

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

Revised  
Not Restricted  
Suitable for Publication

Case No. CI-16-01916

VEENA PRISCILLA MENEZES

Plaintiff

v

TRANSPORT ACCIDENT COMMISSION

Defendant

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JUDGE: HIS HONOUR JUDGE LAURITSEN  
WHERE HELD: Melbourne  
DATE OF HEARING: 23 June 2021  
DATE OF JUDGMENT: 14 October 2021  
CASE MAY BE CITED AS: Menezes v Transport Accident Commission  
MEDIUM NEUTRAL CITATION: [2021] VCC 1511

**REASONS FOR JUDGMENT**

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Subject: TRANSPORT ACCIDENT  
Catchwords: Damages – serious injury – injury to the cervical spine – previous motor vehicle accident – paragraph (a) of the definition of “serious injury” – pain and suffering  
Legislation Cited: *Transport Accident Act 1986, s93(17)*  
Cases Cited: *Petkovski v Galletti* [1994] 1 VR 436; *Humphries and Anor v Poljak* [1992] 2 VR 1; *Rowe v Transport Accident Commission* [2017] VSCA 377; *Parrish v Specialized Australia Pty Ltd (Rulings)* [2020] VSC 15  
Judgment: Pursuant to s93(17) of the *Transport Accident Act*, leave granted to the plaintiff to bring common law proceedings in relation to injury suffered by her in the transport accident on 15 July 2009.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr C Hangay with Ms M Tate	Slater and Gordon Ltd
For the Defendant	Mr W R Middleton with Mr S Pinkstone	Solicitor to the Transport Accident Commission

HIS HONOUR:

### **Introduction**

- 1 Veena Menezes seeks leave to start a proceeding to recover damages for injuries allegedly suffered in a transport accident which occurred on 15 July 2009 (“the transport accident”). Ms Menezes relies upon the definition of “serious injury” contained in paragraph (a) of s93(17) of the *Transport Accident Act 1996* (“the Act”). The body function is that related to the cervical spine. This application is complicated by her suffering an injury to her cervical spine in a motor vehicle accident which occurred in Dubai some four years earlier.
- 2 Ms Menezes does not rely upon paragraph (c) of the definition of “serious injury”. Nor does she rely upon any psychological consequences of her physical injury in support of her claim under paragraph (a).
- 3 There are two main issues in this proceeding:
  - (a) whether Ms Menezes can establish she suffered an injury as a result of the transport accident. If she can establish an injury, what kind of injury. The defendant’s position is twofold. First, she cannot establish an injury. If she can, then the effects of the injury, whether simple or extended, were temporary and did not lead to the need for the fusion in 2016.
  - (b) if she does establish an injury with effects greater than temporary, then the comparison demanded by *Petkovski v Galletti*<sup>1</sup> arises to determine whether she has suffered a “serious injury”.

### **Circumstances**

- 4 Ms Menezes is now fifty-five. She was born in Mumbai, India. She is very well educated, having obtained bachelor and masters’ degrees.

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<sup>1</sup> [1994] 1 VR 436

- 5 She is married with two adult children.
- 6 She left Mumbai in 1993 and went to Dubai, living there until January 2007 when she and her family came to Australia.
- 7 In 2005, while living in Dubai, Ms Menezes suffered an injury to her neck in a motor vehicle accident. She sought treatment. MRI scans were taken of her cervical spine. In his affidavit, the plaintiff's husband, Ambroz Menezes, recalled the effect of this injury upon her:<sup>2</sup>
- “... she attended a chiropractor and physiotherapist from time to time, but her pain symptoms were intermittent and did not impact on her ability to work, complete daily chores or participate in leisure activities that she enjoyed.”
- 8 Despite the husband's evidence, she had about two days off work.
- 9 After coming to Australia, she attended a general practitioner, who referred her to an orthopaedic surgeon, Mr Russell Miller. In August 2007, Mr Miller examined her. With conservative treatment, her symptoms improved.
- 10 At the time of the transport accident, Ms Menezes was receiving treatment from a chiropractor and her general practitioner.
- 11 The symptoms resurfaced while Ms Menezes was involved in the construction of her new home and moving into it.
- 12 In March 2009, Ms Menezes attended a chiropractor, Dr Repka. She saw him for her general aches and pains as she was virtually managing the construction of her new house. Since she had attended a chiropractor in Dubai, she decided to attend one in Australia.
- 13 Overall, Ms Menezes' view of her condition at the time of the accident is:<sup>3</sup>

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<sup>2</sup> Affidavit of Ambroz Menezes sworn 9 April 2019 at paragraph [8]

<sup>3</sup> Affidavit of the plaintiff sworn 9 April 2019 at paragraph [8]

“I do not contend that I made a full recovery from the earlier neck condition. I did have symptoms and I did receive medical treatment. However, before the transport accident, the symptoms were manageable and things had improved.”

### **Transport accident**

- 14 On 15 July 2009, Ms Menezes was driving her motor vehicle, a Nissan X-trail. While stationary in Station Road, Melton West, it was struck forcibly from behind by a taxi. She was wearing a seatbelt. Although propelled forward by the collision, her vehicle did not strike the vehicle ahead. Instead, she was able to drive her vehicle around it. Her son was a passenger but he was uninjured. Her husband came to the scene and drove Ms Menezes away in her vehicle. She suffered injury to her neck and low back.<sup>4</sup>
- 15 There are photographs of her damaged motor vehicle. Two of the photographs show significant damage to the rear passenger side and the bumper bar on that side. In the course of my judicial career, I have heard many claims for property damages arising out of motor vehicle accidents. I have learnt to be wary of photographs as reliable indicators of the extent of an impact. The fact that Ms Menezes drove her motor vehicle away from the scene adds little to the “violence” of the collision.

### **After the accident**

- 16 Following the accident, Ms Menezes was driven to her chiropractor, Dr Adrian Repka, but could not see him until the next day. At some stage, she also saw a physiotherapist.
- 17 She was absent from work for two days. She was reluctant to take more time off work through fear of losing her job and the need to support her young family.

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<sup>4</sup> There are photographs of the damage to her vehicle. I could not find the extent of the impact from them.

- 18 She continued seeing Dr Repka after the transport accident. She changed to the Lerderderg Chiropractic Clinic and then to the Melton Chiropractic Clinic. She continued to attend her general practitioner.
- 19 Ms Menezes saw various practitioners for treatment until, in January 2016, she underwent an anterior cervical discectomy and fusion at the C5-6 level. She had some physiotherapy following this surgery.
- 20 In June 2016, she attended as an outpatient rehabilitation programme at the Epworth Hospital in Richmond. She attended weekly for six or seven weeks.
- 21 She has continued to receive treatment, mainly in the form of physiotherapy.
- 22 In about October 2014, she fell in a Coles supermarket. She hurt her knees, hands and pelvic area.
- 23 In November 2014, she had a further fall in a Bunnings store.
- 24 In October 2018, Ms Menezes was injured at work when stationery fell from a shelf onto her. Because of the psychological impact of that incident, she was off work for about fifteen months.
- 25 In about March 2020, she returned to work as an information management co-ordinator with the Melton City Council.

### **Pre-15 July 2009 treatment**

#### ***2005 MRI scans***

- 26 On or about 31 August 2005, MRI scans were taken of the cervical spine at a hospital in Dubai.<sup>5</sup> Apart from noting disc bulges at C4-5 and C6-7, the radiologists commented on the C5-6 disc:

“... shows posterocentral disc prolapse, significantly indenting the thecal sac and cord. No compression on nerve root noted. The neural foraminae appear normal.”

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<sup>5</sup> Report dated 31 August 2005

### **2007 CT and MRI scans**

27 On 8 February 2007, CT scans were taken.<sup>6</sup> Regarding the C5-6 disc, they showed:

“... There is a small midline disc protrusion at C5/6 although this does not appear to significantly compromise the thecal sac or spinal cord. ... .”

28 On 1 October 2007, MRI scans were taken.<sup>7</sup> Again, of the C5-6 disc, the radiologist said:

“... there is a moderate central disc protrusion measuring 8 x 4 x 2mm. It is seen effacing the theca. The neural exit foraminae appear adequate.”

29 The radiologist added that there was no increased signal within the cord to suggest myelomalacia.

### **Dr Govender**

30 Dr Marcy Govender is Ms Menezes' general practitioner. She practises in the Primary Medical & Dental Centre in Melton. She referred Ms Menezes to Mr Miller. In her letter of referral, Dr Govender mentions neck pain, numbness in both hands with tingling sensations.<sup>8</sup>

31 It appears Ms Menezes first attended Dr Govender's clinic on 8 February 2007 where she complained of neck pain for one week, numbness in the left arm and left leg. Between that date and 14 July 2009, there are five entries in the clinical notes where Ms Menezes complains of neck, shoulder or arm pain. After the transport accident, the first attendance at the Centre on 25 July 2009 concerned Ms Menezes' relationship with her husband. Apparently, they had lost their savings in the stock market collapse. There is no mention of the accident or the injuries she suffered. In fact, there is no mention of the neck until 2011.

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<sup>6</sup> Report dated 8 February 2007.

<sup>7</sup> Report dated 1 October 2007.

<sup>8</sup> Letter dated 18 June 2007.

**Mr Miller**

32 In August 2007, Mr Russell Miller, an orthopaedic surgeon, examined Ms Menezes at the request of her general practitioner. She told him of two motor vehicle accidents, both occurring in Dubai, one in 2005 and the other in about January 2007. Pausing there. Ms Menezes says there was only one accident in Dubai and I accept that evidence.

33 Since that accident, she suffered from diffuse neck, right shoulder, right arm pain and pain in the upper thoracic area. Conservative treatment had not helped.

34 His examination showed diffuse tenderness and a slightly restricted range of movement. He suspected a muscular or ligamentous strain of the cervical spine and the presence of disc disease.

35 He reviewed her on 4 October 2007. She still suffered from neck and diffuse arm pain. MRI scans showed a C5-6 disc bulge but he did not think this caused neural compromise. Noting she was intending to try acupuncture and osteopathy, he recommended conservative treatment, adding he did not think he had other measures to help her. According to Ms Menezes, he recommended exercises and physiotherapy.

**Physiotherapy**

36 Before seeing a chiropractor, Ms Menezes was treated by a physiotherapist. Despite a comprehensive court book, there is no information in it or her oral evidence about the details of that treatment.

**Chiropractors**

37 Before and after the transport accident, Ms Menezes attended three chiropractic practices. In order, they were:

- (a) Dr Repka at “Healthbychiropractic” between March 2009 and August 2010;
- (b) Dr Haddad at the “Lerderderg Chiropractic Clinic” between August 2010 and September 2012;

(c) Dr Haddad at the “Melton Chiropractic Clinic” between October 2012 and January 2013.

***Dr Repka***

38 Dr Adrian Repka is a chiropractor. He saw Ms Menezes for the first time on 23 March 2009.<sup>9</sup> She complained of headaches and neck pain, ascribing the initial onset of these symptoms in 2005 but the most recent bout in the week before her initial presentation. Ms Menezes explained the reason for these symptoms:<sup>10</sup>

“Cause I was in constant pain because I was working all five days a week and during the weekend I was preparing the move for my house and décor

... And preparing for the house warming ceremony.”

39 Clinically, Dr Repka could not explain her symptoms or, as he expressed it – “assessment ... revealed no outstanding findings”.<sup>11</sup> X-rays showed mild degeneration in the cervical and mid-thoracic areas which could be the cause.<sup>12</sup> His treatment sought to improve her pain and improve her daily living activities. Judging from his clinical notes, prior to the transport accident, Dr Repka treated her fourteen times. From the same notes, after the transport accident, she continued attending his practice until August 2010. In all, she attended his clinic at least sixteen times from the day after the transport accident until a date in August 2010.

40 The diagnosis within Dr Repka’s practice was whiplash and the treatment was based on that diagnosis. However, Ms Menezes became an intermittent and spasmodic attender at the practice and treatment became difficult to provide. She left his clinic because the treatment was not helping her, his charges were “exorbitant” and she could not afford them.

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<sup>9</sup> Report dated 30 November 2015 and clinical records at Joint Court Book (“JCB”) at p 235

<sup>10</sup> Transcript at p 44

<sup>11</sup> Mr O’Brien interpreted that to mean full cervical movements

<sup>12</sup> The report of the x-rays is dated 23 March 2009

## **Post transport accident**

### ***Dr Haddad***

- 41 Dr Jihan Haddad is a chiropractor. He practises from the Melton Chiropractic Clinic.<sup>13</sup>
- 42 Ms Menezes first attended his Melton practice on 9 October 2012, complaining of chronic neck pain and headaches. However, she had consulted him when he was working at another practice, Lerderderg Chiropractic Centre, in 2010 and 2011. There is a tax invoice detailing her attendance at the practice on fifteen occasions between 5 October 2010 and 4 June 2011.<sup>14</sup> However, extracts of its clinical notes specify her last attendance was on 12 September 2012.<sup>15</sup>
- 43 At the Melton practice, she attended fifteen appointments between 13 October 2012 and 7 March 2013. He diagnosed cervical facet syndrome stemming from cervical facet joint pain following a whiplash injury.
- 44 Presumably speaking of the time she attended his Melton practice and of her neck, he said:<sup>16</sup>

“... [d]ull, [a]chy pain although was reported to be sharp during acute episodes; often accompanied by headaches and limited range of motion of the cervical spine. Her pain was often localized where she would pinpoint her pain. She generally presented on all occasions with neck musculature spasm; that sometimes radiated to the shoulders or mid back regions ... .”

### ***Mr Maartens***

- 45 Mr Nicholas Maartens is a consultant neurosurgeon. On about 29 January 2014, he examined Ms Menezes at the request of her general practitioner. She complained of pain in her neck and arms, mainly the left. His initial diagnosis was cervical spondylosis. By 23 May 2013, he changed his view of the MRI scans.<sup>17</sup>

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<sup>13</sup> Report dated 17 March 2016

<sup>14</sup> Copy tax invoice appearing at p 263 of the JCB

<sup>15</sup> JCB at p 255.

<sup>16</sup> At p 4

<sup>17</sup> Report dated 23 May 2014

Where previously he said they showed very mild degenerative changes, he now said:

“... there was something significant going on at C5/6 where there was a high signal lesion effacing the spinal cord as part of what was described as calcification of the posterior longitudinal ligament over C4/5 and C5/6.”

- 46 By 18 July 2014, Dr Maartens wrote to an unidentified shoulder surgeon seeking that person’s assistance in diagnosis and management. By then, Dr Maartens listed four diagnoses (including whiplash neck injury) and one possible diagnosis.

***Dr Tan***

- 47 Dr Caroline Tan is a neurosurgeon. She examined Ms Menezes on 13 August 2014 at the request of a general practitioner.<sup>18</sup> Overall, Dr Tan was unsure as to the cause of Ms Menezes’ pain. Since MRI scans did not provide definite evidence of nerve compression in the cervical spine, she questioned the role of cervical surgery. She wanted further investigations (for example an MRI scan of the left shoulder and more nerve conduction studies) for a diagnosis for “her symptoms did not fall into any defined syndrome”. She wanted Ms Menezes to see a particular musculoskeletal physiotherapist, which I doubt happened.

***Mr Lo***

- 48 Mr Patrick Lo is a neurosurgeon.<sup>19</sup> He examined Ms Menezes on 29 September and 27 October 2015 at the request of her general practitioner. He believed she was suffering from cervical radiculopathy (C6 and C7) secondary to cervical spondylosis.
- 49 He arranged for MRI scans, which were taken on 13 October 2015. It appears he viewed the scans for, to him, they showed severe and extensive disc protrusion at C5-6 causing marked indentation of the spinal cord. There was a left-sided C6-7 disc prolapse and a very mild broad-based C4-5 disc prolapse. He believed her left arm symptoms came from the protrusion and prolapse at C5-6 and C6-7 discs

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<sup>18</sup> Reports dated 3 August 2014 and 4 December 2015

<sup>19</sup> Reports dated 29 September 2015 and 27 October 2015

respectively. The scans confirmed what Mr Lo suspected that “her cervical spine had worsened over the course of the last couple of years”. He thought she was “in dire need of a multi-level anterior cervical discectomy and fusion at the C5 to C7 levels”. After detailing the risks, he awaited her decision. He outlined an extensive list of risks associated with this surgery. Ms Menezes did not return to Mr Lo and sought another opinion.

**Mr King**

50 Mr James King is a neurosurgeon. On 29 January 2016, he performed an anterior discectomy and fusion at C5-6 for a central disc prolapse and cord compression.

51 Mr King first saw Ms Menezes on 20 November 2015. She complained:<sup>20</sup>

“Over the last two years, she had progressive heaviness in the legs, numbness in the hands, poor balance, bilateral shoulder pain and pain radiating down the hand into the thumb on the left side. She described stiffness in the neck. She described urinary urgency but no incontinence or urinary tract infection.”

52 His examination revealed a mild restriction of cervical spine movement, normal tone and power of the upper limbs, present biceps, brachioradialis and triceps jerks. She had grossly normal sensation in the lower limbs. There was no evidence of clonus. Knee and ankle jerks were present but were not brisk, with downgoing plantars.

53 Mr King saw the MRI scans of 13 October 2015 showing a calcified central disc prolapse at C5-6, causing effacement of the thecal sac and potentially mild cord compression, without signal change in the cord. There were disc bulges at C4-5 and C6-7. He diagnosed cervical degenerative disease with evidence of canal narrowing and possible cord compression. There were no signs of myelopathy.

54 Following the operation, Mr King reviewed Ms Menezes on many occasions over the next four years.

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<sup>20</sup> Report dated 12 May 2016 at p 2

- 55 On 6 February 2016, she developed left arm pain, which Mr King considered consistent with C7 radiculopathy. He prescribed Lyrica. After about four to six weeks, the symptoms improved slowly.
- 56 In May 2016, Mr King anticipated intermittent symptoms in the neck, shoulder and arm with an estimated 10 to 20 per cent chance of adjacent segment progressive degenerative disease at C4-5 and C6-7.
- 57 On 14 July 2016, Ms Menezes had recovered from surgery. After the surgery, she developed left arm pain but that largely resolved. She had stopped taking Lyrica and was taking Panadol intermittently. She had returned to full-time work. She was still experiencing headaches, left-sided facial pain and jaw discomfort. Intermittently, there was a choking feeling in the throat. There were no symptoms from the right arm and there was occasional left upper arm discomfort.
- 58 His examination that day showed a well healed wound. Ms Menezes had a good range of cervical spine movement. She had normal power and tone in the upper limbs. Flexion-extension x-rays looked satisfactory. MRI scans on 24 March 2016 showed satisfactory decompression of the cervical cord at C5-6. They showed left-sided C6-7 foraminal stenosis, which had not been treated.
- 59 Mr King re-examined Ms Menezes in March 2017. Her condition was good except for minimal neck discomfort, intermittent pains over her left shoulder and occasional pain in the region of the elbow and wrist. She was still taking only Panadol for pain relief. The results of his examination remained the same except reflexes were generally reduced. MRI scans in the previous month showed a satisfactory decompression at C5-6. It showed degenerative disease at C4-5 and C6-7. There was no evidence of spinal cord decompression but multi-level foraminal stenosis. On 28 March 2017, flexion-extension x-rays were satisfactory.
- 60 Mr King re-examined Ms Menezes on 16 May 2018. This was not a routine re-examination as it had been requested by her general practitioner. She described

various symptoms including those due to a fall. On examination, she had a normal range of cervical spine movement. Her gait was normal, as was her tone and power in the upper limbs. Her reflexes were reduced and she had grossly normal sensation. He thought her symptoms were reasonably well controlled. He did not change her management or seek further imaging.

61 On 19 March 2019, Mr King re-examined her. By then she was off work after an incident in October 2018. She told him of the diagnosis of Post-Traumatic Stress Disorder. Again, there was a good range of cervical spine movement. She had normal tone and power in the upper limbs. There were no myelopathic signs. He viewed MRI scans taken on 5 March 2019. The fusion appeared stable with minor degenerative disc disease at C4-5 and C5-6 but no significant progression.

62 Again, at the request of her general practitioner, she returned in October 2019. He took a history of increasing symptoms. There was now mild restriction of cervical spine movement, essentially normal tone and power in the upper limbs. There were reduced reflexes. He now identified the biceps, brachioradialis and triceps. There were still no myelopathic signs. Further MRI scans on 23 October 2019 showed essentially stable findings and mild spinal canal stenosis at C4-5 which had not progressed, bilateral moderate foraminal stenosis at C4-5 and mild bilateral foraminal stenosis at C6-7.

63 On 12 December 2019, Mr King re-examined her again. Since May 2018, Ms Menezes complained of increasing symptoms. On 12 December, she complained of:<sup>21</sup>

“... significant symptoms around the neck and shoulders and in both upper limbs, in addition to the temporo-mandibular joints bilaterally. She described the neck pain as getting worse over the last 12 months, with increasing pain in both hands and weakness in both hands. She had pain in the back of the neck, radiating into both shoulders with stiffness, particularly rotating to the left. She had tightness in the neck, particularly in the morning and tightness in the hands. She did describe difficulty with swallowing and intermittently choking.”

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<sup>21</sup> Report dated 1 July 2020 at p 4.

64 His examination repeated his findings in October 2019. Further MRI scans showed stability. He did not recommend any further surgery as Ms Menezes had not benefited significantly from the ACDF surgery. He did recommend, as he had done so in the past, physiotherapy and simple analgesia.

65 As to prognosis, Mr King considered her condition had been relatively stable for four years even though she still had significant problems. He expected her symptoms to persist.

66 If her Post-Traumatic Stress Disorder could be satisfactorily treated, Mr King felt she could return to work in the longer term.

67 She was then taking Panadol Osteo and vitamin D and had stopped her psychotropic medicine.

68 As to causation, Mr King said, in May 2016:

“I do note that the patient underwent an MRI on 1st October 2007, performed in Ballarat. This does show evidence of degenerative disease in the cervical region, less severe than the findings in 2015, but there was evidence of a C5-6 central disc prolapse at that time.”

### **Medico-legal opinion**

#### ***Mr O'Brien***

69 Mr John F O'Brien is an orthopaedic surgeon. On 27 September 2018, he examined Ms Menezes at the request of her solicitors.<sup>22</sup> He took a detailed history, made an examination and reviewed the reports of images taken in 2007, 2013 and 2015. He did not see any reports following the fusion.

70 Mr O'Brien re-examined Ms Menezes on 4 December 2017.<sup>23</sup>

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<sup>22</sup> Report dated 27 September 2016.

<sup>23</sup> Report dated 4 December 2017.

71 As a result of the transport accident, Mr O'Brien diagnosed Ms Menezes as suffering from an aggravation of cervical spondylosis. As to the cause of the left arm pain, he said:<sup>24</sup>

“On the basis of probabilities however I would suggest it is possible that the motor vehicle accident causing an exacerbation of pain has resulted in the progressive pathology leading to the current clinical condition.”

72 Mr O'Brien assumed the state of movement in her cervical spine was unrestricted at the time of the transport accident. He did so, relying on a comment in Dr Repka's 2015 report. For the purposes of an impairment assessment, he made no deduction for the condition before the transport accident.

**Mr Speck**

73 Mr Gary Speck is an orthopaedic surgeon. On 17 September 2019, he examined Ms Menezes at the defendant's request.<sup>25</sup> He took a comprehensive history, read various reports, including those of imaging, and conducted an examination.

74 Mr Speck found, on examination, that Ms Menezes had a good range of movement of the thoracolumbar spine but restricted movements of the cervical spine. Reflexes of both upper and lower limbs were normal except for the knee, which was not tested. Sensation in these limbs was symmetrical except for the proximal muscles of the left lower limb. He found widespread tenderness:<sup>26</sup>

“There was tenderness in a wide area from the lower thoracic to the upper thoracic region maximum around the mid-region of T4-T8. There was tenderness over both scapulae, the shoulders and the trapezius muscles especially with a lesser degree of tenderness in the midline. She indicated that all of the arms were tender and palpation was not specifically undertaken to minimize any further pain.”

75 Mr Speck considered:

(a) the transport accident caused a soft tissue injury to the neck in the presence of pre-existing degenerative changes. There were degenerative changes in

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<sup>24</sup> Report dated 20 October 2016

<sup>25</sup> Report dated 12 November 2019

<sup>26</sup> At p 7

the neck from at least 2005. There were symptoms and she required treatment before the transport accident. There was no evidence of neurological compromise at any time and no specific changes on the imaging before and after the accident;

- (b) the further treatment of her current symptoms should focus on a Chronic Pain Syndrome and not an organic problem, for the effects of the soft tissue injury had gone. This syndrome existed before the transport accident. He recommended a multi-disciplinary pain or functional restoration programme and appropriate psychological support with non-narcotic analgesics, exercise and continuing at work;
- (c) not unnaturally, the prognosis for her soft tissue injuries was excellent given the disappearance of its effects;
- (d) these injuries cause no ongoing disability or effect on her work. Nor do they cause any ongoing disability or effect on her daily living activities, domestic and leisure activities;
- (e) there was no relationship between the need for the cervical fusion and the transport accident.<sup>27</sup>

“The cervical fusion was undertaken for axial neck pain. There was no historical evidence of radicular compression and ... [two previous] surgeons had declined operation on the basis of there being no nerve root compression. There is no relation to the transport accident.”

### ***Professor Bittar***

76 Professor Richard Bittar is a neurosurgeon. On 3 December 2020, he examined Ms Menezes at the request of her solicitors.<sup>28</sup> Professor Bittar took a detailed history, read the reports of imaging taken between 2005 and 2020 and examined her. He diagnosed an aggravation of cervical spondylosis which causes neck pain, right arm pain and cervicogenic headaches. Using the language of worker’s

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<sup>27</sup> At p 12

<sup>28</sup> Report dated 3 December 2020

compensation, he considered the transport accident remained a significant contributing factor.

77 As to a comparison between her condition before and after the transport accident, he said:<sup>29</sup>

“While she does have a significant pre-existing cervical spine condition, this was causing intermittent symptoms prior to the subject transport accident. Her symptoms have been much more severe and persistent since the subject transport accident, consistent with a sustained aggravation of her pre-existing condition by the transport accident.”

78 As to the future, he sought confirmation of a solid fusion. She should continue her current treatment but should be seen by pain specialist.

79 His prognosis was guarded, with the expectation she will experience pain and disability into the foreseeable future.

80 Although she could work in a job similar to her pre-accident job, he felt the constant pain and medicines would detrimentally impact on the quality of her work and study. She is undertaking further study in cybersecurity.

81 On 3 June 2021, Professor Bittar wrote a supplementary report. Largely, it consists of a commentary on aspects of Mr Roger’s first report. The salient features are:

- (a) the clinical records of Dr Repka’s clinic before and after the transport accident and a report of Dr Repka. Professor Bittar thought they showed a worsening of symptoms, which did not return to their pre-accident level;
- (b) as to the lack of complaint after the transport accident, he points to the chiropractic records of early complaint;

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<sup>29</sup> At p 5

- (c) he criticises Mr Rogers' comment of no significant alteration of the cervical disc pathology over nine years by deprecating the comparison of the findings set out in reports and the findings from an actual viewing of the scans;
- (d) he disagrees with Mr Roger's questioning of the need for the fusion by asserting an incorrect summary of Mr Lo's clinical findings as being normal. He also asserts the fusion gave Ms Menezes some relief;
- (e) the transport accident accelerated the need for neck surgery;
- (f) the outcome may have been better if there had been a three level fusion rather than just one level.

***Mr Rogers***

82 Mr Myron Rogers is a neurosurgeon. At the request of the defendant, he undertook a desktop assessment of reports and other documents relating to Ms Menezes. The defendant's solicitors asked him a number of questions, and over the course of two reports he gave answers:

- (a) comparing the reports of the MRI scans of 31 August 2005 and 1 October 2007, there is a small central disc protrusion and it remained unchanged in size between 2005 and 2007. There is a legible entry from Dr Repka for 16 April 2009 indicating a normal range of movement of the cervical spine. He concluded her symptomatic cervical spondylosis continued to have an impact on her quality of life from 2005;
- (b) an examination of the general practitioner's clinical notes reveal the first complaint of neck pain after the transport accident was on 1 April 2013. If her neck was injured in the transport accident, he would expect she would have been complaining of neck pain within several days, considering she had existing cervical disc degeneration which was symptomatic. The lack of complaint means she did not suffer a "new" injury to her neck or an aggravation of the existing condition. The lack of attendance upon her

general practitioner means that, assuming there was an exacerbation of the existing condition, the effects of the exacerbation were transient;

- (c) he viewed the MRI scans taken on 21 October 2013 and the reports of imaging taken between 31 August 2005 and 13 October 2015 and concluded there was no significant alteration of cervical disc pathology over nine years. This view is confirmed by his examination of the clinical records of Lerderderg Chiropractic Clinic where there is no significant change in her neck symptoms following the transport accident. He also considered the state of her cervical spine shown in the MRI scans he viewed (21 October 2013) were typical of constitutional degenerative changes seen in a forty-seven-year old person.

Pausing there. I would interpret that comment as implying the state of her cervical spine in 2013 was due to natural degeneration unrelated to the transport accident and, possibly, the 2005 accident;

- (d) he agreed with Mr Gary Speck's opinion that Ms Menezes' symptoms are explained by the continuation of a pre-existing Chronic Pain Syndrome. The reason for cervical fusion was unrelated to the effect of the transport accident. He felt the non-organic explanation of her symptoms is supported by the failure of the surgery to affect her symptoms;
- (e) he felt Ms Menezes should not have undergone the ACDF surgery because there was never any objective clinical evidence of radiculopathy or instability. Moreover, he disagreed with Professor Bittar's comment that following the surgery, she had significant improvement in her symptoms by citing her complaint of persistent severe neck and right arm pain;
- (f) his examination of the notes of the Lerderderg Chiropractic Clinic between May 2010 and August 2012 were mainly focussed on the thoracic and lumbar spines, and support the conclusion there was no significant change in her neck symptoms following the transport accident. He reached the same

conclusion after looking at Dr Repka's notes. He believed she travelled to India about four weeks after the transport accident. Pausing there, that was not the case. However, she did travel to India in 2010 and 2012 to see her sick father.

(g) he maintained the imaging documents mild degenerative change at C5-6 level.

(h) although Mr Lo found evidence of radiculopathy, no one else did, including Mr King, who examined her shortly afterwards.

### **Current**

83 At present, Ms Menezes experiences constant neck pain. It varies in nature between sharp, throbbing, stabbing or aching. The pain spreads to the back of her neck and into the front of her chest on the right side. From there it moves through her right collarbone, shoulder blade and arm. Its intensity varies with certain activities. She describes the pain as severe.

84 With her right arm, the pain is almost constant and affects the entire arm, including the wrist, thumb and index finger. This pain is dull and heavy.

85 Most days, she experiences headaches. She describes them as severe. She feels a pounding sensation in the back and top of her head. Not unnaturally, these headaches interfere with her concentration.

86 Since the operation, she no longer suffers pain in her left arm. However, the arm feels weak and limits the weights she can carry.

87 She takes Panadol Osteo, about six to eight tablets a day. If her pain worsens, she takes Meloxicam or Panadeine Forte. She uses Moove and heat packs regularly. She describes Moove as a cream like Voltaren. Her husband massages her neck, which gives some relief.

- 88 Before the restrictions due to the pandemic, she attended a physiotherapist twice a week. It stopped due the restrictions but resumed this year. However, she stopped attending because it aggravated her neck symptoms.
- 89 The movements of her cervical spine were mildly restricted.
- 90 Ms Menezes is still reviewed by Mr King. At her most recent review in April 2021, he suggested a CT-guided cortisone injection into her neck and participation in a pain management programme. Neither has occurred; the former because she is diabetic and must get that condition under control before the injection can be administered.
- 91 She avoids sudden or repetitive movements and will hold her neck in a fixed position if using a computer or reading.
- 92 She uses both hands to carry heavier things and usually her left if the item is lighter.
- 93 She has uninterrupted sleep of about four hours each night. She wakes more than once a night through pain. She then uses her heat pack and Moove cream to resume sleeping. She uses a special pillow and sleeps on her back. She finds this very uncomfortable, preferring to sleep on her side. Her sleep rarely refreshes her and she is fatigued during the day.
- 94 Her ability to perform various leisure activities is restricted – yoga, gardening or making pottery.
- 95 Domestically, she now only cooks easy meals. She has trouble removing clothes from the washing machine. She avoids changing the bed sheets. All of these tasks are left to her family.
- 96 Her intimate life with her husband has been adversely affected, especially after the 2016 surgery.

97 Following the transport accident, Ms Menezes was absent from work for only two days. She continued working until an accident at work in October 2018. Her ceasing work has nothing to do with this application. In March 2020, she returned to work as an information management co-ordinator on a full-time basis. Since 31 March 2021, she has not worked, for reasons unrelated to this application.

### Legal considerations

98 For the purposes of this application, a person who is injured as a result of a transport accident may recover damages in respect of the injury if the injury is a “serious injury”.<sup>30</sup> In this application, “serious injury” is a long-term serious impairment or loss of body function.<sup>31</sup>

99 The meaning of “serious” in s97(17) of the Act was explained in *Humphries and Anor v Poljak*.<sup>32</sup>

“To be ‘serious’ the consequences of the injury must be serious to the particular applicant. Those consequences will relate to pecuniary disadvantage and/or pain and suffering. In forming a judgment as to whether, when regard is had to such a consequence, an injury is to be held to be serious the question to be asked is: can the injury, when judged by comparison with other cases in the range of possible impairments or losses, be fairly described at least as ‘very considerable’ and certainly more than ‘significant’ or ‘marked’.”

100 The headnote captures the principle in *Petkovski v Galletti*.<sup>33</sup>

“In an application to bring proceedings under s 93 of the Transport Accident Act, where the case is one of aggravation of a pre-existing condition, the applicant must establish what injury was caused by the accident. An analysis must be made of the extent of the impairment of the body function before and after the relevant injury, and the additional impairment must involve serious long-term impairment of a body function.”

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<sup>30</sup> Section 93(2) of the Act

<sup>31</sup> Paragraph (a) of the definition of “serious injury” in s 93(17) of the Act

<sup>32</sup> (*Supra*) 140 per Crockett and Southwell JJ

<sup>33</sup> [1994] 1 VR 436

## Discussion

### Credit

101 The defendant raised the issue of Ms Menezes' credit. It submitted she was inconsistent in her evidence and avoided answering questions by saying she could not answer the question.

102 A combination of the style of cross-examination and the use of an audio-visual link made Ms Menezes appear as an unimpressive witness. For example having been taken to page 255 of the court book, Ms Menezes was asked to explain what treatment she received between 3 August 2011 and 29 August 2012 for the records of the Lerderderg Clinic revealed none:<sup>34</sup>

Q: "You cannot answer my question, can you? You can't say what treatment occurred between 3 August 11 and 29 August 12, can you?---

A: I remember going for my neck pain for sure."

103 On occasion, some of her expressions were unorthodox and conveyed a different understanding of the question from that of the questioner, yet on other occasions, she was quite definite in her answers.

104 Despite Mr Miller recording two motor vehicle accidents before the transport accident, there was only one. Since Ms Menezes did not tell him of two such accidents, one might wonder where he got the information. Wondering, however, is pointless. The fact has no bearing on her credit.

105 Overall, I did not consider Ms Menezes was untruthful or unreliable as a witness.

### **Did she suffer an injury in the transport accident and, if so, what injury?**

106 Ms Menezes did suffer an injury as a result of the transport accident. The injury was an aggravation of her pre-existing cervical spondylosis. The aggravation caused a significant deterioration in the state of her cervical spine such that an ACDF procedure was carried out. Why am I satisfied?

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<sup>34</sup> Transcript at p 54

- 107 Each of Mr Lo and Mr King saw evidence of the worsening of her cervical spondylosis. Each saw some evidence of radiculopathy. Mr Lo was more definite than Mr King. Neither diagnosed in terms of aggravation of a pre-existing condition because neither was in a position to do so. Their history taking was limited to the task of medical, not legal, diagnosis.
- 108 Since 2014, Ms Menezes had been seeking a medical answer to her condition. She had left the chiropractors because they could not improve her condition. She attended four neurosurgeons before undergoing surgery.
- 109 The causal link between the transport accident and the injury and the nature of the injury became a contest between medico-legal opinions. As often happens in these cases, it involved Ms Menezes' history of symptoms and treatment.
- 110 Mr Rogers noted her delay in apparently mentioning the neck to her general practitioner. This supported the contention that the accident had little or no effect on the state of her neck. The importance of the observation faded as it was realised Mr Menezes' preferred form of treatment from early 2009 was chiropractic.
- 111 The records of her general practitioner's practice do not mention the neck until 16 May 2011. This is an isolated entry, with the next in March 2013. They make no mention of the accident or any physical injury on her first visit after the accident on 25 July 2009. While the records of the chiropractic clinics mention frequent attendances until September 2012, the lack of mention in the general practitioner's records indicates Ms Menezes preferred chiropractic to medical treatment for her physical injuries. This is the flavour of her evidence.<sup>35</sup>

Q: "How do you remember that now then?---

A: Because on the date of my accident from the spot of the accident I drove straight away ... to Dr Rapka (sic) rather than going to my GP as very maybe not aware of what I should be doing as a new migrant. I went to see him and he did not entertain me that day as he has his appointments booked so he gave me an appointment the next day."

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<sup>35</sup> Transcript at p 37.

112 In his first report and in answer to questions, Mr Rogers made three statements:<sup>36</sup>

“This transport accident is recorded as occurring on 15 July 2009, the plaintiff saw her GP on several occasions throughout the second half of 2009 and on multiple occasions through 2011 and 2012, and the first record of there being neck pain is an entry dated 1 April 2013 ‘has pain in the left side of the neck radiating down the left arm’.

...

If there had been an injury to the neck because of the 2009 transport accident, I would expect, the Plaintiff would have been complaining of neck pain within several days of the transport accident as she had pre-existing symptomatic cervical disc degeneration.

...

In my opinion the 2009 transport accident did not result in any new injury ... nor did it result in an aggravation of the cervical spondylosis.”

(sic)

113 Ms Menezes attended Dr Repka’s clinic the day after the transport accident. She tried to see him the same day but could not. She had attended his clinic before the transport accident on 23 March 2009 and continued to do so until August 2010. She left that clinic because his treatment was not helping and considered his charges “exorbitant”. Shortly afterwards, she went to the Lerderderg Chiropractic Clinic and was treated by Dr Haddad. She followed Dr Haddad to his own practice and continued with him until 7 March 2013.

114 It seems clear she was complaining about neck pain when she saw Dr Repka the day after the transport accident and continued to do so as she went from him to the Lerderderg Chiropractic Clinic and then to the Melton Chiropractic Clinic.

115 Mr Roger’s underlying assumption of there being no mention of neck pain until April 2013 is incorrect. There is an immediate attendance upon a chiropractor. For Ms Menezes, her first port of call was a chiropractor and it continued that way for years. Mr Rogers is incorrect to identify April 2013 as the first complaint to her general practitioner. There was an isolated mention in 2011 but that does not

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<sup>36</sup> At pp 2 and 3

detract from Mr Rogers' point of delay insofar as the general practitioner is concerned.

116 Then the focus shifted to a comparison between Ms Menezes' complaints and treatment before and after the transport accident.

117 Her entry in the records of Health by Chiropractic on 21 March 2009 refers to the neck, head, shoulders and face, and qualified by her words "pain, pain, pain". She was taking Panadol at the time.

118 The entry of her first attendance at the Lerderberg Clinic on 17 August 2010 does not refer to the 2009 accident. This entry is more detailed than the very brief entries elsewhere. But it is still cryptic and an unsound basis to infer anything about Ms Menezes' view of the accident.

119 If one narrows the periods of her attendances on a chiropractor before and after the transport accident to the period between March and July 2009 and after 2009 until 2010, then the frequency is not greater after the accident. However, if the period is broadened after the transport accident, then the conclusion is more or less correct.

120 Referring to the chiropractic clinical notes, the defendant submitted that some of the pre and post-accident treatment related to Ms Menezes' complaint of pain in T4 to T8 region to chiropractors, which was unrelated to the injury allegedly suffered in the transport accident.

121 I have looked at the exhibited clinical notes. It does appear T4 and T8 and T4 to T8 are mentioned frequently. However, the notes are very difficult to read and are very brief. I am surprised that anything of significance can be gleaned from them. They really needed the interpretation of their author.

122 Both Mr Speck and Mr Rogers denied the need for the 2016 surgery. The fact of that surgery is an important component of Ms Menezes' claim of a "serious injury".

- 123 Ms Menezes suffered from significant neck symptoms before the transport accident. She had active chiropractic treatment. Following the accident, she continued chiropractic treatment and some physiotherapy. By 2014, she had moved from largely chiropractic treatment to seeking serious medical advice, initially through the specialist opinion of Dr Maartens and Dr Tan. Their opinions were inconclusive and they wanted further investigations. She did not have such investigations. Instead, she sought the opinions of two other neurosurgeons, Mr Lo and then Mr King. The former suggesting an extensive fusion and the latter, a modified version. Mr King carried out the surgery.
- 124 Two neurosurgeons recommended different forms of the ACDF procedure. In doing so, Dr Lo diagnosed cervical radiculopathy, relying on his finding of reduced triceps and biceps reflexes. Dr King did not find neurological damage but saw a very damaged C5-6 disc with potentially adverse implications for the cord. Earlier, I outlined the course of Mr King's treatment. Following the operation, he reviewed Ms Menezes on many occasions afterwards. By her last attendance, I would say that the operation was only partly successful. Ms Menezes had developed significant symptoms.
- 125 Mr Lo and Mr King are treating specialists. Each identified a problem and proposed a solution. Even apart from their views as treatment specialists, I have the detailed evidence of Mr King. I could not accept the views of Mr Speck and Mr Rogers that the surgery was not warranted.
- 126 Mr Rogers read the reports of MRI scans in 2005, 2007, 2014 and October 2015 and viewed the scans from 2013. He believed there had been no significant alteration in her cervical pathology over nine years (presumably 2007 to 2015).
- 127 In 2016, while explaining Ms Menezes' left arm symptoms, Mr O'Brien saw an obvious progression between 2007 and 2013 in the degeneration of her cervical

spine. To him, by 2013, there was extensive degenerative change, including ossification of the posterior longitudinal ligament:<sup>37</sup>

“... Indeed, it would appear that in approximately 2013 when the next investigation was undertaken, the patient experiences the onset of symptoms related to the left arm. At that time there was extensive degenerative change noted in the MRI which obviously progressed, being associated with what has been reported as ossification of the posterior longitudinal ligament. ... .”

128 After viewing the October 2015 MRI scans, Mr Lo commented:

“... As I suspected, her cervical spine has worsened over the course of the last couple of years. ... .”

129 To him, the scans showed a severe and extensive disc protrusion at C5-6 and was causing a marked indentation of the spinal cord. There were a left-sided C6-7 disc prolapse and a very mild broad-based C5-6 disc prolapse. He believed her left arm symptoms came from the protrusion and prolapse at C5-6 and C6-7 discs respectively. He concluded she was in dire need of an ACDF procedure involving three levels.

130 Professor Bittar criticised Mr Rogers’ use of reports of imaging to conclude there was no significant change in the state of her cervical spine over nine years, saying:<sup>38</sup>

“... I am however critical of attempting to compare radiology reports authored by different radiologists who are commenting on scans taken on different MRI scanners, and then comparing these to an MRI scan that was viewed directly. This methodology is unreliable, inaccurate, and prone to error. Comparing MRI scans and reports in this manner does not allow one to accurately determine whether there has been any radiological alteration of cervical disc pathology over a nine year period. ... .”

131 I note Professor Bittar says his doctorate is in functional neuroimaging, which, I believe, is the study of the brain through neuroimaging devices. It seems Professor Bittar is in a very good position to express the above view.

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<sup>37</sup> Report dated 27 September 2016 at p 4

<sup>38</sup> Report dated 3 June 2021 at p 2

- 132 Apart from the criticism, Mr Rogers' assertion sits uncomfortably with the apparent deterioration of her cervical spine up to the time of the surgery. There appears to be a world of difference between what Mr Miller saw in 2007 on the one hand and Mr Lo in 2015 and Mr King on the other.
- 133 The defendant's Senior Counsel made a series of discrete criticisms of Professor Bittar's reports.
- 134 First, he criticised Professor Bittar's use of the expression "significant contributing factor" as being an incorrect test in transport accident cases. He referred me to passages from the judgment in *Rowe v Transport Accident Commission*.<sup>39</sup>
- 135 The expression "significant contributing factor" is the creation of the accident compensation legislation. It has nothing to do with the Act. However, the mistake is understandable. Practitioners, like Professor Bittar, give opinions in serious injury applications under two different schemes. Each scheme speaks of a "serious injury" but differ in the details. Even though the mistake is understandable, Professor Bittar's use of the expression must be analysed for the meaning he wanted to convey in this context.
- 136 Aggravating a pre-existing injury is to worsen the symptoms due to the injury. That, I understand, is the meaning Professor Bittar uses in describing the injury in those terms. That is, the transport accident resulted in an injury which is the aggravation of a pre-existing injury. Stated that way, his use of the expression suggests there are other causes of the injury but the effect of the transport accident is an important cause. Professor Bittar's misuse of the expression in the context of a transport accident does not affect the validity of his opinion.
- 137 Second, the defendant criticised Professor Bittar's conclusion that Ms Menezes' neck symptoms worsened after the transport accident, in that he incorrectly analysed the chiropractic evidence. I have already dealt with that issue.

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<sup>39</sup> [2017] VSCA 377 at paragraphs [82] to [86]

- 138 Third, Professor Bittar’s conclusion that her symptoms were mild in the pre-transport accident period was criticised based on the MRI findings in 2005. Despite those findings, the overall tenor of the evidence of Ms Menezes and her husband is that they were mild. It is a reasonable assumption to be made.
- 139 Fourth, the defendant criticised Professor Bittar for concluding there was an aggravation of her underlying condition based on his clinical findings. It is impossible for me to reject his conclusion by looking at his findings. If he made the diagnosis without any abnormal findings, then I could reject his conclusion. But I cannot reject his conclusion when he noted some abnormal findings.
- 140 If a physical examination is useful in a particular case, Mr Rogers was handicapped through his inability to examine Ms Menezes. He did not suggest he was handicapped. Even though surgery occurred in 2016, Ms Menezes was complaining of symptoms in 2021. One supposes an examination might have been useful.
- 141 Fifth, the defendant criticised Professor Bittar over his linking of the transport accident with the injury he diagnosed and the need for surgery. It also criticised his failure to disclose a path of reasoning linking the transport accident with the need for surgery, citing passages from *Parrish v Specialized Australia Pty Ltd (Rulings)*.<sup>40</sup>
- 142 I do not consider these criticisms as valid. I have already dealt with the need for surgery. There is sufficient in Professor Bittar’s reports to disclose a path of reasoning. He relies upon the information available to him, including his examination findings and the radiological material.
- 143 Sixth, the defendant accused Professor Bittar as displaying partisanship. A description of someone forming part of a “small minority” does not suggest

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<sup>40</sup> [2020] VSC 15 at paragraph [25(d)] and [42]

partisanship but merely a departure from the majority view. However, in this case, I do not consider Professor Bittar is either partisan or forming a part of a minority.

144 The defendant raised the language used by Mr O'Brien, in effect, submitting Mr O'Brien's view as to connection between the transport accident and Ms Menezes' condition in 2016 was weak because of the language he used:

"On this history one would conclude that the 2009 incident did cause aggravation of what appears to have been chronic neck pain. It most likely was an aggravation of cervical spondylosis. A considerable time delay before the onset of arm pain after this current exacerbation does make it difficult to categorically blame the 2009 incident. On the basis of probabilities however I would suggest it is possible that the motor vehicle accident causing an exacerbation of pain has resulted in the progressive pathology leading to the current condition."

145 I would interpret this passage as Mr O'Brien saying the degenerative condition of the cervical spine was aggravated by the transport accident and, although less certain, it also caused the arm pain. I would not interpret Mr O'Brien as only saying the causal link between accident and neck and arm was a possibility.

146 I do not accept that there was a soft tissue injury with transient effects. Nor do I accept there was some form of psychological pain disorder in operation, before and after the transport accident, such that it is the cause or predominant cause of her symptoms.

147 Apart from the other opinions, Mr Speck was handicapped through the unavailability of imaging. He did review the reports of imaging from August 2005 to March 2009. He had nothing after March 2009. Naturally, he could not comment on the issue of progression of degenerative changes after the transport accident.

148 Two treating neurosurgeons saw evidence of the progression of the degenerative change and both acted on the extent of the deterioration to offer the option of significant surgery. As a medico-legal examiner, Mr O'Brien came to the same conclusion as to progression.

### **Are the consequences “serious”?**

149 Ms Menezes described her neck pain as severe. Subjectively that may be so but unlikely to be so objectively. To me, severe pain would cause the person to think of nothing other than the pain and desperately seek relief. Ms Menezes is not in that category. Coupled with her right arm and headaches, the issue of pain for her is very significant from its intensity and constancy or near constancy. The problem with her jaw is unrelated to the transport accident and I will ignore it.

150 In a question to Mr Rogers, the defendant’s solicitors quoted five entries in the clinical notes of the general practitioner between 6 June 2010 and 21 October 2012 and asked whether he attached any significance to the entries before 1 April 2013 including those entries. Mr Rogers answered:<sup>41</sup>

“As we rely on objective evidence to form an opinion, the notes from the General Practice reinforce the contention that if there was an exacerbation of symptoms following the 15 July 2009 transport accident, it was not interfering with the Plaintiff’s quality of life.”

151 One might think Mr Rogers’ reliance upon “objective evidence” is due to him conducting a desktop analysis but he returned to the issue when questioning what Professor Bittar meant by “clinical” exacerbation of an underlying condition:<sup>42</sup>

“I would ask Professor Bittar to define what he means by a ‘clinical’ exacerbation of the underlying pre-existing condition. If he is relying on the Plaintiff describing symptoms, this is subjective information regarding her perception of chronic pain, a clinical exacerbation to me would imply new symptoms and signs that are in concordance with radiologic findings.”

152 I would have thought a patient’s subjective information was essential to the issues facing practitioners. On one view, Mr Rogers is stating a strong scepticism of what Ms Menezes says about pain unless it is corroborated by objective evidence.

### **Pre-2009 condition**

153 Ms Menezes suffered pain in her neck before the transport accident. She received chiropractic treatment up to the day before the transport accident.

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<sup>41</sup> Report dated 16 June 2021 at p 3

<sup>42</sup> Report dated 16 June 2021 at p 4

- 154 She had seen Mr Miller in 2007. After MRI scans, he thought she suffered from either a muscular or ligamentous strain. He noted the presence of cervical disc disease. He recommended exercise and physiotherapy. He understood she might seek other remedies.
- 155 Before the transport accident, Ms Menezes played badminton with her daughter. She jogged. She did yoga. She danced regularly. She gardened and made pottery. She arranged and played host to family gatherings celebrating religious festivals. She was active in her community, assisting other newly-arrived immigrants.
- 156 Domestically, and despite her employment commitments, she performed most or all of household and domestic duties (including cooking) in a large, two storey house. The domestic duties included driving her children to the many events they were involved in.
- 157 Her intimate relations were unimpaired by the existing state of her neck.
- 158 Overall, the consequences of the state of her neck before the transport accident were noticeable. But the consequences after the transport accident were immense, culminating in serious surgery, which was partially successful, and leaving her with significant symptoms.
- 159 In terms of the comparison required by *Petkovski v Galletti*,<sup>43</sup> the effect of the aggravation is serious.

**Is the impairment injury long-term?**

- 160 The transport accident occurred in 2009. It led to the fusion in 2016. It was partly successful. There remains significant symptoms which will continue into the foreseeable future. The impairment is long term.

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<sup>43</sup> *Supra*

## **Conclusion**

161 I am satisfied Ms Menezes has suffered a “serious injury” as a result of the transport accident. I will grant her leave to commence a proceeding to recover damages.

162 I will hear the parties on the form of my order and the question of costs.

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