

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

(Un) Revised
(Not) Restricted
(Not) Suitable for Publication

Case No. CI-18-05616

RICHARD BORG

Plaintiff

v

TRANSPORT ACCIDENT COMMISSION

Defendant

JUDGE: HIS HONOUR JUDGE GINNANE
WHERE HELD: Melbourne
DATE OF HEARING: 28 & 29 April 2020
DATE OF JUDGMENT: 7 December 2020
CASE MAY BE CITED AS: Borg v TAC
MEDIUM NEUTRAL CITATION: [2020] VCC 1935

REASONS FOR JUDGMENT

Subject: Accident Compensation
Catchwords: Serious injury application
Legislation Cited: *Transport Accident Act 1986*;
Cases Cited: *TAC v Zepic* [2013] VSCA 232; *Dressing v Porter* [2006] VSCA 215; *Demmler v TAC* [2018] VSCA 284; *Hooley v TAC* [2019] VSCA 263; *Richards v Wylie* [2000] 1 VR 79; *Petkovski v Galletti* [1994] 1 VR 436; *Kelso v Tatiara Meat Co Pty Ltd* (2007) 17 VR 592, 628; *Sabo v George Weston Foods* [2009] VSCA 242; *Hunter v Transport Accident Commission & Avalanche* [2005] VSCA 1; *Angelatos v Museum of Victoria* [1999] VSCA 129; *Georgopoulos v Silaforts* [2012] VSCA 179; *Humphries & Anor v Poljak* [1992] 2 VR 129; *Yirga-Denbu v VWA* [2018] VSCA 35; *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260; *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1; *Stijepic v One Force Group Australia Pty Ltd* [2009] VSCA 181; *Sutton v Laminex Group Pty Ltd* (2011) 31 VR 100.

Judgment: Application granted

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr A Ingram QC with
Ms Jing Zhu

Slater and Gordon

For the Defendant

Mr P Jens QC with
Ms S Manova

Transit Accident Commission

HIS HONOUR:

1. The plaintiff seeks the grant of a serious injury application pursuant to s93(4)(d) of the *Transport Accident Act 1986* (“the Act”). The claim was pursued on ground (a) for impairment to the function of the plaintiff’s spine encompassing the lumbar and cervical spine and, to a lesser extent, the thoracic spine. In light of *TAC v Zepic*,¹ the treatment of the spine as a single body function is not controversial.
2. The plaintiff also relies on injury to the function of right upper limb by way of the shoulder. It was put either as a referral from the aggravated injury to the spine or as a separate injury caused by the transport accident.
3. The plaintiff was represented by Mr Ingram QC together with Ms Zhu of junior counsel.
4. The defendant says that the plaintiff did not suffer a serious injury to the function of the spine as a consequence of the transport accident. The defendant says the plaintiff’s back was in a very bad and degenerative state following a work injury in 1987. The defendant says any aggravation to the spine does not give rise to a serious injury.
5. The defendant says the pain in the plaintiff’s right shoulder is due to an unrelated shoulder disease that he now also experiences in his left shoulder and is not an injury caused by the transport accident.
6. The defendant was represented by Mr Jens QC together with Ms S Manova of junior counsel.

¹ [2013] VSCA 232.

The respective oral and documentary evidence of the parties

7. The plaintiff gave evidence-in-chief. He did so by adopting the contents of his affidavits sworn 28 February 2018, 6 September 2019 and 19 March 2020.²
8. He also relied on an affidavit made by his wife, Wendy Borg, dated 6 September 2019.³ She was not required for cross-examination. Her evidence was, therefore, unchallenged. In addition, he relied on a written statement by Stuart Stotten, the insured driver of the vehicle dated 11 September 2015, in which he was the front seat passenger at the time of the accident.⁴ Nothing of relevance for the purposes of my decision turns on his statement.
9. The plaintiff produced extensive historical evidence of treatment and attendances for his back and for unrelated conditions prior to the transport accident, together with more recent medical evidence. It has not proved necessary to refer to all of this evidence in order to disclose my path of reasoning to conclusion. I have considered such of it as the parties directed me to, and that proved ultimately to be relevant. In addition, in arriving at my decision, I have read and considered the oral evidence of the plaintiff by way of cross-examination and re-examination, as well as the affidavit evidence of his wife.

The plaintiff's material

Treating medical evidence:

- Report of Ambulance Victoria dated 11 July 2014;⁵
- Report of Dr Paul Robinson dated 11 July 2014;⁶
- Report of Mr David Horvath dated 13 August 2015, 31 March 2016, 16 February 2017, 20 June 2018 and 2 April 2020;⁷

² Exhibit P1, Plaintiff's Court Book ("PCB") 11-24 and 28-30.

³ Exhibit P2, PCB 25-27.

⁴ Exhibit P33, Defendant's Court Book ("DCB") 110-115.

⁵ Exhibit P3, PCB 36-41.

⁶ Exhibit P4, PCB 42.

⁷ Exhibit P5, PCB 43-69.

- Report of Western Health dated 29 August 2015;⁸
- Report of Mr Rohan Price dated 24 September 2018 (report to Dr Sooknandan);⁹
- Report of Dr S. Sooknandan dated 5 November 2015 and 23 March 2020;¹⁰
- Initial Medical Certificate dated 11 July 2014.¹¹

Medico-legal evidence:

- Report of Dr David Weissman dated 24 February 2016;¹²
- Report of Mr Russell Miller dated 17 July 2017;¹³
- Report of Dr Nathan Serry dated 26 July 2017;¹⁴
- Report of Professor Richard Bittar dated 2 September 2019;¹⁵
- Report of Mr Ash Chehata dated 22 November 2019;¹⁶
- Report of Dr Joseph Slesenger dated 20 January 2020;¹⁷
- Report of Mr Chris Haw dated 15 January 2016;¹⁸
- Report of Dr Toma Mikhael dated 29 September 2015.¹⁹

8 Exhibit P6, PCB 90-91.
 9 Exhibit P7, PCB 94.
 10 Exhibit P16, PCB 92-93 and 291-293.
 11 Exhibit P29, DCB 97.
 12 Exhibit P8, PCB 95-107.
 13 Exhibit P9, PCB 108-116.
 14 Exhibit P10, PCB 117-126.
 15 Exhibit P11, PCB 127-131.
 16 Exhibit P12, PCB 132-137.
 17 Exhibit P13, PCB 138-150.
 18 Exhibit P17, DCB 36-40.
 19 Exhibit P35.

Radiology:

- Ultrasound right shoulder and x-ray cervical, thoracic and lumbar spine dated 17 September 2015, MRI cervical spine dated 14 August 2018 and MRI right shoulder dated 24 August 2018 (PCB 154);²⁰
- X-ray thoracic and lumbar spine dated 12 April 1991;²¹
- CT lumbo-sacral spine dated 18 April 1991;²²
- X-ray cervical spine dated 29 January 2013;²³
- MRI cervical spine dated 12 February 2013.²⁴

Financial:

- Vincents Chartered Accountants report dated 25 February 2020 and Vincents Chartered Accountants supplementary report dated 14 April 2020.²⁵

Miscellaneous material:

- Report of Dr Ong Beng Poon dated 17 May 1989 and 18 September 1989;²⁶
- Report of Dr S.G. Bronchinetti dated 30 April 1991 and 14 May 1991;²⁷
- Report of John Patrikios dated 7 June 1991 and 12 June 1991;²⁸
- Report of Mr Stephen Levinsky dated 1 December 1991;²⁹
- Claim for Compensation Summary dated 29 July 2015;³⁰

²⁰ Exhibit P14, PCB 151-154.

²¹ Exhibit P19, DCB 43.

²² Exhibit P20, PCB 44.

²³ Exhibit P21, DCB 86.

²⁴ Exhibit P22, DCB 87-88.

²⁵ Exhibit P15, PCB 155-289.

²⁶ Exhibit P18, DCB 41-42.

²⁷ Exhibit P23, DCB 45-47.

²⁸ Exhibit P24, DCB 48-51.

²⁹ Exhibit P25, DCB 71-73.

³⁰ Exhibit P30, DCB 98-101.

- Transport Accident Commission letters dated 29 September 2015, 21 September 2016 and 28 September 2016;³¹
- Statement of Mr Stuart Stotten dated 11 September 2015.³²

Clinical notes:

- Melton Health consultation note dated 28 January 2013 and 11 July 2014;³³
- Pre-accident records of Mr David Horvath;³⁴
- Excerpts of Western Hospital ED notes dated 11 July 2014;³⁵
- Primary Medical and Dental Centre (“PMDC”) consultation notes as at 13 February 2019.³⁶

The defendant’s material

Medico-legal evidence:

- Report of Dr John Owen dated 15 May 2019, 14 January 2020 and 22 April 2020;³⁷
- Report of Dr Andrew Firestone dated 28 June 2019;³⁸
- Reports of Mr Graham Peck dated 24 June 1991, 27 June 1991 and 20 March 1995.³⁹

Relevant legal principles

10. Section 93(6) of the Act provides:

31 Exhibit P32.
 32 Exhibit P33, DCB 110-115.
 33 Exhibit P26, DCB 89-90 and 94.
 34 Exhibit P27, DCB 91-93.
 35 Exhibit P28, DCB 95-96.
 36 Exhibit 31, DCB 102-108.
 37 Exhibit D1, DCB 5-24.
 38 Exhibit D2, DCB 25-35.
 39 Exhibit D3, DCB 63-70.

“A court must not give leave under subsection (4)(d) unless it is satisfied that the injury is a serious injury.”

11. The definition of “*serious injury*” as set out in s93(17) of the Act is, relevantly, as follows:

“serious injury’ means –

- (a) serious long-term impairment or loss of a body function; or*
- (b) permanent serious disfigurement; or*
- (c) severe long-term mental or severe long-term behavioural disturbance or disorder; or*
- (d) loss of a foetus.”*

12. In forming a judgement as to whether the consequences of an injury are “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”. The relevant consequences to a plaintiff will relate to pecuniary disadvantage and/or pain and suffering. Pecuniary disadvantage and pain and suffering consequences are cumulatively considered. As well, and in accordance with *Richards v Wylie*,⁴⁰ a plaintiff may place reliance upon the psychiatric consequences of an injury as long as, in the words of Chernov J, “*the tail isn’t wagging the dog*”.

13. The Court must assess whether the injury is “serious” for the purposes of the Act, at the time the application is heard.⁴¹ In assessing the “consequences” of the injury, the Court is required to consider the consequences to this plaintiff, viewed objectively, arising from the transport accident.⁴² The task of assessing the pain and suffering consequences of an injury has been held largely to be a question of impression and value judgement.⁴³

⁴⁰ [2000] 1 VR 79 at [28].

⁴¹ See s93(6) of the Act, which states that leave must not be given by a court unless the court “is satisfied that the injury *is* a serious injury”. I take that expression to mean that the injury is “*at the time at which the application is heard*”, a serious injury for the purposes of the Act.

⁴² *Petkovski v Galletti* [1994] 1 VR 436, 442 (*‘Petkovski’*); *Demmler v TAC* [2018] VSCA 284 at [52].

⁴³ See *Kelso v Tatiara Meat Co Pty Ltd* (2007) 17 VR 592, 628; see also *Sabo v George Weston Foods*

14. In determining the application, the Court must give reasons that disclose the pathway of reasoning in dealing with the evidence and issues raised by the application.⁴⁴
15. A person who is injured is to be compensated only for such injuries as are proven to have resulted from the relevant accident.⁴⁵
16. Applying the principles set out in *Petkovski v Galletti*⁴⁶ (“Petkovski”) in an application such as this, where the plaintiff has a relevant pre-existing condition, it is the consequences of the aggravation of that injury or the consequences of the additional injury, which must be assessed. To undertake this task, the plaintiff must establish what injury was caused by the accident. The Court must then determine the consequences of that injury to the plaintiff, by comparing the plaintiff’s condition before and after that injury.⁴⁷ If I am satisfied that the additional impairment is “serious” and long-term, then the plaintiff will have demonstrated that he is suffering from a “serious injury” under the Act.⁴⁸

The plaintiff

17. The plaintiff is aged 63 years. He is married with two daughters and two sons. He has eight grandchildren. He completed Year 8. He has worked a physically demanding life, predominantly in the building industry, including carpentry, concreting and brick work. He has improved his skills and obtained qualifications in drafting and building.
18. The plaintiff complains of both very considerable pain and suffering consequences and pecuniary disadvantage caused by the transport accident, with his pecuniary disadvantage exhibited by the fact that his longstanding business has been seriously compromised through his inability to pursue it to

[2009] VSCA 242 at [67].

⁴⁴ See generally *Hunter v Transport Accident Commission & Avalanche* [2005] VSCA 1 at [23]-[26].

⁴⁵ *Petkovski* [1994] 1 VR 436.

⁴⁶ [1994] 1 VR 436.

⁴⁷ *Petkovski* [1994] 1 VR 436, 444.

⁴⁸ *Ibid.*

degree he did previously. Prior to the transport accident he was able to work up to 60 hours a week, but he says this has been reduced to about 20 hours a week.

Credibility

19. The plaintiff's credibility was not assailed in the course of the hearing. The plaintiff was on occasions querulous in answer to certain questions put to him in cross-examination and, particularly, as it pertained to a lack of treatment he sought in the period of approximately one year following the transport accident, other than on the day, as well as in his response to his perceived treatment from Mr Price, one of the specialists to whom he was referred for a medico legal assessment, but overall, I formed a favourable opinion of him. He was direct and to the point.

The transport accident

20. On 11 July 2014, the plaintiff was involved in a transport accident. He was the front passenger seat in a vehicle driven by Stuart Stotten. The vehicle collided with the rear of another vehicle whilst travelling on the Western Highway, Rockbank. The plaintiff described suffering injuries to both his shoulders, neck and lower back.⁴⁹ He reported that it was a forceful collision with speed involved of approximately 40 kilometres per hour.
21. The plaintiff came home after the transport accident. His wife found him bent over in the shower. She took him to seek medical treatment. He attended Dr Robinson at the Djerriwarrh Health Services, who noted the following:

"Involved in MCA approx. 1.5 hrs ago. Initially after accident the patients wasn't in pain, but gradually over the course of the last hour, he complains of worsening lumbar back pain, 'feels like he's twisted'. He denies any chest tightness, difficulty breathing and denies any LOC or head strike. He complains of neck pain ... C-spine: some mild tenderness over c2-3 region ... Limbs NAD, no lacs or bruises ... Patient requires transfer to ED for C-spine imaging, and consideration of lower back pain and possible further investigation of the upper

⁴⁹ Affidavit PCB 14, paragraph 14.

abdominal pain. STAT Morphine IV and Maxolon 10mg (NKDA). Ambulance called."

22. He was taken by ambulance to Western Hospital. A note of entry made by the ambulance crew was of a *"frontal impact at approx. 50km/hr"*. Western Hospital noted *"O/E some R/L neck tenderness"* and *"mild L paralumbar tenderness"*.
23. The plaintiff was diagnosed with a muscle sprain, prescribed analgesia and referred to a general practitioner.⁵⁰ He did not see a treating doctor until 6 August 2015 when he obtained some analgesia because of a complaint of back pain *"he attributed to the MVA, a year before that presentation"*⁵¹.

Return to work

24. On 20 July 2014, the plaintiff returned gradually to work in his pool and landscape business, "Tidy Edge Pty Ltd", but he soon encountered difficulty coping with its physical demands. He said he brought in his brother to undertake labouring work. He reduced the number of pool building contracts that he had on his books. He commenced using subcontracted labour and another occasional part-timer, usually towards the end of the week, which was when he would most notably experience an increase in the level of pain.
25. He said that prior to the transport accident he had a number of contracts running simultaneously, but he now began to work on a one pool contract at a time basis.
26. In 2015 he purchased a jumping castle business with a view to transitioning from the physical demands of the pool and landscaping work, but he sold the business because of the physical demands of erecting and dismantling the necessary equipment.

⁵⁰ Report of Western Health PCB 90.

⁵¹ Exhibit P35 - Report Dr Toma Mikhael, to Slater & Gordon, solicitors, dated 29 September 2015

27. By the latter months of 2015, he deposed to a working capacity of some three days a week.⁵²

Treatment received since the transport accident

28. Prior to the transport accident, the plaintiff had obtained treatment for his back from David Horvath, physiotherapist, and medical care from the Primary Medical and Dental Centre (PMDC). He continued to receive treatment and care from both after the transport accident.
29. The plaintiff first attended on Mr Horvath after the transport accident on 22 July 2015 with severe right sided lower back pain and recent increasing symptoms including his low back having become so bad that he “*basically could not work*”.⁵³ Mr Horvath said he had seen the plaintiff at the beginning of 2013 with some neck problems after which his general practitioner ordered an x-ray that revealed some degenerative changes at C5-6, but no encroachment on the intervertebral neural foramina. The neck problem thereafter settled.
30. The plaintiff attended the PMDC in August 2015 for back pain, which was reported to be related to the transport accident, and then later that month for right-sided leg pain.⁵⁴
31. The plaintiff attended on Dr Sooknandan at the Bacchus Marsh Medical Centre, who diagnosed a lower dorsal scoliosis/muscle spasm and right shoulder symptoms and prescribed Panadeine Forte, Voltaren and Nurofen.⁵⁵
32. On 17 September 2015, ultrasound of the right shoulder disclosed a partial thickness tear of the subscapularis, as well as a full thickness tear in the supraspinatus measuring 33 millimetres x 35 millimetres and evidence of bursal bunching. The x-ray of the cervical, thoracic and lumbar spine revealed

⁵² Exhibit P1 - Affidavit of Plaintiff, paragraph 18, PCB15.

⁵³ Exhibit P5, Report David Horvath 13 August 2015, PCB 43 at 44.

⁵⁴ Exhibit P31, DCB 103.

⁵⁵ Exhibit P16, PCB 92.

degenerative changes at C5-6, C6-7 and C3-4 and some broad based scoliosis convex to the right in the thoracic spine and some mild scoliosis convex to the right in the lumbar spine. There was retrolisthesis of L2 on L3 and L3 on L4. Degenerative disc disease was also identified at L1-2, L2-3 and L5-S1.⁵⁶

33. The evidence points to degenerative tearing in at least one or more of the tendons of the rotator cuff in the plaintiff's right shoulder, however, the plaintiff says his right shoulder was asymptomatic before the transport accident. There is nothing in the clinical notes to suggest otherwise.
34. The plaintiff received treatment from Mr Horvath, and Dr Sooknandan, at various times throughout 2016 and into 2018 for reagravation issues with his lumbosacral spine, and in some instances his cervical and thoracic spine as well as for shoulder symptoms.
35. The plaintiff had an MRI of the cervical spine in April 2018.⁵⁷ It revealed spondylosis at numerous levels. Mostly there was no nerve root impingement, but at C5-6 there was shown to be effacement of the thecal sac and bony growths or osteophytes encroaching on the C6 neural exit foramen bilaterally and probable impingement of the C6 nerves bilaterally. At C6-7 osteophytic spondylosis effacing the thecal sac with osteophytic encroachment on the C7 neural exit foramina was demonstrated bilaterally and possible impingement of the C7 nerves bilaterally – C7-T1 mild spondylosis with osteophytic encroachment that may catch the right C8 neural exit foramen with possible impingement of the nerve.
36. The plaintiff's right shoulder was the subject of an MRI on 24 August 2018. It demonstrated acute on chronic changes with a full width supraspinatus tear, partial thickness subscapularis tear and severe enthesopathy change at the infrapinatus tendon, longitudinal split in the long head of biceps tendon.

⁵⁶ Exhibit P14, PCB 151-2.

⁵⁷ Exhibit P14, PCB 153-4.

37. The plaintiff continued under the care of Dr Sooknandan. He was referred to Mr Price, orthopaedic surgeon, who recommended surgery to the right shoulder. Liability was not accepted by the TAC. Surgery has not been performed.

Medication and treatment

38. The plaintiff's medication consists of Panadeine Forte (most nights), Mobic (daily), Panadol Osteo (four tablets daily), Ibuprofen (as required), Nurofen Plus (which he cease due to reflux indigestion).
39. The plaintiff attends approximately weekly on Mr Horvath.
40. He continues to attend his general practitioner

Lengthy prior transport accident history of back pain

41. The plaintiff has a lengthy history of back pain dating back to an injury in 1987. It is necessary to consider a good deal of it.⁵⁸
42. The first account of injury is of the plaintiff hurting his back lifting railway sleepers on 12 May 1987.⁵⁹
43. He attended his general practitioner, Dr Ong Beng Poon, of the Melton Medical Clinic, on 14 May 1987 and an x-ray showed a narrow L5-S1 disc space with incomplete fusion of the sacrum. Subsequent treatment included injections, manipulation under general anaesthesia. Physiotherapy was provided by Sandra Hardy.⁶⁰
44. On 11 July 1988, the plaintiff attended on Dr Lewinsky, a pain specialist at the Metropolitan Spinal Clinic, and treatments included manipulation, MUA, traction, physiotherapy and hydrotherapy.⁶¹

⁵⁸ A very detailed and helpful chronology was provided by Mr Ingram.

⁵⁹ Exhibit P18, DCB 42 report of Mr Troy.

⁶⁰ Exhibit P3, PCB 41, report of Dr Poon.

⁶¹ Exhibit P25, PCB 71, report of Dr Lewinsky.

45. On 11 April 1991, the plaintiff attended on Dr Bronchinetti, a general practitioner at the Gell Street Medical Centre, Bacchus Marsh with a complaint of four years back trouble aggravated by work, and was referred for x-ray and CT scan and a subsequent referral to Mr Patrikios, an orthopaedic surgeon.⁶²
46. An x-ray of the lumbosacral spine followed and demonstrated moderate to severe narrowing of the lumbosacral disc space with associated osteophytic lipping indicating degenerative disc disease – remaining intervertebral disc spaces appeared to be of normal width without spondylosis.⁶³
47. On 12 April 1991, an x-ray of the plaintiff's thoracic spine demonstrated mild anterior spondylitic lipping at T6-7, T8-9 without significant disc space narrowing indicative of early degenerative change and scoliosis to the left.⁶⁴
48. A CT scan of the lumbosacral spine of 18 April 1991 revealed a degenerate L5-S1 disc with slight bulging of the annulus posteriorly and laterally but no effacement of the epidural fat or decompression of nerve roots. At L4-5 level there was a very slight bulging of the disc postero-centrally with effacement of the epidural fat. The L3-4 disc appeared normal.⁶⁵
49. On 9 May 1991, the plaintiff attended on Mr Patrikios who noted past treatment by Mr Nelson, surgeon, including traction, physiotherapy, manipulation under general anaesthesia, epidural injection and tennis machine stimulation.
50. Mr Patrikios diagnosed a physical injury to L5-S1 disc related to the 1987 work accident, and that the plaintiff's options would be to accept a disability or consider L5-S1 spinal fusion. He regarded the plaintiff's current work disability to be 100 per cent.⁶⁶

⁶² Exhibit P23, PCB 45-46.

⁶³ Exhibit P19, PCB 43.

⁶⁴ Exhibit P19, DCB 43.

⁶⁵ Exhibit P20, DCB 44.

⁶⁶ Exhibit P24, DCB 48-50.

51. Between 1991 and 1993, the plaintiff remained off work entirely and was in receipt of compensation payments.⁶⁷
52. In March 1995, Mr Peck's report on examination, noted that the plaintiff had become eligible for an invalid pension in January 1994.⁶⁸ He also reported that the plaintiff was experiencing "*problems with the neck*".

The plaintiff commences a pool and landscaping business in 1996

53. Despite the 1987 work injury and the damage to his lumbar and thoracic spine, in 1996 the plaintiff purchased and commenced operations of "Tidy Edge Pty Ltd". The business specialised in swimming pool installation and landscaping.
54. In his affidavit the plaintiff deposed that by 1996, he had recovered from his previous low back problems. He described being involved in "*very heavy work, but it was very rewarding*".⁶⁹ He described occasional aches and pains in his neck and lower back due to heavy manual work, notably in 2000 and again in 2013, but these impositions by way of pain did not interfere with his capacity to undertake work "*on the tools*" of 60 hours per week.⁷⁰ He said he was also able to provide manual labouring assistance to his two sons in their concreting business.⁷¹ He described a number of different periods relating to different aspects of work he performed in the business. He said that the work between 1996 and 2000 was very easy. In 2000 the nature of the business changed when it began to undertake above ground liner pools which lasted a further two or three years and then again the business developed into "*concrete and manufacturing pools*"⁷² which was the type of work being undertaken at the time of the transport accident. He described the component aspects and the physical demands of that part of the business, which he said

⁶⁷ DCB 74.

⁶⁸ Exhibit D3, DCB 68.

⁶⁹ Exhibit P1, PCB 12.

⁷⁰ Exhibit P1, PCB 13.

⁷¹ Exhibit P1, PCB 13.

⁷² T 97.

was very physical.⁷³ The concreting of pools was, however, contracted out. He said that the finishing off of a pool i.e. the tiling and rendering was beyond him and that the *“biggest struggle is trying to work your shoulders and (indistinct) to try and render – the answer is, no, I can’t do that anymore”*⁷⁴.

Numerous attendances for conditions, including his back, after commencing Tidy Edge, but prior to transport accident

55. On 2 August 2000, the plaintiff attended Mr Horvath with left knee pain. He continued to attend on him on several occasions, including 28 August 2000, for his left knee,⁷⁵ and on 5 January 2001 for his left knee and tennis elbow,⁷⁶ and on 20 February 2001 with lower back pain.⁷⁷ After this, the plaintiff did not attend on Mr Horvath again until 1 December 2004 in relation to any lower back pain.⁷⁸
56. Between 2005 and 2008, the plaintiff attended the PMDC for a variety of medical reasons, including on 28 May 2005 with left sided muscular pain,⁷⁹ and on 27 December 2005 with left shoulder pain.⁸⁰
57. On 7 August 2009, the plaintiff returned to Mr Horvath with further issues including neck stiffness⁸¹ and, on 24 February 2010, with right sided neck pain,⁸² and again in 23 August 2010 with neck pain on the right side being greater than the left.⁸³
58. The plaintiff had no need to attend the PMDC again until 27 November 2010 and, when he did, it was for unrelated matters. About another two years passed without the need for any medical attention for any reason. It remained this way until 2013.

73 T 98.

74 T 99

75 Exhibit P26, DCB 91.

76 Exhibit P26, DCB 91-92.

77 Exhibit P26, DCB 92.

78 Exhibit P26, DCB 93.

79 Exhibit P31, DCB 108.

80 Exhibit P31, DCB 107.

81 Exhibit P27, DCB 93.

82 Exhibit P27, DCB 93.

83 Exhibit P27, DCB 93.

59. The plaintiff consulted Mr Horvath on 18 January 2013 with neck pain.⁸⁴
60. On 29 January 2013, the plaintiff again attended the PMDC for pain on the left side of his neck. An x-ray of 1 February 2013 showed degeneration. The plaintiff experienced neck pain and left arm tingling and numbness along the C5-6 distribution.
61. An MRI scan of 12 February 2013 disclosed foraminal stenosis that was moderate on right and mild on left at C3-4, was moderate bilaterally at C5-6, moderate on right and mild on left C6-7. It also disclosed mild posterior disc osseous complex at C5-6 leading to mild central canal stenosis and mild posterolateral disc protrusions at C2-3 and C3-4.⁸⁵
62. The plaintiff returned to Mr Horvath on 25 January 2013 with neck pain, experiencing greater pain to the right side as opposed to the left.⁸⁶

Treatment attendances post the transport accident

63. A little over a year following the transport accident, and on 22 July 2015, the plaintiff attended Mr Horvath with severe lower back pain and increasing symptoms.⁸⁷
64. On 6 August 2015, the plaintiff attended PMDC for back pain and returned again on 24 August 2015 with right sided leg pain.⁸⁸
65. On 10 September 2015, the plaintiff attended Dr Sooknandan, at Bacchus Marsh Medical Centre. He diagnosed the plaintiff with lower dorsal scoliosis/muscle spasm and right shoulder symptoms. Dr Sooknandan recorded that the plaintiff had been using Panadeine Forte, Voltaren and Nurofen, which medicines he also prescribed.⁸⁹

⁸⁴ Exhibit P27, DCB 93.

⁸⁵ Exhibit P22, DCB 87-88.

⁸⁶ Exhibit P27, DCB 93.

⁸⁷ Exhibit P5, PCB 43.

⁸⁸ Exhibit P31, DCB 104.

⁸⁹ Exhibit P16, PCB 92.

66. The plaintiff had an ultrasound on 17 September 2015. It demonstrated a partial thickness tear of the scapularis, a full thickness tear of the supraspinatus measuring 33 millimetres x 35 millimetres and bursal bunching.⁹⁰
67. On 17 September 2015, the plaintiff had x-rays for his cervical, thoracic and lumbar spine. The results showed that at the cervical spine C5-6 and C6-7 there was degenerative disc disease with osteophytes encroaching on the right at C3-4 and bilaterally C5-6 and C6-7. Furthermore, he had broad based scoliosis convex to the right in the thoracic spine. He also suffered moderate scoliosis convex to the right in the lumbar spine with 2-3 millimetres retrolisthesis of L2 on L3 and of L3 on L4. Lastly, there was degenerative disc disease at L1-2, L2-3 and L5-S1 levels.⁹¹
68. On 21 September 2015, the plaintiff attended Mr Horvath due to the reagravation in his back, neck and thoracic spine.⁹²
69. On 22 September 2015, the plaintiff attended Dr Sooknandan with neck and bilateral shoulder pain and was reported as only working three days a week.⁹³
70. In December 2015, the plaintiff went on a 10 day cruise in New Zealand and again in January 2016, for a 7 day cruise in New Zealand.
71. On 17 October 2016, 21 November 2016 and again on March 2017, the plaintiff attended Mr Horvath.
72. In August 2017, the plaintiff travelled to Malta to visit elderly relatives and the graves of family.

⁹⁰ Exhibit P14, PCB 151.

⁹¹ Exhibit P14, PCB 151.

⁹² Exhibit P5, PCB 47.

⁹³ Exhibit P16, PCB 291.

73. In October 2017, upon returning from Malta and going back to work, he attended Mr Horvath with a reagravation of pain through his lumbosacral spine.⁹⁴
74. In April 2018, the plaintiff had an MRI scan for his cervical spine which demonstrated the following:
- (a) at C2-3 mild spondylosis without nerve impingement;
 - (b) at C3-4 minor spondylosis without nerve impingement;
 - (c) C4-5 facet joint spondylosis bilaterally without nerve impingement;
 - (d) at C5-6 spondylosis effacing the thecal sac with osteophytic encroachment on the C6 neural exit foramina bilaterally and probable impingement of the C6 nerves bilaterally;
 - (e) at C6-7 spondylosis effacing the thecal sac with osteophytic encroachment on the C7 neural exit foramina demonstrated bilaterally and possible impingement of the C7 nerves bilaterally; and
 - (f) at C7-T1 mild spondylosis with osteophytic encroachment on the right C8 neural exit foramen possibly impinging the nerve.⁹⁵
75. In April 2018, Mr Horvath reported that the plaintiff has been undertaking increasingly regular treatment and had been compliant with home exercise.⁹⁶ He also noted that:

“At each time the plaintiff’s presentation was basically the same with quite severe reagravation through his lumbosacral spine and also in some instances cervical and thoracic spine. It mainly, however, is through his lumbosacral spine. The plaintiff finds a direct correlation between the aggravations and the amount of work that he performs. The aggravations were usually associated with an increase in the amount of work that he had to do, especially after trying to take a break or a holiday. This invariably required him to increase his working hours, and each time the plaintiff has tried that he has a direct severe aggravation

⁹⁴ Exhibit P5, PCB 66.

⁹⁵ Exhibit P14, PCB 153.

⁹⁶ Exhibit P5, PCB 70.

*through his lumbosacral spine especially. Mr Horvath⁹⁷ feels there is a direct correlation between the increase in his work duties and his ongoing pain levels. If the plaintiff performs lesser hours, he is much more able to self-manage his condition with his home exercise program, however, he has very little leeway in this.*⁹⁸

76. On 10 August 2018, the plaintiff attended Dr Sooknandan with neck, back and bilateral shoulder pain which he reported as due to the injuries sustained in the transport accident.⁹⁹ He was referred for an MRI scan.¹⁰⁰
77. The MRI scan taken on 24 August 2018 revealed that the right shoulder demonstrated acute on chronic changes with full width supraspinatus tear, partial thickness subscapularis tear and severe enthesopathy change at the infraspinatus tendon, longitudinal split in the long head of biceps tendon.¹⁰¹
78. On 1 September 2018, the plaintiff again attended Dr Sooknandan, with neck and bilateral shoulder pain, poor sleep, depressed mood and distress with the pain and limitations to his life. He was prescribed Panadeine Forte and referred to orthopaedic surgeon, Mr Price, orthopaedic surgeon.¹⁰²
79. On 24 September 2018, the plaintiff attended Mr Price complaining of right shoulder pain since the transport accident. Mr Price recommended arthroscopy and rotator cuff repair and forwarded a letter to the TAC for approval.¹⁰³
80. According to Dr Sooknandan:

“Mr. Price advised he had a right shoulder medium to large sized U-shaped tear of his supraspinatus. He had a similar pattern on the left side. He advised that the patient required a right shoulder arthroscopy and rotator cuff repair.”¹⁰⁴

97 A typographical error.

98 Exhibit P5, PCB 70.

99 Exhibit P16, PCB 292.

100 Exhibit P16, PCB 292.

101 Exhibit P14, PCB 154

102 Exhibit P16, PCB 292.

103 Exhibit P7, PCB 94.

104 Exhibit P16, PCB 292.

81. The plaintiff attended Dr Sooknandan on 6 October 2018, 27 October 2018, 24 November 2018 and 14 December 2018 with continuing bilateral shoulder pain, neck pain and back pain.¹⁰⁵ He was prescribed Mobic, Panadeine Forte and Voltaren Gel.¹⁰⁶
82. On 6 March 2019, 11 May 2019, 24 August 2019 and 11 November 2019, the plaintiff attended Dr Sooknandan with bilateral shoulder pain, neck pain, back pain and difficulty sleeping because of the pain.¹⁰⁷ He was advised to continue with physiotherapy and to continue with medication prescribed.¹⁰⁸
83. The plaintiff attended Dr Sooknandan on 10 February 2020 with neck pain and right shoulder pain.¹⁰⁹ He advised the doctor that his pain was getting worse and he was unable to do things he could do before his injury. He was counselled and advised to continue with prescribed treatment.¹¹⁰ In his letter dated 23 March 2020, Dr Sooknandan stated that the plaintiff's prognosis was at this stage indeterminable.¹¹¹
84. The plaintiff remains under the regular care of Dr Sooknandan and maintains weekly attendances upon Mr Horvarth.¹¹²
85. The plaintiff said in his affidavit¹¹³:

"My sleep is still interrupted by pain, even if I take strong pain-killing medications before I go to bed. Consequently, I believe that I would be lucky to get three or four hours of uninterrupted sleep per night. It is a very frustrating and difficult situation to manage.

...

I am also very worried about what the future holds for me. In particular, I am worried that if the condition of my neck and my back continues to deteriorate over time, I will lose even more of what little physical

¹⁰⁵ Exhibit P16, PCB 293.
¹⁰⁶ Exhibit P16, PCB 293.
¹⁰⁷ Exhibit P16, PCB 293.
¹⁰⁸ Exhibit P16, PCB 293.
¹⁰⁹ Exhibit P16, PCB 293.
¹¹⁰ Exhibit P16, PCB 293.
¹¹¹ Exhibit P16, PCB 293.
¹¹² Exhibit P1, PCB 29.
¹¹³ Exhibit P1, PCB 17-19.

capacity I have left following the collision. Consequently, I fear that I may not be able to continue in my own business, even in a limited capacity.

...

In addition, since the collision occurred I have also been unable to help my sons who work in the building industry on a regular basis. This loss is very upsetting for me."

86. Another of the consequences relied on by the plaintiff is that it proved necessary to sell the family home in Melton and "*we downsized to a property which requires a lot less maintenance and upkeep compared to our previous home*".¹¹⁴

87. In his second affidavit, the plaintiff said his life has continued to be plagued by pain resulting from injuries sustained in the transport accident. He described the pain as located in his spine with some referred symptoms up from his neck into his head and causing headaches, and down from his lower back into his right buttock.

88. The plaintiff deposed to:

*"Constant pain and stiffness in my lower back. The pain I suffer in my lower back can also vary in intensity. However, it is always apparent to some degree. At times the pain in my lower back can be severe and disabling. It radiates up into the middle part of my spine as well as into my buttocks and thighs, worse on the right to the left ..."*¹¹⁵

89. The plaintiff deposed that he has been unable to continue the business of Tidy Edge Pty Ltd, at the same level and capacity he was able to before sustaining injury in the transport accident. Whereas, prior to the transport accident, he was able to work up to 60 hours a week, presently he was averaging about a third of that, namely 20 hours a week, principally because of his spinal pain but also to a lesser extent as a result of his right shoulder pain. He said he employs a part-time casual two or three days a week and also has another part-timer from time to time. He also receives some help from his brother, and

¹¹⁴ Exhibit P1, PCB 19.

¹¹⁵ Exhibit P1, PCB 16.

it is only because of the additional labour that he is able to keep the business running.

90. Wendy Borg said that when the plaintiff comes home from work, she is frequently required to assist him to get his clothes off and assist him into the shower, such is the degree of spinal pain that he is in.
91. The plaintiff explained that he had not handed in his Builders' Licence because he ascertained that it will have to be held by him for seven years after his last completed contract. He is, however, no longer taking on new contract work and hence he considers that his working life has prematurely been brought to an end. His hours of work continue to reduce slowly, although he still tries to attend work three days a week, but he picks the work that he does with great care so as to minimise the risk of exacerbating his symptoms.

Analysis and consideration of the plaintiff's case

92. The plaintiff's case is of a man who has experienced many changes in his lumbar spine over a lengthy period of time, and as far back as the late 1980s injury, and subsequently to the cervical spine, but that the level of impairment caused by these changes, and the symptoms associated with them, is markedly different from the extent of impairment that has developed subsequent to the transport accident, both in pain and suffering consequences when measured against the extent of activities he has been required to forego and also the significant deterioration in his work capacity which, on his evidence, is roughly two-thirds of what it had been.
93. With respect to the right shoulder condition, the plaintiff submitted that, on the available evidence, whilst the tears are likely to have been pre-existing, nonetheless, I should be satisfied the right shoulder was asymptomatic, and since the transport accident it has become symptomatic, and increasingly troublesome to the plaintiff to the point that surgery has been recommended,

although the clinical value of surgical repair has been questioned in the opinion of Mr Chehata.¹¹⁶

Analysis and consideration of the defence

94. The defendant submitted that the long and detailed medical history is of the plaintiff having suffered a clearly serious problem with his spine and surrounding muscle tissue dating back to the late 1980s and into the early 1990s. Such was the extent of the impairment to the function of his spine that he qualified for an invalid pension.
95. As well as having been in receipt of weekly payments as a result of the earlier work injury, the defendant noted that the plaintiff also had a common law claim for the spine. The consensus of medical opinion at the time was that the plaintiff ought not go back to heavy work. However, he eventually returned to heavy work. It may have been intimated by the defendant in the course of the plaintiff's cross-examination, that the return to work after the resolution of the common law claim was more than coincidental and not just attributable to the plaintiff being a stoic. The plaintiff was not cross-examined to suggest that he was waiting the determination of his common law claim before disclosing a capacity to return to work. I place no store on any inference if such was intended.
96. Mr Jens submitted that, as far as the plaintiff's right shoulder is concerned, Mr Miller was unable to find a connection between it and the transport accident.
97. Mr Jens submitted that the evidence suggests that the plaintiff is suffering a degenerative condition affecting his right shoulder, which is now reflected in his left shoulder and that is unrelated to the transport accident. The defendant relied on the opinions of Dr Owen.
98. As far as the plaintiff's spine is concerned, the defendant submitted that the plaintiff suffers from a degenerative condition that has progressively affected

¹¹⁶ Exhibit P12, PCB132-137

him in a serious way from the date of his back injury in 1986. Mr Patrikios diagnosed the L5-S1 injury as related to the old work injury. He thought the plaintiff's options were either to accept his situation or consider an L5-S1 spinal fusion. He considered the plaintiff's work disability was 100 per cent. The plaintiff has since declined the option of a fusion.

99. The plaintiff was still in dire straits in 1995 as a result of the old injury and he experienced similar issues then as are now claimed, including the need to seek assistance from his brother with heavier manual work.
100. Mr Jens noted attendances on practitioners and physiotherapists for a variety of ailments before the 2014 transport accident, but that in the period from July 2014 to July 2015 the plaintiff did not attend upon Mr Horvath, or a medical practitioner for any problem associated with injuries from the transport accident until August 2015.
101. Mr Jens submitted that it was a telling consideration that from 1987 when aged 30, the plaintiff found himself off work effectively until 1995 because of the effects of the earlier back injury.
102. Mr Jens submitted that when the plaintiff returned to the workforce in 1996 he said he avoided heavy work until 2000 and was instead engaged in much lighter work.
103. Mr Jens contested the reliability of the plaintiff's evidence that he was engaged in heavy physical labouring work from 2000 up to the date of the transport accident in 2014. In support of this argument, Mr Jens referred to the financial figures for the plaintiff's business that revealed that the company experienced substantial fluctuations in turnover. Gross receipts reduced from \$334,000 in 2011 to \$114,000 in 2014. Mr Jens argued that the reduction reflected the plaintiff approaching 60 years of age and that he was seeing his doctor from time to time and that realistically the plaintiff's work trajectory was downwards.

104. Mr Jens submitted that the evidence identified that the plaintiff's landscaping and pool business was experiencing a downturn well before the transport accident. Wages paid in 2010 were \$34,000; 2011, approximately \$43,000; 2012, \$22,800; 2013, \$22,800; and in 2014, \$37,678. Since then the highest figure for wages is \$5,400 in 2016 and 2017. As to contracting expenses, the figures cited were for 2010, \$112,000; 2011, \$140,000; 2012, \$68,000; 2013, \$28,800; 2014 \$9,673; 2016, \$13,527 and \$14,778 in 2017.
105. Mr Jens submitted that the figures do not support the plaintiff's assertion that he has been required to assist his business by increasing the amount of labour required.
106. Mr Jens submitted that despite the reduction in turnover of the plaintiff's business prior to the accident, in August 2011 he was willing to pay approximately \$170,000 for two pieces of substantial equipment and, one year later, to sell the same equipment due to an apparent decision to have the business concentrate on smaller subdivisions, for which the machinery was superfluous. Mr Jens submitted the sale of equipment was more consistent with the plaintiff having made a business decision prior to the transport accident to undertake less demanding work because of the condition of his degenerative back, than a change in the size of sub-divisions the plaintiff intended to concentrate on.
107. Mr Jens referred to the decision of the Court of Appeal in *Angelatos v Museum of Victoria*.¹¹⁷ The Court dismissed an appeal from his Honour Judge Hanlon who refused to grant leave to the plaintiff who was injured as a furniture removalist at the age of 57. As the Court of Appeal related when addressing his Honour's findings of fact:

"His Honour then went on to describe the appellant's work history following "the accident", saying that, because of the lighter duties provided, the appellant was able to continue working until mid 1997 when, through no fault of the respondent, his employment was "brought to an end" at "an age where many people are considering retirement". It

¹¹⁷ [1999] VSCA 129

was His Honour's view that the appellant had accepted his "retirement package" because he was "at an age when many people are retiring and earn... Justly warranted benefits of rest and recreation". None the less, his Honour found that the appellant's prospects of finding further employment were "very grim indeed."

108. I do not think that the circumstances that Mr Angelatos found himself in are of an equivalent application to the plaintiff. It seems to me that the plaintiff remained vitally interested in his business before the transport accident and intended to remain engaged in his physical work. I do not regard the further change and concentration on pool installations on smaller block sizes as suggestive of an acceptance of increasing incapacity, as opposed to the plaintiff being conscious of changes in the market. It was his company, and there was no retirement package for him, other than one he fashioned by hard graft.
109. Mr Jens submitted that the plaintiff told Mr Horvath in July 2015 that he downgraded from the large family home because of his injuries and had for the last few weeks been building a pool to assist his wife who was also suffering a severe ongoing injury. Mr Jens submitted that it was fanciful to accept that the plaintiff had determined in such a short space of time since the transport accident, and without any medical advice since the transport accident, that his life had changed to the extent that he had needed to change house because he could no longer manage the larger home. Mr Jens submitted that the far more probable explanation for the downsizing and the reduction in the business turnover since 2011 was due to the plaintiff's age and the pre-existing state of his spine and a decision to reduce undertaking heavy work.
110. Mr Jens submitted that the major change relied on by the plaintiff to his lifestyle has been to his fishing activities and wrought by the injury to the shoulder region, whereas he contended that the playing of the guitar from which he derived enjoyment has not been affected by the impaired function of his back.

111. Mr Jens submitted that I should be sceptical about the plaintiff's explanation of why he had not obtained medical attention for a period of about a year from the date of the accident otherwise than on the day of its occurrence.
112. Mr Jens, however, appropriately acknowledged that if the plaintiff presents with the condition of his right arm as described, and if I am satisfied on the balance of probabilities that its function is a consequence of the motor vehicle accident, and the consequences to the plaintiff in terms of his life and work that he testified to are accepted by me, then he would be hard pressed to resist a finding of a serious injury. However, Mr Jens pressed a submission that neither by way of causation nor in terms of consequences occasioned to the plaintiff should I reach such a favourable conclusion to him.
113. Mr Jens further submitted that taken on its own, the plaintiff's back, whether attention is directed to it by way of neck pain or the lower back, would not satisfy the test for seriousness whether by reference to radiological evidence, the plaintiff's treatment regime, or the impacts upon his life.
114. Mr Jens further submitted that if the plaintiff was unimpeded by the effect of his right shoulder he would still be working "seven days a week. He put the submission this way:
- "He says that the major impact upon his work are the shoulders and shoulder...*
- Of course it follows, and if Your Honour found that the injury to the spine being a serious injury, well, this falls away, this topic, this shoulder topic, but what we say is it's a complicating factor because, in our submission, it is the major impediment to his activities of daily living; that is to say, it is the major cause of the consequences of both the impediment to his work and the impediment to his activities of daily living. That's why we submit that it is an important topic that needs to be determined...¹¹⁸*
115. Mr Jens referred to the psychiatric report from Dr Weissman dated February 2016 and asked rhetorically what aspect of the plaintiff's total presentation has worsened since the date of his report. Mr Jens contended that only one thing

¹¹⁸ T 146.

had changed, and that is the plaintiff's shoulder. After a *precis* of the plaintiff's affidavit evidence, and the account of the plaintiff's life reported on by Dr Weissman, Mr Jens submitted that:

*"So that, this is the position at p.99 in relation to his work and his social life and his family life, and then his shoulder's come into play, they get worse, and he's ultimately referred to Price for a tear of the rotator cuff, indeed on both sides. That's, in effect, as we put it."*¹¹⁹

116. The sum total effect of the submissions made on behalf of the defendant is that the plaintiff failed to establish that the function of his spine has been aggravated by the transport accident such as to constitute a serious injury and that the right shoulder injury is not caused by the transport accident.

Consideration of pecuniary implications

117. As regards pecuniary consequences, if I am satisfied that the plaintiff was working a fifth or, perhaps, even a sixth day per week before the accident and in the manner he has described, and he has been reduced to three days work as a result of injuries caused by the transport accident, then it would be difficult to conclude that he does not satisfy the test for a serious injury.

Plaintiff's submissions

118. Mr Ingram submitted that irrespective of the degree of degenerative change identified before the plaintiff was involved in the transport accident in July 2014, the plaintiff's clinical records are absent a reference to right shoulder symptomatology.
119. Mr Ingram submitted that there had been no effective challenge to the plaintiff's credit by the defendant.
120. Mr Ingram submitted that as far as the plaintiff's reliance upon a whole-of-spine injury is concerned, at various times the plaintiff has been symptomatic, and sometimes significantly so, in relation to the lumbar spine.

¹¹⁹ T146-148.

121. Mr Ingram submitted that it is relevant that, despite significant pre-transport injury deterioration of the plaintiff's spine, and the consensus of medical opinion that he had little or no retained work capacity from the injury he suffered in 1987, and he should not engage in heavy work, the establishment of "Tidy Edge" in 1996 demonstrated the plaintiff to be an extremely hardworking and stoic individual. He was someone, it was submitted, about whom I should be satisfied, was prepared to work through pain, and work with pain, but who has experienced a demonstrable pecuniary disadvantage flowing subsequent to and in consequence of injuries sustained in the July 2014 transport accident.
122. Mr Ingram submitted that the evidence revealed the plaintiff to be a man who enjoyed a significant pre-transport accident recreational and light activities existence despite the degeneration to his spine. The plaintiff had deposed¹²⁰ that before the transport accident he was able to work on the tools up to 60 hours a week and also manage the administrative side of the business and assist his sons in their business, the latter fact he said, being a matter that brought him considerable satisfaction. He enjoyed working and keeping busy. He was also busy with his family life. He enjoyed spending a great deal of time with his eight grandchildren. He often went fishing, both saltwater and fresh water, managed the maintenance of his home and garden and enjoyed playing the guitar.
123. I accept each of these matters of fact as outlined by Mr Ingram and that were also addressed in the plaintiff's evidence. The primary question is, however, what by way of additional aggravation to the plaintiff's spine has been wrought by the transport accident in terms of a reduction to his previous lifestyle and by way of additional pain and suffering and financial disadvantage and is it sufficient to amount to a serious injury?

¹²⁰ Exhibit P1, PCB 13, [10-12].

124. It is trite but true, that the law may only reward a plaintiff for the consequences of a compensable injury. In addressing this principle, Mr Ingram submitted that there is a sufficiency of evidence to identify that the plaintiff has suffered referred pain from his cervical spine into his right shoulder irrespective of whether the right shoulder stands apart as an injury caused by the transport accident.
125. Mr Ingram furthermore submitted, that if there is a sufficient evidentiary basis for the origin of referred right shoulder pain to be from the neck, there therefore, exists a cause of the plaintiff's injury that is part of the compensable spinal injury that I should conclude was aggravated by the transport accident, and consequently, I am entitled to incorporate the right shoulder symptoms as stemming from this partial cause.
126. Mr Ingram submitted that I ought not attempt to differentiate and attribute what right shoulder symptoms are referred from the cervical spine as opposed to being caused by the rotator cuff injury, despite the existence of a diagnosis of rotator cuff injury. Nonetheless, Mr Ingram did not abandon the rotator cuff injury as caused by the transport accident.
127. Mr Ingram addressed the opinions of Mr Owen who examined the plaintiff on behalf of the defendant, and provided a number of reports, as well as the report of Mr Miller who provided a joint orthopaedic impairment assessment report dated 17 July 2017. Mr Ingram submitted that although Mr Owen had some of the records, Mr Miller did not. An examination of Mr Miller's report identifies a very detailed set of enclosures with which he was supplied to the point in time at which the request for a report was made.
128. Mr Ingram noted that neither Mr Miller or Mr Owen "*had the plaintiff's evidence in toto and, in particular, the plaintiff's viva voce evidence.*"¹²¹ That is the

¹²¹ T156

inevitable state of affairs in a serious injury case. In any event, doctors are not called on to assess oral evidence; that is the role of the Court.

129. Mr Miller reported on 17 July 2017 that the plaintiff's right shoulder revealed prominent and tender acromioclavicular joint with:

Abduction 130 degrees

Forward Elevation 130 degrees

External Rotation 40 degrees

Internal Rotation 40degrees.¹²²

130. Mr Miller reported minor soft tissue crepitus during shoulder movement.

131. In terms of diagnosis and prognosis, Mr Miller wrote, that the plaintiff's symptoms are partly referred from his cervical spine and partly referred from rotator cuff pathology. He wrote that the plaintiff "*cope reasonably well with those symptoms*"¹²³ and he believed the prognosis for the right shoulder was good.

132. As to a relationship to the transport accident, Mr Miller wrote that "*that the rotator cuff pathology was pre-existing. I believe that the development of the symptoms and that the right shoulder disease reflects predominantly pre-existing disease*"¹²⁴.

133. In his report dated 24 September 2018, Mr Price recorded a history that the plaintiff had been troubled by right shoulder pain since the car accident and that it had had become particularly painful over the past four months.¹²⁵ He wrote that the pain is:

"located over the anterolateral deltoid and radiates towards his biceps muscle belly. It limits his ability to perform overhead activities and reaching behind his back. He's had a similar pattern of pain on the left side but this has been present for only three months and is not associated with any specific injury. He has difficulty lifting things away

¹²² Exhibit P9 PCB 108 at 112.

¹²³ Exhibit P9 at 113.

¹²⁴ Exhibit P9, PCB 113.

¹²⁵ Exhibit P5, PCB 79.

*from his body and pain with overhead activities. The pain in both of his shoulders is now limiting his ability to work”.*¹²⁶

134. Mr Chehata reported on 12 November 2019:

*“On examination he has widespread trapezial muscular spasm running down the right shoulder with asymmetric loss and minimal muscle wasting... Examination of the right shoulder revealed a cuff deficient shoulder in both right and left sides, although the left is asymptomatic.”*¹²⁷

135. Mr Chehata’s account that the left shoulder was asymptomatic as at November 2019, is different to Mr Price who, as noted above, in September 2018, identified that pain in both shoulders was limiting the plaintiff’s ability to work.

136. Mr Chehata recorded improvements in abduction and both internal and external shoulder movements of the right shoulder from the examination recordings for each shoulder that Mr Miller performed in 2017.

137. Mr Chehata also wrote:

*“There is clearly a degenerative and constitutional component to his rotator cuff tear as it is almost symmetrical on the left side, but has clearly been aggravated by the motor vehicle accident as he has osteoarthritis of the cervical spine and pre-existing degenerative changes in the lumbar spine.”*¹²⁸

138. In light of Mr Chehata’s report, Mr Ingram argued that the plaintiff has suffered a transport accident-related aggravation of the right shoulder.

139. As regards the right shoulder, the plaintiff’s affidavit evidence is that:

*“In addition, the neck pain still radiates down into my shoulders, much worse on the right side compared to the left side as well as down into my right upper arm and around the right shoulder blade.”*¹²⁹

140. Mr Ingram referred to Professor Bittar’s report dated 2 September 2019, prepared at the request of the plaintiff’s solicitors. Professor Bittar addressed the plaintiff’s neck pain as follows:

¹²⁶ Exhibit P5, PCB 79.

¹²⁷ Exhibit P12, PCB 135.

¹²⁸ Exhibit P12, PCB 135.

¹²⁹ Exhibit P1, PCB 16, [21].

“He experiences constant neck pain which is sharp, throbbing or gnawing at times. His neck pain is bilateral but is worse on the right side. It radiates into both shoulders, particularly the right shoulder and into the right retroscapular region. His neck pain has an average severity of 9/10 with a maximum severity of 10/10. It is exacerbated by sudden neck movements, maintaining his neck in a fixed position for prolonged periods, pushing, pulling, straining, repeated his arm movements, using his arms above shoulder height and any sudden or sustained neck extension, flexion or rotation. If she sits or stands in the one position for more than very short periods of time, his neck pain flares up, and any attempts to use a computer or to drive because an aggravation of his neck pain. His neck pain improves with recumbent city, frequent postural changes and medications. His neck pain affects his ability to read as much as he wishes and also causes significant difficulty in concentrating.

....

In addition to his neck pain and lower back pain, he also complains of significant pain in the right shoulder with restricted movement. I explained to him that an assessment of his shoulder is beyond my area of expertise.”¹³⁰

141. Dr Slesenger is an occupational physician, who in addressing the condition of the plaintiff’s neck, wrote in a report dated 20 January 2020 and provided to the plaintiff’s solicitors:

“He has ongoing moderate to severe pain in the neck radiating into the right shoulder. There is associated restriction to his range of movements, which is variable, as well as restrictions to his range of shoulder movements.

He has difficulty lying on the right side, difficulty forward reaching and difficulty over shoulder reaching on the right side.”¹³¹

142. Dr Slesenger also addressed the pain and consequences the plaintiff was experiencing as a result of his lower back with his pain being described as ongoing and severe and aggravated by work activity and weather or prolonged sitting and of experiencing disturbed sleep as a result of his symptoms.
143. Mr Haw is a hand and orthopaedic surgeon who examined the plaintiff on the request of the plaintiff’s solicitors in January 2016 and furnished a report. The history he obtained included that in the context of the previous injury the plaintiff had lost weight, undergone physiotherapy and hydrotherapy and that

¹³⁰ Exhibit P11, PCB 128, point (3).

¹³¹ Exhibit P13, PCB 140.

his “back came good, and was good up until the recent accident¹³²”. As well he had experienced intermittent stiff neck pain since 2000 that would last one to three days and then would go and he would be free of pain for months but returned following the transport accident and never fully resolved.

144. Mr Haw in response to questions asked of him said that whilst the plaintiff’s injuries were not caused by the transport accident, “... *pre-existing degenerative problems were aggravated by the accident.*”¹³³

145. Mr Ingram relied on the principle expressed by the Court of Appeal in *Dressing v Porter*,¹³⁴ where Ashley J said, with the concurrence of Callaway and Buchanan JJ, that:

*“What His Honour had to do was to decide what symptoms afflicted the appellant in consequence of his compensable injury and with what effect. If, by reason of pain and suffering consequences the compensable injury met the serious injury test, it was beside the point that some other condition might also have satisfied the test by reason of its pain and suffering consequences.”*¹³⁵

146. Mr Ingram submitted that *Dressing v Porter* has at least the effect, that if there is another injury to the plaintiff (that is, other than the spine) which itself gives rise to the requisite degree of consequences (that is, the bilateral rotator cuff disease), that state of affairs cannot be relied on by a defendant to escape liability for a condition that itself would otherwise satisfy the test for seriousness (the spine condition), when measured against its pain and suffering consequences.

147. Following *Dressing v Porter*, the Court of Appeal in *Bezzina v Phi & Anor*,¹³⁶ suggested an alternative approach was required in an appropriate case¹³⁷ and that in such an appropriate case, when determining if the compensable injury

¹³² Exhibit P17, DCB 37.

¹³³ Exhibit P17, DCB 39.

¹³⁴ [2006] VSCA 215.

¹³⁵ [2006] VSCA 215 at [47].

¹³⁶ [2012] VSCA 161.

¹³⁷ The circumstances included that the plaintiff had been in receipt of a disability pension for a long standing back injury when he suffered injuries to his neck and right shoulder in a transport accident. At first instance, it was found that the neck and right shoulder injuries did not meet the serious injury test.

being relied upon is a serious injury, it is relevant to consider the impact of unrelated injuries on the plaintiff. At [23] the Court said:

“In assessing whether each claimed serious injury satisfied the ‘very considerable’ test, her Honour was required to examine the impact of the injury on the applicant as a whole. Far from her honour’s approach being erroneous, her Honour was bound, when examining the consequences of the claimed serious injury, to look at how they affected the applicant as he was and would likely have been absent the injuries he sustained in the transport accident. This included looking at and considering the effect (and likely effect in the future) of the applicants pre-existing injuries”.

148. In *Peak Engineering Pty Ltd v McKenzie & Anor*¹³⁸ the Court of Appeal said that the trial judge had erred by not identifying and excluding the continuing consequences on the plaintiff of an earlier left knee injury in assessing whether a subsequent hand injury was serious. Maxwell P. said at [24]:

“In a case of this kind, where two different injuries are concurrently producing pain and suffering consequences the applicant, it will ordinarily be necessary to make findings about all of the pain and suffering consequences which are operative at the date of the trial. This would seem to be an essential pre-condition to the task of deciding which of the pain and suffering consequences are attributable to which injury.”

149. Mr Ingram, submitted that, on the evidence, the plaintiff’s right shoulder is sufficiently implicated as a compensable injury from the spine and is not a separate injury, due to its presentation by way of referred pain from the plaintiff’s neck, and independent of a rotator cuff injury, and hence is capable of being treated as part of the spinal injury aggravated by the transport accident.
150. In the alternative, Mr Ingram contended that the plaintiff had suffered a separate aggravation injury of the diagnosed rotator cuff pathology as a result of the transport accident.

¹³⁸ [2014] VSCA 67.

Financial disadvantage

151. As far as pecuniary disadvantage is concerned, Mr Ingram relied on the plaintiff's affidavit that his working capacity has been reduced to three to four days' work a week on average. The plaintiff has needed to knock back substantial and remunerative work. His attempts to transition out of the landscape and pool building industry into the jumping castle business was unsuccessful because of its physical demands which he could not manage.
152. Mr Ingram referred to the statement in *Petkovski*, per Southwell and Teague JJ who said:
- "While the evidence of economic loss is skimpy to say the least, and the evidence is imprecise as to normal working hours, it can safely be inferred that they must have totalled significantly more than 30 a week; the accident has effectively reduced them to 20."*¹³⁹
153. Mr Ingram referred to the absence of a challenge to the truthfulness of the plaintiff's reduced working capacity. There was a faint challenge along this line in some of the cross-examination conducted by Mr Jens. That it was not a full blooded challenge, can be understood in part at least, in the context of the defendant's case that, because of his age, the plaintiff's pre-existing degenerative spine was already progressing such as to drive him away from the level of activity he had previously enjoyed and that this is reflected in the reduced turnover of the business in the years preceding the transport accident and, particularly from 2011, as well as the other facts I have already referred to. There is, I think, an entirely reasonable basis to understand the defendant's approach to its cross examination of the plaintiff, and in light of it, it did not require a direct challenge the plaintiff's honesty.
154. Mr Ingram submitted that by means of a simple comparison, the plaintiff has exhibited a greater loss of working capacity than Mr Petkovski whose reduction was, nonetheless, considered sufficient for the Court of Appeal to be satisfied of the existence of pecuniary disadvantage.

¹³⁹ [1994] 1 VR 436, 444.

155. Mr Ingram submitted that it was both unnecessary, and forensically unproductive, to place too great a reliance on the financial reporting analysis prepared by the plaintiff. Mr Ingram submitted that the dissection of financial figures derived from analysis of experts was better left for a damages trial in the event a serious injury certificate were granted, but he intimated there could be a claim for significant past and future losses. Whilst this was a nice piece of advocacy on the part of senior counsel, I am more inclined to the view, that having put the figures into evidence, there can hardly be complaint that Mr Jens analysed them in a manner to suggest an alternative interpretation.
156. Mr Ingram's submission, so far as the economic loss consequences are concerned, was on surer footing when he developed his argument by reference to the evidence that Mrs Borg was required to handle in large part the books of the business after the transport accident. Her affidavit evidence also referred to a forced winding down of the business, together with the need for the engagement of the plaintiff's brother and of casual employees, as well as the failed attempt at the jumping castle business due to the plaintiff's inability to work.
157. Mr Ingram also referred to the contents of Mr Horvath's first report dated 13 August 2015, in which he wrote that the plaintiff was able to work only three or four days a week. Mr Horvath added:

*"I have known Mr Borg for quite some time since 2000 and if I have had one consistent difficulty during that time with him it would be in trying to get him to slow down."*¹⁴⁰

158. Mr Horvath's reporting dated 31 March 2016, 16 February 2017, 20 June 2018 and 2 April 2020 contained a consistent account of the plaintiff's pain and suffering. In the most recent of his reports he wrote:

*"From the nature of the accident as described to me by Mr Borg, I feel that the nature and severity of the injury he is suffering is quite consistent with the circumstances of the accident."*¹⁴¹

¹⁴⁰ Exhibit P5, PCB 44.

¹⁴¹ Exhibit P5, PCB 71.

159. Accepting, as he did the pre-existing state of the plaintiff's back, Mr Horvath said:

*"From the investigations that have been performed it is clear that there is a degenerative component present in Mr Borg's lumbosacral and cervical spine and also into his shoulder as well."*¹⁴²

160. But, relevantly, from the point of view of my exercise, he went on to say:

*"The pertinent fact though is that, prior to the motor vehicle accident, Mr Borg was able to work quite continuously for six to seven days a week."*¹⁴³

Discussion of the medical evidence and reasoning to conclusion

161. The chain of medical evidence after the transport accident commences with the plaintiff's attendance on Dr Robinson,¹⁴⁴ and at Western Health.¹⁴⁵

162. Next of relevance is the reporting by Dr Sooknandan. In his first report, he related having seen the plaintiff on 10 September 2015 with neck pain, back pain and numbness in the right leg. Although he was then working, the plaintiff explained that after some three days of work he would experience back flare-ups and need to take two days off.¹⁴⁶

163. Dr Sooknandan observed that he was also treating the plaintiff for right shoulder pain. He was taking Panadeine Forte, Voltaren and Nurofen, as well as receiving treatment from Mr Horvath. He said he saw the plaintiff again on 22 September 2015 with neck, back and bilateral shoulder pain. A considerable period of time elapsed before Dr Sooknandan would see the plaintiff again.

164. In his second report of 23 March 2020,¹⁴⁷ Dr Sooknandan said the plaintiff returned for treatment on 10 August 2018 with neck, back and bilateral shoulder pain. His report outlined the plaintiff's ongoing attendances from then

¹⁴² Exhibit P5, PCB 71.

¹⁴³ Exhibit P5, PCB 71.

¹⁴⁴ Exhibit P4, PCB 42.

¹⁴⁵ Exhibit P6, PCB 90-91.

¹⁴⁶ Exhibit P16, PCB 92.

¹⁴⁷ Exhibit P16, PCB 291-293.

and up until 10 February 2020, when he complained of neck pain and right shoulder pain, and said that *“the pain was getting worse and he was unable to do things he could do before his injury”*.

Delay in treatment

165. Mr Ingram submitted that the defendant’s reliance on the plaintiff’s delay in obtaining treatment as a relevant consideration was explicable and should be not be regarded adversely. The plaintiff deposed that there was a hold-up in his claim being processed by TAC. He could not afford to pay for the treatment. He said he tried to make appointments and they would be cancelled because they were not approved by the TAC. He said he found this highly embarrassing and he was a proud man. He said, *“it was frustrating for 12 months that I couldn’t get any help or assistance or medication or pain control medication in any way or form.”*¹⁴⁸
166. In a letter dated 29 September 2015, the Commission wrote that, *“In accordance with the Act and after carefully considering this information, TAC is unable to accept your claim as you appear to be entitled to WorkSafe benefits”*.¹⁴⁹ It is unnecessary for me to traverse why the claim was not accepted, but it was not accepted until September 2016, and I accept that the delay of treatment is consistent with that state of affairs and provides a probable explanation for it.
167. Mr Ingram referred to Dr Weissman’s report dated 24 February 2016.¹⁵⁰ He thought the plaintiff to be suffering mild symptoms and features of a chronic adjustment disorder consequential to the transport accident.
168. Dr Serry, in a report to the plaintiff’s solicitors dated 26 July 2017,¹⁵¹ expressed the opinion, that from a psychiatric viewpoint, the plaintiff has experienced a degree of lowered mood in the context of ongoing pain and

¹⁴⁸ T 35.

¹⁴⁹ Part Exhibit P32.

¹⁵⁰ Exhibit P8, PCB 103-104.

¹⁵¹ Exhibit P10, PCB 117-126.

restrictions and he was somewhat anxious and frustrated and had been mildly traumatised by the accident circumstances, although he gave a generally favourable prognosis. He said that the plaintiff:

*“... presents as an uncomplaining individual and he appears to be managing his accident-related injuries to the best of his abilities. He does not in my opinion require any specific mental health intervention.”*¹⁵²

169. Dr Firestone’s psychiatric opinion expressed in a report on examination of the plaintiff provided for the defendant, and dated 28 June 2019, is largely consistent with the plaintiff’s opinion writers and he said that:

*“I note that two years ago he suffered the loss of a brother he loved, he visits his grave regularly every fortnight. There appears to be an adjustment disorder with mild to moderate depressive features since that time as a result.”*¹⁵³

170. He added:

*“Grieving the deaths in his family amplifies any psychological distress which is secondary to the transport accident and pain from injuries from it.”*¹⁵⁴

171. Mr Miller reported the plaintiff works approximately three and a half to four days a week, and employed casuals to undertake more physical work and was pacing himself at a slower rate of less physical work.¹⁵⁵ In relation to the cervical spine, he said that whilst the plaintiff *“suffered a musculo-ligamentous strain to the cervical spine and aggravation of degenerative disease in the cervical spine and further superimposed injury”*, he found *“no evidence of radiculopathy or neurological deficit. Ongoing symptoms are likely. The prognosis for the cervical spine is only fair.”*¹⁵⁶ As to the relationship to the transport accident, Mr Miller wrote¹⁵⁷:

“This is complex and multifactorial. It is clear the client had pre-existing disease in the cervical spine. On the information available to me, this has

¹⁵² Exhibit P10, PCB 123.

¹⁵³ Exhibit D2, DCB 32.

¹⁵⁴ Exhibit D2, DCB 32.

¹⁵⁵ Exhibit P9, PCB 113

¹⁵⁶ Exhibit P9, 113.

¹⁵⁷ Exhibit P9, 113.

been aggravated by the motor vehicle accident outlined above. I regard this as being significantly accident related”.

172. Mr Miller made like findings and attributions to the transport accident as regards the plaintiff’s lumbar spine.
173. As to the plaintiff’s right shoulder, he considered that his symptoms were *“partly referred from the cervical spine and partly referred from rotator cuff pathology”*. He added that the plaintiff *“copes reasonably well with those symptoms...I believe the prognosis for the right shoulder is good”*¹⁵⁸.
174. Mr Miller thought that the plaintiff will only be able to continue with his current restricted hours due to accident-related effects¹⁵⁹. He said the plaintiff will have a reduced capacity for heavier domestic activities as a result of his orthopaedic injury, and that he had previously enjoyed fishing, playing the guitar and live theatre which he has not been able to do to the same extent as prior to the accident. Mr Miller considered that the plaintiff will have some reduction in his capacity for pre-injury, leisure and recreational activities¹⁶⁰.
175. Professor Bittar wrote, relevant to his area of expertise, that the plaintiff complains of the following symptoms¹⁶¹:

“Lower back pain. This is constant and radiates predominantly to the right side in the lumbosacral region. It varies in character between sharp, throbbing, stabbing and aching. It has an average severity of 6/10 with a maximum severity of 8/10. It is exacerbated by bending, twisting, lifting, pushing, pulling, coughing, sneezing, straining, sitting for more than 30 minutes, standing for more than 60 minutes and walking for more than 15 minutes. It improves with recumbent sea, frequent postural changes and medications.

Right sciatica (posterior leg pain). He experiences constant pain radiating to his right buttock, hamstrings and calf and is leg pain is generally dull or aching in character. It has an average severity of 6/10 with a maximum severity of 8/10. It has similar exacerbating and relieving factors to his lower back pain.

Neck Pain. He experiences constant neck pain which is sharp, throbbing or gnawing at times. His neck pain is bilateral but is worse on the right side. It radiates into both shoulders, particularly the right shoulder, and

¹⁵⁸ Exhibit P9, 113.

¹⁵⁹ Exhibit P9, 115.

¹⁶⁰ Exhibit P9, 116.

¹⁶¹ Exhibit P11, PCB 127-131.

into the right retro scapular region. His neck pain has an average severity of 9/10 with a maximum severity of 10/10. It is exacerbated by sudden neck movements, maintaining his neck in a fixed position for prolonged periods, pushing, pulling, straining, repetitive arm movements, using his arms above shoulder height and any sudden or sustained neck extension, flexion or rotation. He sits or stands on the one position for more than very short periods of time, his neck pain flares up, and any attempts to use a computer or to drive causes an aggravation of his neck pain. His neck pain improves with recumbent sea, frequent postural changes and medications. His neck pain affectivity ability to read as much as he wishes and also causes significant difficulty in concentrating.

...

In addition to his neck pain and lower back pain, he also complains of significant pain in the right shoulder with restricted movement. I explained to him that an assessment of his shoulder is beyond my area of expertise.

...

Effects of His Neck Pain and Back Pain

He socialises much less than he did previously due to sitting and standing intolerance, severity of pain, inability to drive long distances and side-effects of medications.

His recreational activities are also severely restricted. He no longer participates in fly fishing, and no longer plays to (sic) guitar or the organ.

His sleep is severely disrupted and he experiences significant daytime tiredness.

His domestic activities are also limited, particularly his ability to undertake household cleaning and gardening.

Overall his quality of life is severely diminished.

...

Work Capacity

In my opinion, he is permanently incapacitated for his full-preinjury duties as a result of the transport accident related injuries. He is currently self-employed in a suitable role in which he has the flexibility to alter his workplace hours activities according to symptoms. In my opinion, his work capacity is unlikely to change significantly into the foreseeable future."

176. Dr Slesenger reported on 20 January 2020¹⁶² that the plaintiff had limited his occupational activities since the transport accident and although he was continuing to perform administrative duties associated with his business, he

¹⁶² Exhibit P13, PCB 138-150.

avoids rendering, concreting and major excavations. The plaintiff had reported performing light excavations with smaller vehicles and he was still performing some formwork and continued to perform a supervisory role in the business. He told Dr Slesenger that he had reduced the size of his business by employing fewer staff and that he no longer engaged in more than three projects at a time. He was working Monday and Friday within the office or attending to prospective customers, and three days a week he was performing lighter construction tasks.

177. Dr Slesenger considered that the plaintiff was probably still working outside his capacity limits and he noted that his symptoms continued to be aggravated by his occupational activities. He was continuing to perform heavy manual tasks, for example formwork, and was also likely to be exposed to whole-body vibration when driving a Bobcat. He said he was concerned that the plaintiff appeared to be undertreated. He noted that his pain control appeared to be suboptimal and he presented with a significant right shoulder impairment with evidence of adhesive capsulitis. He also thought the plaintiff to be at risk of deteriorating symptoms due to the degenerative nature of his underlying condition.

178. Mr Haw reported that the plaintiff had been required to change the nature of his business from having two full-time workers to two casual sub-contractors. As a result, he had less direct responsibility and had been able to drop his work time from six days a week to three to four days per week. The plaintiff explained to Mr Haw that some days he is quite unable to work at all and will need a hot bath or shower and take up to six Panadeine Forte.

The criticisms of Mr Owen

179. Mr Ingram submitted that Mr Owen's reporting was problematic. He made a number of submissions directed at the content of his reports. He first addressed Mr Owen's report dated 15 May 2019¹⁶³ where, in response to

¹⁶³ Exhibit D1, DCB 5-15.

being asked what physical injuries were caused by the transport accident, he wrote that:

“Mr Borg had obviously a deceleration injury from his motor vehicle accident which made him symptomatic in his cervical and lumbar spines in particular, and over the subsequent weeks he noticed problems in his shoulders.”¹⁶⁴

180. Mr Owen was aware that the plaintiff had been suffering some cervical problems at the beginning of 2013, and at that time there had also been cervical radiology and referred arm pain, but he noted that it appeared to be part of an investigation for a cardiac problem.

181. Mr Owen added:

“On the basis of this I think it is reasonable to accept that Mr Horvath [sic] had a soft tissue injury to his cervical and lumbar spines. I would see these as an aggravation of an underlying condition.”¹⁶⁵

182. Further on in his report, he noted that in September 2018:

“Mr Price takes the history that Mr Borg said he had been troubled by pain on the right side since the car accident in 2014 and has been particularly painful over the last four months.

My understanding of this shoulder problem then is that Mr Borg has a tear in his rotator cuff in his right and left shoulders. Any significant acute tearing of the rotator cuff would be very painful and the patient would be immediately aware of it.

In this circumstance it is almost certain that the rotator cuff problem, tearing that is, is long-standing, degenerate and not post-traumatic. Therefore I would discount any liability to the shoulders as being related to the accident in 2014.”¹⁶⁶

183. Mr Ingram submitted that Mr Owen’s finding is inconsistent with the plaintiff’s radiology that acute on chronic change had been identified. Furthermore, it has proved inconsistent with the plaintiff’s evidence both on affidavit and under cross-examination about the onset of right shoulder pain.

184. Mr Owen continued:

¹⁶⁴ Exhibit D1, DCB 9.
¹⁶⁵ Exhibit D1, DCB 10.
¹⁶⁶ Exhibit D1, DCB 10.

“The neck problem I suspect has resolved back to a low level of ongoing disability. The lumbar spine seems to be more symptomatic.”¹⁶⁷

185. Mr Ingram submitted that suspicion is not sufficient a basis to make good a medical opinion.

186. Mr Ingram did, however, note that Mr Owen accepted that the plaintiff’s lumbar spine remains symptomatic. He additionally wrote:

“I would say that it is apparent that his right shoulder, with advancing degenerative rotator cuff disease, is a major problem for him working, as is his lumbar spine.”¹⁶⁸

187. Mr Owen did not, however, consider the shoulder problem as being post-traumatic despite it limiting the plaintiff’s use of his arm overhead and being very painful and warranting some intervention¹⁶⁹.

188. Mr Ingram submitted, that despite the criticisms of his reporting, Mr Owen accepted the persistence of the lumbar spine as a major problem for the plaintiff, and it being related to the transport accident, although, in his opinion, the cervical spine having resolved.

189. Mr Ingram submitted that there is much in the next report of Mr Owen dated 14 January 2020¹⁷⁰ that is not expert opinion, but speculation induced by what he characterised as a series of unorthodox questions addressed to Mr Owen at the request of the defendant’s solicitors. The first question, asked him to express an opinion on the signs and symptoms he would expect the plaintiff to have experienced after the transport accident and on an ongoing basis, if his current condition was caused or contributed by the transport accident.¹⁷¹ Mr Ingram submitted that this was an inappropriate question to have posed. Mr Owen said:

¹⁶⁷ Exhibit D1, DCB 11.
¹⁶⁸ Exhibit D1, DCB 11.
¹⁶⁹ Exhibit D1, DCB 11.
¹⁷⁰ Exhibit D1, DCB 16-19.
¹⁷¹ Exhibit D1, DCB 17.

*"I would have expected Mr Borg to have complained of low back and neck pain with its onset soon after the accident. I would have expected the pain to have prompted his attendance at the hospital as he did."*¹⁷²

190. Mr Owen recognised that:

*"The severity of his pain and any clinical signs that he may have exhibited on this attendance at the hospital are not available to me."*¹⁷³

191. He further acknowledged:

*"I am not aware of what instructions on follow up were given to Mr Borg by the hospital."*¹⁷⁴

192. Mr Owen also said he was unaware if the plaintiff had been referred back to his general practitioner for ongoing care.¹⁷⁵

193. Mr Ingram submitted that, in important respects, Mr Owen's report contains opinions based on an absence of relevant facts. Mr Ingram submitted that Mr Owen's approach was unacceptable when regard is had to the further proposition about which he was asked to comment, namely, the supposed delay by the plaintiff in seeking treatment from July 2014 to July 2015, which Mr Ingram contended, was directed by the defendant at negating causation.

194. In response to the period of delay in treatment Mr Owen said:

*"The gap in the treatment is indicative that his problem was considered by the claimant to be manageable and that his symptoms were not serious enough, and his incapacity not great enough, for him to seek medical attention or treatment."*¹⁷⁶

195. Mr Ingram submitted the value of Mr Owen's opinion was diminished because of the absence of relevant facts having been disclosed to him, specifically, the rejection of the plaintiff's claim by the TAC, but that, in any event, the worth of the opinion had been overtaken by the plaintiff's account in evidence of an inability to afford treatment out of his own pocket, assuming I accepted his explanation.

¹⁷² Exhibit D1, DCB 17.

¹⁷³ Exhibit D1, DCB 17.

¹⁷⁴ Exhibit D1, DCB 17.

¹⁷⁵ Exhibit D1, DCB 17.

¹⁷⁶ Exhibit D1, DCB 18.

196. I agree with Mr Ingram that the opinion's value on the matter of a lack of disclosed treatment in the period of approximately one year following the transport accident, is diminished by the additional fact of TAC's management of the claim and the plaintiff's evidence by way of explanation, and that I accept.

197. Mr Owen's final report is dated 22 April 2020.¹⁷⁷ In it, he noted that the plaintiff had suffered an injury in 1987. He wrote that statistically 85 per cent of adults suffer an episode of back pain in their lives. He said:

*"He was only in his thirties at the stage and he was obviously off work for an extended period of time. His back problem, I understand, was accepted as a workers' compensation issue. It was serious enough for all the opinions to mention a significant degree of impairment and predict problems doing heavy manual work indeed advising against it."*¹⁷⁸

198. Mr Ingram submitted that although there is no indication in Dr Owen's report that the plaintiff was asked to outline a medical history of any previous symptoms in his lower back, nonetheless, Dr Owen wrote that:

*"It really does stretch credibility, that even though it was some time ago, the claimant did not remember his back problem in his interview in May 2019."*¹⁷⁹

199. Mr Ingram submitted that the history of the injury furnished by the plaintiff in respect of his spine was accurate. I agree that the Owen report does not invite a finding that the plaintiff obfuscated his history.

Right Shoulder – Defendant's Submissions

200. Mr Jens submitted that in so far as reliance by way of right shoulder injury to the transport accident is concerned, the plaintiff had acknowledged that a substantial cause for his inability to continue his lifestyle since the transport accident was because of his right shoulder and then in part his left shoulder.

¹⁷⁷ Exhibit D1, DCB 20-24.

¹⁷⁸ Exhibit D1, DCB 22.

¹⁷⁹ Exhibit D1, DCB 22.

201. Mr Jens submitted that there was a real question of the cause of the plaintiff's right shoulder because more recent medical opinion considered that the plaintiff's left shoulder is exhibiting identical problems. Because the plaintiff was unaware of any injury to it, Mr Jens argued this tended to favour a diagnosis of bilateral shoulder disease.

202. Mr Jens noted that in 2016, Mr Haw made no mention of the right shoulder and Professor Bittar, beyond relating the plaintiff's pain, acknowledged that it is a matter that falls outside his area of expertise.

203. Mr Jens submitted, that Mr Miller, by contrast, said of the right shoulder on examination:

"The client has symptoms in the right shoulder. These are partly referred from his cervical spine and partly referred from rotator cuff pathology. He copes reasonably well with those symptoms. I believe the prognosis for the right shoulder is good. I believe that the rotator cuff pathology in the right shoulder was pre-existing and I believe that the development of symptoms and the right shoulder disease reflects predominantly pre-existing disease."

204. Mr Jens submitted that according to Mr Miller, the plaintiff's right shoulder is predominantly attributable to a pre-existing disease exhibited by rotator cuff pathology.

205. Mr Jens also submitted that Mr Owen's opinion ought to be preferred, that is to say, that the right shoulder presents as a separate and unrelated development due to rotator cuff pathology.

206. Mr Jens referred to the absence of a medical report specifically identifying neck pain as a causative of the plaintiff's right shoulder condition as opposed to the non-transport accident damaged rotator cuff.

207. Mr Jens addressed the report of Mr Chehata, who had been requested to provide answers to a number of questions, and in response to "Question 1", after addressing the neck and the cervical and lumbar spine said:

"He also has constitutional degenerative cuff tears, with the right side aggravated by the motor vehicle accident."

208. Mr Jens impugned Mr Chehata's reasoning to conclusion when he wrote:¹⁸⁰

"Examination of the right shoulder revealed a cuff deficient shoulder in both the right and left sides, although the left is asymptomatic. There is clearly a degenerative and constitutional component to his cuff tear as it is almost symmetrical on the left side but has clearly been aggravated by the motor vehicle accident, as he has osteoarthritis of the cervical spine and pre-existing degenerative changes in the lumbar spine."

209. Mr Jens said that, although the defendant agreed with Dr Chetata about the existence of a degenerative and constitutional component to the rotator cuff tear as it is almost symmetrical on the left, it did not agree with his opinion that it has been aggravated by the motor vehicle accident or that evidence of such an aggravation can be attributed to the presence of osteoarthritis of the neck and the lumbar spine. Mr Jens submitted that Dr Chehata's opinion linking the problem with the plaintiff's right shoulder, as an aggravation caused by the motor vehicle accident because of the presence of osteoarthritis in the neck and the lumbar spine, made no sense.

210. Mr Jens also adverted to the plaintiff having been the front seat passenger in the car such that his seatbelt would have come across his left shoulder, but that Dr Chehata failed to engage with the mechanism of injury, of how the right shoulder condition is a result of the accident.

Spinal Aggravation – Defendant's Submissions

211. Mr Jens submitted that, taken on its own, the plaintiff's back would not satisfy the test for seriousness by recourse to the radiological evidence, nor the plaintiff's treatment regime, nor indeed how the plaintiff described his back when detailing the major impact there has been to his life.

212. Mr Jens submitted that the major changes deposed to by the plaintiff in his lifestyle is ultimately attributable to the shoulder region insofar as his work, his fishing activities by way of sporting pursuits and recreation, as well as the playing of the guitar.

¹⁸⁰ Exhibit P12, PCB 135.

213. Mr Jens contended that even were I to ignore the right shoulder and concentrated only on the plaintiff's spine and the extent of any aggravation to it as a result of the transport accident, then the problem of the attribution of the right shoulder does not go away as a complicating factor. This is because, as he argued, it is now the shoulders that is the major impediment to the plaintiff's activities of daily living; that is to say, it is the major cause of the consequences of both the impediment to his work and the impediment to his activities of daily living.

Findings and conclusion

214. The starting point is to recognise that in *Humphries & Anor v Poljak*,¹⁸¹ Crockett and Southwell JJ provided guidance in serious injury applications arising out of a transport accident.

"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 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' ..."

215. I have next had regard to the opinion of Mr Miller, who certainly recognised the presence of a referral of the plaintiff's pain from his spine to his right shoulder when he wrote¹⁸²:

"The client has symptoms in the right shoulder. These are partly referred from the cervical spine and partly referred from rotator cuff pathology."

216. Mr Miller's reference of referral of symptoms from the cervical spine to the right shoulder needs to also be read in light of his finding that the pre-existing disease in the cervical spine had been aggravated by the transport accident. However, the other partial cause he related was to the rotator cuff pathology, and that he did not regard as transport accident related.

217. In addressing these matters, I have also kept in mind that I am dealing with a gateway provision and, ultimately, it is a matter of judgement based on the

¹⁸¹ [1992] 2 VR 129.

¹⁸² Exhibit P9, PCB 113.

whole of the evidence.¹⁸³ Doctors have not been cross-examined on their opinions and findings.

218. I have already said that I formed a favourable impression of the plaintiff, such that I do not think that the fact of since the transport accident, he has been prepared to keep working, although at a lesser intensity and frequency is a matter that tells against the granting of his application. To use the words of Nettle JA in *Dwyer v Calco Timbers Pty Ltd (No 2)*:¹⁸⁴

*“... it would be unfortunate, and in [our] view wrongheaded, if ... such an applicant were treated less favourably than another who, being of less strength of character, simply resigned ... [her]self to ... [her] injury.”*¹⁸⁵

219. I have considered that in *Haden Engineering Pty Ltd v McKinnon*,¹⁸⁶ the Court of Appeal made observations about the task of evaluating the pain and suffering consequences of an injury. The weight to be attached to the plaintiff’s account of the pain experienced will depend upon an assessment of the plaintiff’s credibility.¹⁸⁷

220. In particular, in *Haden*, Maxwell P. observed that the consequences of pain and suffering encompass both the plaintiff’s experience of pain, as well as the disabling effect of the pain on the plaintiff’s physical capabilities (including capacity for work) and enjoyment of life.¹⁸⁸

221. The plaintiff provided a detailed comparative account of before and after the transport accident and it was confirmed in the course of his oral evidence. I did not find his account undermined in cross-examination.

222. Part of the process for the Court is to assess the intensity of pain which the plaintiff experiences, together with the frequency of pain and episodes. The plaintiff described intense pain in the lumbar spine that he needs to manage by daily medication. The pain in his spine and right shoulder is aggravated by

¹⁸³ *Yirga-Denbu v VWA* [2018] VSCA 35 at 89.

¹⁸⁴ [2008] VSCA 260.

¹⁸⁵ [2008] VSCA 260 at [3].

¹⁸⁶ (2010) 31 VR 1.

¹⁸⁷ *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1 at [12].

¹⁸⁸ (2010) 31 VR 1 at [9].

the ordinariness of everyday activities as he deposed to in his first affidavit such as prolonged standing or sitting (including driving) or walking too far and as well, bending, lifting, twisting and pushing and pulling movements aggravate the pain in his spine.

Compensable injury

223. The details and occurrence of the transport accident are not in dispute.
224. Having regard to all of the relevant evidence, I find that, prior to the transport accident, the plaintiff suffered from various problems. His 1987 injury to his back was significant. Respectable medical opinion at the time was to the effect that the plaintiff should not return to heavy physical work for fear of creating greater impairment to it. There was also an element of degeneration. There was some previous account of neck pain but, by the time of the transport accident, the evidence is that it had settled. I accept that was the position. Some of the pre-existing problems with the plaintiff's back necessitated visits to his treating physiotherapist over the years before the transport accident.
225. The plaintiff had no record of anxiety or depression before the transport accident. He still is emotionally affected by the pain and enforced reduction in his activities that have arisen since the transport accident. He had no right shoulder symptomology before the transport accident. His left shoulder was asymptomatic although there was evidence of a tear. I am satisfied that in the years following 1987, the plaintiff's capacity to work had gradually returned. I am satisfied that after the transport accident his circumstances changed markedly and for the worse.
226. As to the plaintiff's pain and suffering consequences, the Court of Appeal stated in *Stijepic v One Force Group Australia Pty Ltd*¹⁸⁹ that the exercise in assessing the statutory emphasis in cases for such leave as is here sought:

"is upon seeing where the facts of a particular case sit in the broad spectrum of cases, remembering that this include cases which do not

¹⁸⁹ [2009] VSCA 181 at [42].

end up in litigation – because, it may be supposed, the consequences are glaringly apparent one way or the other. “

227. I have approached the plaintiff's evidence and his account of it mindful that in *Haden Engineering* mentioned earlier, and subsequently applied in *Sutton v Laminex Group Pty Ltd*,¹⁹⁰ in determining the pain and suffering consequences of an injury, it is necessary to consider not only “*what the plaintiff says about the pain (both in court and to doctors)*”, but also “*what the plaintiff does about the pain (for example, medication, rest, seeking medical treatment)*”, as well as “*what the doctors say about the extent and intensity of the plaintiff's pain*” and “*what the objective evidence shows about the disabling effects of the pain.*”¹⁹¹ In this regard, I have remained mindful of the submissions advanced by Mr Jens that there was a period of a year following the accident when the plaintiff obtained no treatment. I have considered the plaintiff's explanation. At one time the plaintiff's evidence was confused between being adamant he had attended on Mr Horvath during the period of the year in dispute and had paid for treatments himself because of the position that had been adopted by the Commission, but was unable to explain why if that had occurred, Mr Horvath's records revealed otherwise. The best evidence are the records of attendances on Mr Horvath and the plaintiff's record of attendances referred to in his reports. The plaintiff might genuinely believe he made some attendances in that period of approximately one year, but I not satisfied he did. However, that mistake by him is not of such consequence that it has changed my ultimate conclusions. I am satisfied that despite the absence of treatment in that time, I prefer the plaintiff's otherwise consistent account of increasing pain and limitation and the development of constant neck pain, as opposed to prior to the transport accident, neck pain that had been on occasions sporadic but had resolved as well as the development of the right shoulder symptoms.

¹⁹⁰ (2011) 31 VR 100 111-13 [51]-[57].

¹⁹¹ *Haden* (2010) 31 VR 1, 4-4 [11].

228. I am also required to consider the evidence of the plaintiff's pain interfering with and limiting his physical functioning and his enjoyment of life, including in his employment capacity.
229. I am satisfied that there is a respectable and discernible basis in the medical opinions to support a conclusion that the plaintiff's pre-existing degenerative spinal condition was made significantly worse by the transport accident both because of the experience of pain and limitations in the lumbar spine but that I am also satisfied that the extent of the aggravation from the transport accident is a cause of referred pain from the cervical region into the right shoulder. I am satisfied too that the extent of incapacity caused to the plaintiff from the 1987 injury has been shown to have improved and this can be seen in the extent of his return to work some significant years following that injury and prior to the transport accident.
230. I am not persuaded to adopt the defendant's submission that it is the shoulders that comprise the major impediment to the plaintiff's activities of daily living; that is to say, it is the major cause of the consequences of both the impediment to the plaintiff's work and the impediment to his activities of daily living. In fact, by way of example, Mr Owen accepts the persistence of the plaintiff's lumbar spine as a major problem for him, and of it being related to the transport accident, despite the cervical spine having in his opinion resolved. The plaintiff said his ability to engage in guitar playing is also limited by his reduced capacity to remain seated.
231. The plaintiff's evidence, that I accept, is confirmatory of lumbar pain. He deposed to:

*"Constant pain and stiffness in my lower back. The pain I suffer in my lower back can also vary in intensity. However, it is always apparent to some degree. At times the pain in my lower back can be severe and disabling. It radiates up into the middle part of my spine as well as into my buttocks and thighs, worse on the right to the left ..."*¹⁹²

¹⁹² Exhibit P1, PCB 16.

232. I accept too, that despite the pre-existing state of the plaintiff's back resulting from the 1987 injury, and existing degeneration, and the historical recommendation that he not return to heavy physical work, that he did so. He said by way of physiotherapy and hydrotherapy and weight loss, his condition improved over time in terms of its impositions on him and in terms of pain. He managed to subsequently conduct a considerable physical working life. I am satisfied that the trajectory has been significantly and adversely affected since the transport accident. Family assistance has been dragooned; casual employees engaged and his book of work reduced. The plaintiff downsized his home and reduced the physical attention he can bring to the work of his company. He purchased a new business venture to only find him not up to it. I am satisfied that the changes have wrought a more than marked financial penalty on the plaintiff's income he is able to derive from his business.
233. Therefore, of itself, I am satisfied the aggravation caused to the plaintiff's spine by the transport accident has been significant.
234. I am also satisfied that there is a sufficient basis in the medical evidence to attribute the right shoulder pain as at least a partial cause of referred pain from the aggravated spinal condition caused by the transport accident. I am satisfied that the plaintiff's right shoulder is sufficiently implicated from the transport accident. Mr Miller identified how the plaintiff is experiencing referred pain from the spine to his right shoulder as well as degenerative pathology accounting for the pain in the right shoulder by way of the rotator cuff disease. That partial cause has brought with it the identified functional limitations that have been described in the previously mentioned medical reports.
235. I accept the plaintiff's account that there has been a significant deterioration in his lifestyle both in relation to his activities of daily living and his enjoyment of life. He said he is gripped by pain in his back. I accept his evidence.

236. I am satisfied that despite the adverse determinations of capacity that had been made in the years following the 1987 injury, the plaintiff proved himself able to regain a work capacity in his pool and landscape business and was able to engage in a range of leisure activities without the companion of constant pain he now experiences from his lumbar and cervical spine and he has been able to demonstrate a more than marked change brought about because of the transport accident, which I am satisfied when judged by reference to range, may be assessed as very considerable.
237. I accept the account of the plaintiff's wife that when the plaintiff comes home from work, she is frequently required to assist him to get his clothes off and into the shower, such is the degree of spinal pain he experiences.
238. I accept that before the transport accident the right shoulder was asymptomatic, and since the transport accident, it has become symptomatic, and increasingly troublesome to the plaintiff to the point that surgery has been recommended.
239. I am not satisfied that there must be an unfavourable finding on the basis that the impacts on the plaintiff by way of lifestyle and financially need be separated out because the right shoulder is partially accounted for by way of the development of bilateral shoulder disease, as the defendant would have it. I am satisfied that the transport accident is implicated as a cause of the development of the right shoulder by way of the aggravation to his pre-existing spine. However, if I am wrong about this, then on the basis of the plaintiff's spine and the consequences identified, the plaintiff would be entitled to the relief sought.
240. It is unnecessary to address the plaintiff's separate submission that if the right shoulder is considered alone and unrelated to the spine that the transport accident has caused an aggravation of underlying tears in the rotator cuff that were previously asymptomatic. I do note Dr Chehata's opinion, that whilst

there is clearly a degenerative and constitutional component to the plaintiff's rotator cuff tear, as it is almost symmetrical on the left side, nonetheless, in his opinion, it has clearly been aggravated by the motor vehicle accident.

241. No submissions were addressed to challenge a conclusion that the plaintiff is suffering a permanent impairment. I am satisfied that the prognosis for the spine is at best fair and I am satisfied the impairment is a long term one.

242. I am satisfied that when the plaintiff's pain and suffering and pecuniary disadvantage are considered cumulatively, they are more than significant or marked, and are at least very considerable. The plaintiff is entitled to a grant of a serious injury certificate. I will hear the parties on the form of final orders and of costs.