalised 'soreness', however in the initial period after the accident his neck pain was the predominant symptom.

His neck pain progressively settled ... .

He continued to work normal duties, and his lower back pain began to deteriorate in 2011. He presented to the emergency department at Knox Private Hospital in December 2011 and came under the care of neurosurgeon, Dr Ian Wang. He was transferred to St Vincent's Private Hospital in late December and underwent an L1/2 micro-discectomy on December 29, 2011. His surgery was uncomplicated and he was discharged home.

He reported a significant improvement in his lower back pain and leg pain following surgery, and was treated with post-operative physiotherapy. He returned to work part-time on modified duties in around August 2012 and progressively increased his hours ... .

He experienced an exacerbation of lower back pain in late 2012 and early 2013. ...



He has had several exacerbations of back pain since then which have resulted in presentations to his general practitioner for treatment.

60 As to causation, Professor Bittar said:

In my opinion, the injury which occurred at work on July 22, 2009 has most likely been a significant contributing factor to the L1/2 disc prolapse and his aggravation of lumbar spondylosis. He experienced lower back pain following that accident and this has persisted. Initially his neck pain was more severe and was a distracting injury. As his neck pain and other pain settled, his back pain became the primary problem. He was originally investigated for an abdominal cause for his lower back pain, which in retrospect was related to the L1/2 disc prolapse, at least to a substantial degree. This surgery resulted in an improvement in pain radiating from his right flank to his right groin, however he has continued to experience significant lower back pain which radiates intermittently into his legs.

The evolution of his symptoms following the accident, together with the absence of a significant pre-accident history of lower back problems, as well as the favourable response of his right-sided pain to surgery, lead me to the conclusion that the accident was most likely a significant contributing factor.

In my opinion, the accident in July 2009 remains a significant contributing factor to his ongoing pain, disability and requirement for treatment.

61 Following his second examination of the applicant, Professor Bittar expressed the same opinion about the causal relationship between the collision and the applicant's back condition.

62 Dr Clive Kenna, a physical medicine physician, examined the applicant, at the request of the WorkCover insurer, CGU Workers Compensation, on 27 February 2012, 25 June 2012 and 29 October 2012. Following his first examination, Dr Kenna recorded the applicant's history as follows:

[The applicant] was using [a smart car], which essentially had no rear back, when the car was rear-ended. There was a tool-box in the back of the car and that rammed through and hit his spine in the mid-lumbar region.

[The applicant] stated that following the accident in which he was rear-ended, he was off work for a week. He returned to work and at that stage, both his neck and back were sore. In fact his back did not feel too bad initially but his neck, to his surprise, resolved over the next few weeks and his back resulted in increasing levels of pain. He kept working following the incident in July 2009, after the initial week off but he realised he did not feel right.

Over the next 18 months, he essentially continued working until an MRI, taken in December 2011, indicated a large central and very large right

paracentral foraminal disc extrusion at the L1/L2 level, compressing the right L1 nerve root.

63 As to causation, Dr Kenna said:

The injury, as a result of the motor vehicle accident, appears to be a central disc protrusion at the L1/L2 level with an extrusion resulting in compression of the right L1 nerve root presenting with back and associated distal symptoms, right side leg more dominant.

This opinion did not alter following Dr Kenna's subsequent examinations. After Dr Kenna's final examination, Dr Kenna said:

I have no doubt [the applicant's] current symptoms do relate to the initial injury which required an operative procedure. The chronicity of it and lack of fitness are not helping his medical presentation.

...

[T]here is no doubt that [the applicant] has incurred a permanent, partial disability pertaining to the injury in July 2009 and that needs to be respected.

64 Mr Ian Jones, an orthopaedic surgeon, examined the applicant, at CGU's solicitors' request on 23 July 2014. Mr Jones recorded a history of the rear-end collision. The history recorded by Mr Jones included the following:

A large metal tool-box in the boot of [the applicant's] smart car reportedly ended up at the back of his seat. Both cars were written off as a result of the impact.

[The applicant] was able to get out of the vehicle. He was taken by ambulance to the Maroondah Hospital complaining of neck, head and facial lacerations with complaints of general soreness. Some X-rays of his head and neck were apparently undertaken and he was diagnosed as suffering 'minor whiplash'.

In February of 2010 [the applicant] saw Mr Myron Rogers again complaining of neck and left arm pain. ...

Approximately a month later [the applicant] stated that [he] was generally sore but particularly in the lower back. [He denied any previous history of back injury.] He put up with his back complaint and continued to work although the back pain gradually deteriorated. His neck and left arm condition apparently settled spontaneously and he has had no further problems since 2010.

[The applicant] was reportedly referred to a kidney specialist in Box Hill in April of 2011. His complaints of upper back pain at the time apparently suggested to his doctors that he may have had a kidney problem but investigations excluded this problem. Eventually he presented at the emergency department at the Knox Hospital in December of 2011 stating that he was unable to walk or drive due to the severity of his back pain.

65 As to causation, Mr Jones said:

In the lumbar spine [the applicant] has suffered a L1/2 disc prolapse following a motor vehicle accident on 22.07.2009.

...

The L1/2 disc injury appears to be related to the accident of 22.07.2009. His more recent episode of back pain appears to be spontaneous in nature and probably related to some constitutional degenerative disc disease at the L4/5 level of his lumbar spine. The latter has ruptured spontaneously and is consistent with simply walking through the kitchen on 20.06.2013. I can find no evidence that his work has been responsible for the more recent disc protrusion or any other injury suffered in the past.

66 Dr Taubman, a consultant physician in general medicine, examined the applicant, at CGU's request on 7 March 2013. Dr Taubman recorded the applicant's history as follows:

In July 2009 [the applicant] was seated in a small smart car ... . He was in the car which was stationary at the time with the lights switched on at approximately 8:00 pm at night. His car was rear-ended by a second vehicle and the police and ambulance were called but [the applicant] is unable to recall their arrival. He was taken to hospital by ambulance and suffered back and neck injuries as well as lacerations. Both cars were written off in the accident.

Initially the majority of the pain was situated over the posterior cervical region. He was taken to Maroondah Hospital and scans were performed. He was kept under observation for several hours. The scans showed no evidence of major pathology and he was discharged home where he rested over the next week.

A heavy tool-box that had been in the rear of the vehicle ended up in the back seat. The tool-box was heavy and normally two people were required to lift it.

Approximately one year after the accident he noted the development of diffuse lumbar and bilateral loin pain. The pain was described as 'aching' in character and also involved both lower limbs.

67 Dr Taubman expressed the conclusion:

[The applicant] is 45 years of age and previously worked repairing water mains. He was involved in a motor car accident in 2009 and suffered posterior cervical discomfort and later on a disc protrusion at the L1, L2 level.

68 Dr David Elder, a consultant in the specialty of occupational and environmental medicine, examined the applicant, at CGU's request on 7 May 2013. Dr Elder took a

history of the rear-end collision and recorded:

[The applicant] confirmed that he suffered neck pain and low back pain in this injury but the neck pain has resolved and he describes the neck as 'fine now'. The low back pain slowly increased such that in December 2011 he was having difficulty mobilising so he attended his general practitioner. He was sent for relatively urgent neurosurgical review and came to an urgent decompression with micro-discectomy in December 2011.

69 Dr Elder expressed his conclusion in the following terms:

In summary, [the applicant] has mechanical low back pain with no clinical evidence of radiculopathy relevant to the accepted lower back injury, which was surgically treated.

[The applicant] confirmed that he no longer has any neck symptomology so there is no medical condition relevant to the accepted neck injury.

70 Finally, Mr Michael Dooley, an orthopaedic surgeon, examined the applicant, at the request of the respondent on 29 July 2015. Mr Dooley recorded the applicant's history as follows:

[The applicant] said that on July 22, 2009 he was driving a company smart vehicle. He was stationary when the vehicle was struck from behind. ... He said that there was a tool-box in the back of his vehicle that pushed into his back on impact. [The applicant] said that both cars were written off in the accident. He was taken by ambulance to Maroondah Hospital. He said that he was diagnosed with concussion and a whiplash injury to his neck. Prior to the accident he had been aware of neck pain and left upper limb pain. He had been reviewed by a neurosurgeon. He said after the accident his symptoms flared. [The applicant] said that in time his symptoms improved. After this improvement he said he noted general soreness throughout his body. He said that he noted soreness in his lower back when he got out of a car and got out of bed. He said that at times he noted pain in the front of his chest and over the flank region. He said that he was referred to specialists in the abdominal and gastroenterological areas. [The applicant] said that he noted ongoing soreness in his back. He said that one day his pain increased in intensity and he noted pain radiating down his legs. He saw his local doctor and he was advised to attend Knox Private Hospital. He said that he underwent MRI scanning and that he was diagnosed with a disc prolapse of the L1/2 region. He was referred to a neurosurgeon and several days later he underwent discectomy surgery. [The applicant] said that this surgery significantly improved his abdominal and chest pain. Overall prior to surgery he said that he had noted very little lower limb pain.

71 As to causation, Mr Dooley said:

Based on all of the information available, as far as I can tell, [the applicant] began to note some chest and abdominal pain around July 2010, ie one year after the motor vehicle accident. He underwent investigation in this regard. He noted significant pain and low back pain towards the end of 2011. In many of the attached reports, it is stated that [the applicant] described noting low back pain after the motor vehicle accident. In relation to his consultations with his local doctors, there is no record of this. When reviewed by his local doctor in December of 2009, there is no record of [the applicant] complaining of low back pain etc. It is noted that [the applicant] complained of chest and abdominal/flank pain around one year following the motor vehicle accident. In time this pain became associated with low back pain. Ordinary clinical practice shows us that when a patient has sustained an injury in compensable circumstances symptoms, often of a wide and varying degree, are then not unreasonably related to that accident. As medical practitioners, it is then our job to assess whether or not the subsequent symptoms can be reasonably related to injuries sustained in the particular accident. In [the applicant's] scenario, we are being asked whether or not the development of abdominal and flank pain and subsequent low back pain around a year after his motor vehicle accident can be reasonably related to the motor vehicle accident. In this regard, I accept that there will be a range of views. My view is that one cannot reasonably relate the subsequent development of a right-sided L1/2 disc prolapse and symptoms in this regard to the motor vehicle accident of 2009. I accept that [the applicant's] recollection is that after his neck pain reduced in its intensity he was aware of general soreness etc. In my view the reality of the situation is that if the motor vehicle accident caused a lumbar disc prolapse on the right side at the L1/2 level, then significant symptoms would have been noted at the time of the motor vehicle accident or soon after. I accept the mechanism whereby [the applicant] and others are relating subsequent symptoms in this regard to his motor vehicle accident. My view is that one cannot reasonably do so on a scientific basis. It is well recognised that overall disc prolapses develop spontaneously as part of the natural evolution of underlying degenerative disc disease. They may occur in response to acute traumatic episodes or chronic repetitive trauma. If they occur in relation to an acute traumatic episode, then symptoms develop either around the time of that episode or within a week or two after. Similarly in relation to the development of acute low back pain around June of 2013, symptoms developed as a consequence of underlying degenerative changes within the lumbar spine at the L4/5 level. They did not develop as a consequence of the motor vehicle accident either directly or indirectly.

### *The judge's reasons*

72 The judge commenced his reasons for judgment with a description of the applicant's background and the circumstances of the collision.<sup>3</sup> By reference to the applicant's evidence and the reports and records of treating medical practitioners, the judge then described the applicant's post-accident progress and treatment.<sup>4</sup>

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<sup>3</sup> Reasons [1]-[5].

<sup>4</sup> Ibid [6]-[27].

73 Next, the judge described and set out relevant parts of s 93 of the Act, and referred to authorities governing the application of that section, including *Humphries v Poljak*,<sup>5</sup> *Richards v Wylie*,<sup>6</sup> *Petkovski v Galletti*,<sup>7</sup> and *De Agostino v Leatch*.<sup>8</sup>

74 The judge then set out and described in considerable detail the expert medical opinions that had been tendered that were relevant to the question of causation,<sup>9</sup> before turning to the parties' submissions<sup>10</sup> and his determination.<sup>11</sup> Immediately it may be noted that nowhere in the judge's reasons did the judge purport to summarise or describe the evidence of the applicant's wife, the applicant's daughter, the applicant's cousin or the applicant's former work colleague. The only reference to, or description of, this evidence in the judgment (putting aside the second last sentence of the judgment in which the judge said that he accepted the submissions of the respondent as to the significance of the affidavits of the lay witnesses), is contained in two short passages in the judge's summary of the parties' contentions. In summarising the applicant's contentions, the judge recorded the applicant's submission that '[the applicant's] evidence and the evidence of the other lay witnesses, mainly his wife, daughter, work colleague and friend, were all supportive of a finding that the back injury is traceable back to the accident'.<sup>12</sup> The judge summarised the respondent's contentions about the evidence of the lay witnesses as follows:

As to the lay witnesses, they [the respondent's counsel] said that Mrs Principe's evidence in which she purported to recall with some precision the onset of low back or flank pain after the transport accident which she put at a month or two later was difficult to square with her inability to remember the timing of the 'explosion' of back pain for Mr Principe in late 2011.

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<sup>5</sup> [1992] 2 VR 129.

<sup>6</sup> (2000) 1 VR 79.

<sup>7</sup> [1994] 1 VR 436 (*'Petkovski'*).

<sup>8</sup> [2011] VSCA 249 (*'De Agostino'*).

<sup>9</sup> Reasons [37]-[96].

<sup>10</sup> Ibid [99]-[121].

<sup>11</sup> Ibid [122]-[134].

<sup>12</sup> Ibid [102].

The rest of the evidence was imprecise as to the onset of low back pain and did not take matters any further.<sup>13</sup>

75 The judge noted that the respondent ‘specifically disclaimed any allegation that [the applicant] was a malingerer or that he was giving deliberately misleading evidence’.<sup>14</sup> The judge recorded the respondent’s submission that:

They [the respondent’s counsel] said it was simply a situation where, over a long period of time, the circumstances of his compensation claim and desire to bring damages proceedings led him to recall events in retrospect in a manner that was inconsistent with contemporary records.<sup>15</sup>

76 Having set out and described all the material and submissions, to which we have referred, under the heading ‘Determination’ the judge then said:

I accept the [respondent’s] contention that there was no distinct record of the onset of low back pain or flank pain until approximately July 2010. This is consistent with the history taken by Mr Clough and also consistent with what is and is not complained of as recorded in the general practitioner’s clinical notes.

I accept the submissions made by [counsel for the applicant], that clinical notes and medical reports setting out histories are not ‘the be all and end all’ of reality. Practitioners having consultations for treatment or medico-legal assessment are subject to all the usual human fallibilities and are frequently pressed for time. It follows, therefore, that allowance must be made for clinical notes and histories being deficient, either because for whatever reason a patient does not see fit to mention a particular matter which may in no way reflect as to the genuineness of the underlying injury, or the patient mentions it and the practitioner fails to make a complete note. Allowing for these limitations in the process of recording medical histories and clinical notes, nevertheless the pattern here is compelling. The thought that Mr Principe made no mention of back pain to medical practitioners in the 12 months following the accident because of pride, a reluctance to seek help or a desire to avoid time off work is difficult to credit. He had ample attendances upon practitioners during this time, including upon a neurosurgeon for spinal issues (the neck). He showed himself during this period able and willing to avail of medical assistance where it was needed. Granted, as an independent contractor, he would wish to avoid time off without a sick pay entitlement; but this would not have precluded his undergoing a range of conservative treatments.

I accept the contention put by [counsel for the respondent] that the investigations of chest pain at Dandenong Hospital with general practitioner follow-up on 7 and 8 April have nothing to do with flank pain or low back pain. Mr D’Urso quite rightly said that a record of left sided chest pain refers

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<sup>13</sup> Ibid [119]–[120].

<sup>14</sup> Ibid [121].

<sup>15</sup> Ibid.

to chest pain on the left front of the chest, not on its lateral aspect. The suggestion made by Mr Principe that the reference to left-sided chest pain could refer to the area above the flank, therefore, cannot be accepted.

I accept the opinion expressed by Mr D'Urso and also by Mr Kossmann that the 'flank pain' could be seen to be related to the low back injury which eventually flared up in December 2011. Nevertheless, the earliest manifestation of this seems to have been 'up to a year' before Mr Principe consulted Mr Clough in July 2012. This manifestation was therefore 12 months after the accident and too remote therefore to be regarded as causally connected to it.

It will be recalled that in the period August/September 2010, Mr Principe travelled to New South Wales to carry out work on a water reticulation system in the Bateman's Bay area. He was able to drive himself to the location but had to be driven by friends on his return. It is tempting to consider that the 'flank pain' had its genesis in some incident that occurred in the course of work or otherwise during the visit to New South Wales, but it is unnecessary to express any firm view on this point.

I am fortified in the view that there was no significant low back problem following the accident by the consideration that in February 2010, Mr Principe travelled to Las Vegas to celebrate his brother's 40<sup>th</sup> birthday. He flew non-stop from Melbourne to Los Angeles and return in economy class. At the time, he recorded the journey on Facebook, mentioning the number of sectors which he had flown, without recording any complaint as to back problems.

Mr Myron Rogers, who was consulted prior to the July 2009 accident (in May) by Mr Principe, recorded some ongoing back pain. Whilst Mr Principe denied that this was the case, it would seem consistent with the heavy work which he had done in his work with the Thiess organisation and previously with the Melbourne and Metropolitan Board of Works and water infrastructure maintenance. He had also worked for a dozen years in the retail industry which may well have entailed substantial lifting and bending.

Mr Principe denied giving Mr Myron Rogers any history of back pain in May 2009 but there is no reason why Mr Rogers would have made the note if he had not been given that history. It is likely that as a result of the heavy work which he had done over the years, and as conceded by Mr D'Urso, Mr Principe was already suffering degenerative disc disease in the low back which led to relatively low level back pain for which he sought no treatment as at the first half of 2009.

Similarly after the accident, he sought no treatment for back pain until the 'three week history' of its onset recorded by the general practitioner in December 2011. On this view, the condition of his low back was the same before and after the transport accident.

Mr Principe said that both vehicles in the impact were written off. The defendant drew attention to certain matters, principally from the hospital records, which gave a different impression of the severity of the impact.

Ultimately, I accept that this was a relatively severe impact, as testified by the insurance documents which were relied upon by the plaintiff to show that the vehicle which he was driving was written off. It may be accepted that such



an impact has the capacity to inflict low back injury. The more obvious danger is the classic 'whiplash' injury to the neck where hyperextension is followed almost instantaneously by hyperflexion. The structure of the seat in which Mr Principe was sitting would preclude any such violent motion affecting his low back. References in medical histories to the heavy tool box appear only after 2011 surgery. On his evidence, the tool box was tightly fitted into the space behind the seat in the vehicle. Therefore, it would not have been possible for the box to move and gain momentum during the impact. Ultimately, it is difficult to think that the box would have added much to the impact of the other vehicle slamming into the back of the Smart Car. No differential movement of the spine would have occurred unless the tool box either broke the seat or managed to effect a flexion or traumatic bend in the seat. There was no evidence suggesting anything along those lines. These considerations are supportive of the view that no significant low back injury was suffered by Mr Principe in the impact.

I therefore accept the views of Mr Dooley as to the lack of a causal link between the low back injury and the July 2009 transport accident. I also accept the submissions of the defendant as to the significance of the affidavits of the lay witnesses.

Leave is refused.<sup>16</sup>

### *Analysis*

77 Once all of the evidence had been tendered before the judge, there was no dispute that the consequences of the applicant's back condition were serious within the meaning of s 93 of the Act. The dispute before the judge then became whether the applicant had established that the collision was a cause of his back condition. As the evidence disclosed, that question was heavily dependent upon the applicant's symptoms, complaints and histories given following the collision.

78 As has been observed before, in many cases of the present kind, the question of whether a particular accident was a cause of a particular injury often depends upon complaints made by, and observations made of, the injured person over the days, weeks and months following the relevant accident.

79 As a general proposition, it may be observed that relevant injuries often manifest themselves within a very short period of time after a particular traumatic event. Sometimes, however, injuries do not manifest themselves immediately. Moreover,

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<sup>16</sup> Ibid [122]-[134].

on occasions, victims of traumatic events do not initially complain about all of the injuries about which they later make complaint. As has also been observed before, sometimes an initially more painful injury (described as a 'distracting injury') masks, or distracts an injured person from, a second injury about which complaint is not initially made. In the present case, it will be recalled that Professor Bittar referred to the applicant's initial neck pain as 'a distracting injury'.

80 All of that said, in general terms it may be accepted that the greater the period of time between a particular traumatic event and a particular complaint of injury, the less likely the traumatic event might be said to be a cause of the injury.

81 In the present case, there was plainly a delay between the collision and the applicant's complaints of back-related symptoms. There were no complaints made by the applicant to medical practitioners that might have been capable of being described as back-related until at least two years after the collision. Absent any complaints by the applicant to any other people, and absent any assertions by the applicant that he in fact suffered back-related symptoms, at some earlier point in time than his first complaint to a doctor, one might readily conclude that the necessary causal link between the collision and the applicant's back condition was not made out.

82 However, in this case there was a substantial body of evidence (the applicant's evidence, the applicant's wife's evidence, the applicant's daughter's evidence, the applicant's cousin's evidence and the applicant's former work colleague's evidence) to the effect that the applicant had back-related symptoms within a relatively short time after the collision – and well prior to his first relevant complaint to a medical practitioner. Further, while the judge went into considerable detail dealing with the evidence of histories given to medical practitioners, very little (if any) reference was made by the judge to this substantial body of evidence that was tendered, called and given by the applicant.

83 The histories given by the applicant to the various doctors who examined him

following the collision are not entirely uniform. There are differences in degree and emphasis about various aspects of both the collision and the applicant's post-accident symptoms. There is nothing unusual in this state of affairs. It would be surprising if the applicant's histories (both as told by the applicant, and as recorded by medical practitioners) were all identical.<sup>17</sup>

84 Notwithstanding the absence of back-related complaints to medical practitioners in the initial period following the collision (and for more than two years thereafter), all of the medical practitioners, bar one (Mr Dooley who examined the applicant for the respondent), were prepared to accept that, on the history they were given of initial back-related symptoms, the collision was a cause of the applicant's back condition. Having regard to the fact that Mr Dooley's opinion stands on its own, so far as the medical opinions are concerned, it is necessary to look closely at this opinion.

85 In his report, Mr Dooley refers to what is said to be 'ordinary clinical practice' in cases where 'a patient has sustained an injury in compensable circumstances'. Mr Dooley then appears to make the generalisation that, in such cases, symptoms of a wide and varying degree are often related (presumably by the injured person) to the accident that has occurred in compensable circumstances. The underlying basis for this broad generalisation about human behaviour is not specified; nor is the basis, upon which an orthopaedic surgeon might be capable of expressing this so-called 'expert opinion', identified. Mr Dooley's opinion, so far as it is premised upon this generalisation, should have been rejected by the judge. The case before the judge always fell to be determined by an analysis of the admissible evidence called and tendered by the parties, and by reference to the applicant's case alone – not by reference to a generalisation about the behaviour of victims of accidents that occurred in compensable circumstances.

86 In his report, Mr Dooley accepted that there would 'be a range of views' about

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<sup>17</sup> Cf *Woolworths Ltd v Warfe* [2013] VSCA 22 [122] (Kaye AJA, with whom Tate and Whelan JJA agreed).

whether the applicant's back condition can reasonably be related to the collision. He then said that he accepted 'the mechanism' whereby those of a different view from him related the applicant's subsequent symptoms to the collision. It is not easy to then reconcile the next sentence of Mr Dooley's report, which stated that the applicant's symptoms could not reasonably be related to the collision 'on a scientific basis'.

87 The applicant makes complaint that the judge's reasons for judgment do not disclose a clear path of reasoning.<sup>18</sup> To the contrary, we think the judge's path of reasoning is relatively clear. The judge determined the causation issue against the applicant because the applicant did not make a relevant complaint of back-related symptoms to a medical practitioner for more than two years. In our view, the real complaint about the judgment is that it does not sufficiently deal with substantial parts of the applicant's case.

88 If the evidence of the applicant, the applicant's wife, the applicant's daughter, the applicant's cousin and the applicant's former work colleague is accepted then the applicant's case on causation (supported as it was by seven, if not eight, medical practitioners) was strong, if not overwhelming.<sup>19</sup> In such circumstances, it was incumbent upon the judge to analyse in some detail the evidence of the applicant and the evidence of the lay witnesses to which we have referred.

89 The respondent submitted that once the applicant's evidence was not accepted as to the timing and onset of back pain, 'the usefulness of additional lay evidence was to a large extent negated'. In making this submission, the respondent relied upon what this Court said in *De Agostino*.<sup>20</sup> In *De Agostino*, the Court accepted that once significant concessions had been extracted in cross-examination from the plaintiff in that case as to her pre-accident capacity, it was not inappropriate for the trial court to have accorded only a 'minor role' to lay affidavits that purported to corroborate

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<sup>18</sup> Proposed ground 8.

<sup>19</sup> Cf proposed grounds 3, 4, 6 and 7.

<sup>20</sup> *De Agostino* [2011] VSCA 249.

what the plaintiff had previously said to the contrary.<sup>21</sup> That is not this case. The applicant made no concessions of present significance in cross-examination. It had never been in dispute that he had omitted to complain of back pain to medical practitioners during the relevant two year period. In determining what finding to make as to whether or when the applicant had suffered back symptoms during the two year period, the other lay evidence was undiminished in its significance and needed to be taken into account. Two further points can be made in answer to the respondent's reliance upon *De Agostino*. First, the reasoning process the respondent now invites this Court to undertake was not the reasoning process engaged in by the judge. Secondly, *De Agostino* was a different case from the present in another respect. In the present case, the genuineness of such complaints as were made by the applicant to the lay witnesses was not in issue. It was only the timing of those complaints (and thus the time at which the back symptoms first existed) that was the issue. One could not simply say that, in isolation, the applicant's evidence was not to be accepted and therefore the lay evidence was 'negated'.

90       Turning to the reason actually given by the judge, in our view, and contrary to the view adopted by the judge, the lay evidence was not so vague as to dates and times as to be unhelpful. Quite the contrary. In these circumstances, it was inappropriate for the judge to have relied as heavily as he did on the evidence of Mr Dooley and on his own speculation as to what might or might not have been possible so far as the movement of the tool-box in the back of the Smart Car was concerned, or as to whether the structure of the seat (about which there was no real evidence) would have precluded any 'violent motion affecting [the applicant's] low back'.<sup>22</sup> Nor was it open to the judge to put aside so readily the combined force of the evidence of the seven or eight other medical practitioners

91       The respondent submitted that, for the applicant to succeed in this Court, in the absence of specific error, the applicant must persuade us that the decision below was

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<sup>21</sup> *De Agostino* [2011] VSCA 249 [51]. See also at [49]-[50].

<sup>22</sup> Reasons [132], and cf proposed ground 5.

‘plainly wrong’, ‘wholly erroneous’ or ‘patently unsustainable’. Reliance was placed by the applicant on a number of decisions including *Mobilio v Balliotis*<sup>23</sup> and *Cowden v Transport Accident Commission*.<sup>24</sup> The decisions relied upon by the respondent concern appeals to this Court where a party has sought to contest a finding as to whether or not an injury is ‘serious’ within the meaning of the Act or the equivalent provisions in the *Accident Compensation Act 1985*.<sup>25</sup> Those decisions show that it is because the question of seriousness involves elements of ‘fact, degree and value judgment’ that they are difficult to challenge on appeal in the absence of specific error. The same approach may not apply in relation to a question of causation arising in a serious injury application.<sup>26</sup> In any event, in our view, specific error has been established here, in that, as we have said, the judge failed to deal appropriately with the lay evidence and the evidence of the medical witnesses whose opinions favoured the claim.

92 Making due allowance for all of the advantages that the trial judge had in seeing the three witnesses who were called to give evidence at first instance and in conducting the application over four sitting days, and having reviewed all of the evidence, we have respectfully come to the conclusion that the judge erred in accepting Mr Dooley’s opinion, and in not concluding that the applicant had established that the collision was a cause of the back condition that the respondent otherwise accepted constituted a serious injury within the meaning of s 93 of the Act.<sup>27</sup>

93 In our view, there being no suggestion that the applicant’s witnesses were untruthful, the applicant’s case on causation was one that should have been accepted by the judge.

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<sup>23</sup> [1998] 3 VR 833.

<sup>24</sup> [2003] VSCA 198.

<sup>25</sup> Which equivalent provisions are now found in the *Workplace Injury Rehabilitation and Compensation Act 2013*, for workplace injuries sustained on or after 1 July 2014.

<sup>26</sup> Cf *Bedeux v Transport Accident Commission* [2016] VSCA 127 [114] (Kaye JA, with whom Ferguson and McLeish JJA agreed).

<sup>27</sup> Cf proposed grounds 3, 4, 6 and 7.

94 This is not a case that should be remitted for rehearing and determination. While there may have been issues about the reliability of the applicant's evidence, there were no relevant issues of credit. There being no issues of credit, this Court is as well placed as the judge at first instance was to determine the question of causation. In our view, the matters of reliability relied upon by the respondent were not such as to require this proceeding to be remitted for rehearing. Further, we do not think that it would be in the interests of justice to remit this proceeding for another lengthy hearing of what is a preliminary application to determine whether or not the applicant may commence a common law proceeding for damages. The fact that this matter (concerned as it was only about a question of causation) occupied four sitting days is a matter of some concern.<sup>28</sup>

### *Conclusion*

95 We will make orders granting the applicant leave to appeal; allowing the appeal; and setting aside the orders made at first instance. Additionally, in lieu of the orders made at first instance, we will make an order, pursuant to s 93 of the Act, granting leave to the applicant to commence a proceeding for damages in relation to the injuries he alleges he sustained as a result of the transport accident in which he was involved on 22 July 2009.

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<sup>28</sup> Cf *Petkovski* [1994] 1 VR 436, 437 (Brooking J).