

# Serious Injury Applications – why are some Plaintiffs not getting over the line?

By

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## Originating Motion Judgements in the last 12 months

	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar
	17	17	17	17	17	17	17	17	18	18	18
<b>Delivered</b>	14	24	11	24	16	23	8	15	0	12	9
<b>Failed</b>	2	9	4	8	2	5	3	1	0	4	2

Total delivered: **156**

Total unsuccessful: **40**

Percentage failure rate was about: **26%**

### Applications that were dismissed

**Whish-Wilson v Transport Accident Commission [2017] VCC 573** – failed on credit and could not establish that the consequences of the claimed injuries both (a) and (c) being aggravation of pre-existing injuries were serious and severe respectively.

**Dalikouras v Transport Accident Commission [2017] VCC 648** – failed on credit and could not establish that the consequences of low back injury were due to the accident i.e causation.

**Williamson v Energy Australia Service Pty Ltd [2017] VCC 737** - couldn't not establish that the claimed psychiatric injury was 'severe' (i.e range).

**Thornton v Australian Lamb Colac Labour Hire Pty Ltd [2017] VCC 738** - could not establish that there was an organic serious injury to the thoracic spine.

**Macleod v Transport Accident Commission [2017] VCC 757** — failed on credit and could not establish that the injury met the statutory test of seriousness.

**Sikovski v Transport Accident Commission [2017] VCC 763** – failed on credit and could not establish that the consequences of the physical injuries sustained in transport accident were serious and that the psychiatric injury was severe.

**Broughton v Victorian WorkCover Authority [2017] VCC 795** – failed on credit and could not disentangle the consequences of the claimed injury from pre-existing injury and also from subsequent injury.

**Mitchell v Transport Accident Commission [2017] VCC 807** – failed on credit and could not establish that the consequences of the aggravation of physical injury sustained in transport accident was serious and that the aggravation of psychiatric injury was severe.

**Ward v Catering Industries [2017] VCC 821** - failed on credit and could not prove the accident caused her serious injury consequences (i.e causation).

**Paul v Transport Accident Commission [2017] VCC 822** - failed to prove that the consequences of the right shoulder impairment were “very considerable” (i.e. range)

**Lewis-Korver v Transport Accident Commission [2017] VCC 835** – failed on credit and causation.

**Gray v Transport Accident Commission [2017] VCC 876** – could not prove that the consequences of the injury stemmed from the accident (i.e causation).

**Matrah (*ne* Almatrah) v Victorian WorkCover Authority [2017] VCC 976** – could not prove that the consequences of the injury stemmed from the work (i.e causation).

**Myers v R & K Tree Maintenance Services Pty Ltd [2017] VCC 978** - failed to prove that the consequences of the right shoulder injury were “very considerable” (i.e. range)

**Dinic v Victorian WorkCover Authority [2017] VCC 1007** - could not establish that the consequences of low back injury could fairly be described as more than significant or marked and at least very considerable.

**Sudar v Druids Friendly Society Limited [2017] VCC 1034** - failed on credit and could not prove that the injuries and the consequences of the injuries stemmed from the work accident (i.e causation).

**Goulas v Glen Cameron Nominees Pty Ltd [2017] VCC 1065** - failed to prove that the consequences of the low back injury were “very considerable” (i.e. range)

**Naftali v Australian Even Pressure Co Pty Ltd [2017] VCC 1099** - failed to prove that the consequences of the knee injury were serious (i.e. range)

**Facey v Bruce Morgan Plumbing Pty Ltd [2017] VCC 1113** - could not establish that the injury to the left arm met the statutory test of seriousness (i.e. range).

**Stout v McLeod [2017] VCC 1131** - failed to prove that an organic injury to the thoracic spine existed which produced the consequences.

**Williams v Victorian WorkCover Authority & Concrete Equipment Australia Pty Ltd [2017] VCC 1158** - failed to disentangle the organic injury to the spine and consequences stemming from the organic injury from the psychological overlay. Failed to prove that the consequences of any secondary psychiatric condition were ‘severe’.

**Virtue v Spotless Services Australia Ltd [2017] VCC 1164** - could not establish that the bilateral carpal tunnel injury met the statutory test of seriousness (i.e. range).

**Kantor v Transport Accident Commission [2017] VCC 1182** - failed on credit and could not prove that the injuries and the consequences of the injuries stemmed from the transport accident (i.e causation).

**Hughes v Transport Accident Commission [2017] VCC 1233** – could not establish that the aggravation of pre-existing lumbar and cervical spine conditions met the statutory test of seriousness.

**Noonan v Foreman [2017] VCC 840** – the Plaintiff was found to be an unreliable witness; failed due to issues of causation and range.

**Hancock v Mallee Accommodation and Support Program Limited [2017] VCC 1460** – failed to establish that the psychiatric injury met the statutory test of seriousness (i.e. range).

**Howser-Sherwell v Transport Accident Commission [2017] VCC 1461** – failed to establish that the aggravation of a pre-existing psychiatric condition met the statutory test of seriousness.

**Whiffen v Roche Diagnostics Australia Pty Ltd [2017] VCC 1490** – the Plaintiff was not accepted as a credible witness; failed to establish the consequences referable to the work incident or their seriousness (i.e issues of disentanglement and causation).

**Kenyon v Transport Accident Commission [2017] VCC 1498** – the plaintiff had pre-existing medical conditions; failed because could not establish the compensable spinal injury met the statutory test of seriousness.

**Engidosheet v Transport Accident Commission [2017] VCC 1933** – the plaintiff's evidence was not entirely reliable; failed to establish the left shoulder or thumb injuries met the statutory test of seriousness.

**Charters v Victorian WorkCover Authority [2017] VCC 1583** – failed to establish that the work incident was a cause of the lower back injury (i.e causation).

**Eroglu v Australian Leisure and Hospitality Group Ltd [2017] VCC 1674** – failed on credit, disentanglement and severity of the psychiatric injury.

**Djakovic v Transport Accident Commission [2017] VCC 1768** – failed due to unreliability of evidence relied upon by the Plaintiff, disentanglement and range.

**Morelas v Transport Accident Commission [2017] VCC 1589** – the Plaintiff was found to be an unreliable witness; could not establish that the neck injury met the statutory test of seriousness.

**Spence v Paraquad Victoria [2018] VCC 111** – the plaintiff was found to be an unreliable witness; failed due to range and disentanglement/causation in light of two subsequent transport accidents.

**Bransgrove v Spotlight Pty Ltd [2018] VCC 118** – failed to establish that the right shoulder condition had a substantial organic basis, and difficulties in identifying the physical and psychological contributions to her consequences; some difficulties with the plaintiff's evidence; further issues as to causation and disentanglement.

**Manikanndan v Oorama Education Pty Ltd [2018] VCC 79** – difficulty in assessing the organic basis for complaints of pain and disability; some exaggeration on the part of the plaintiff; failed to establish that the shoulder injuries met the test of seriousness.

**Pirrett v Victorian WorkCover Authority [2018] VCC 139** – failed to establish that the compensable aggravation of a pre-existing neck injury met the test of seriousness.

**Stubbs v Transport Accident Commission [2018] VCC 221** – Plaintiff sought leave in respect of injuries suffered in two separate transport accidents; failed to establish that the aggravation of the pre-existing psychiatric condition from the second accident met the test of seriousness.



## Why are some Plaintiffs not getting over the line?

### Credit

- Your client should be warned about honesty early on.
- Put all necessary information such as pre-existing and subsequent injuries and conditions into the first affidavit in a forthright manner; to do this all clinical notes need to be obtained prior to conference with barrister. Do not try to fix it up by putting it in a third or fourth affidavit. See: *Whish-Wilson v Transport Accident Commission* [2017] VCC 573, *Broughton v Victorian WorkCover Authority* [2017] VCC 795, *Dalikouras v Transport Accident Commission* [2017] VCC 648 and *Mitchell v Transport Accident Commission* [2017] VCC 80.
- Do not downplay consequences of other unrelated injuries or conditions to the doctors or in the affidavit material. See: *Whish-Wilson v Transport Accident Commission* [2017] VCC 573
- Do a social media search of your client - you know the Defendants will. See: *Lewis-Korver v Transport Accident Commission* [2017] VCC 835 (pole dancing on Facebook).
- If your client does not give accurate histories to the doctors, their reports won't hold much weight. Make sure the doctors have full and accurate histories of pre-existing and subsequent injuries and conditions including contemporaneous clinical records. See: *Ward v Catering Industries* [2017] VCC 821

### Causation

- You must be able to link the current consequences with the claimed injury / cause. It is not enough that it is accepted that an injury occurred at the time. See: *Gray v Transport*

*Accident Commission* [2017] VCC 876, *Matrah (ne Almatrah) v Victorian WorkCover Authority* [2017] VCC 976 and *Sudar v Druids Friendly Society Limited* [2017] VCC 1034

- Be careful in cases where there has been a long gap between the original injury and complaints of pain / long gap in treatment. See: *Paul v Transport Accident Commission* [2017] VCC 822
- Ask the doctors the relevant questions:
  - For example: Are the Plaintiff's current complaints of pain, restrictions and incapacity caused by the original injury to the lumbar spine which occurred in the transport accident on 12 July 2012?

### Disentanglement

- Whether or not the issue of there being a substantial organic basis is likely to be relevant at hearing will be apparent from the medical evidence obtained by both parties.
- Where such an issue is raised, ensure that you have asked doctors the relevant questions to establish whether your case is primarily to be brought under sub-paragraph (a) or (c) of the definition of 'serious injury'.
- Disentanglement of consequences attributable to the compensable injury – as compared with other medical conditions – will turn on a combination of both the drafting of the plaintiff's affidavits, and obtaining relevant medical evidence. It is important to ascertain from initial conferences with the plaintiff whether there are any other medical conditions which might have consequences for either pain and suffering or pecuniary loss.

- Remember that there is a need to disentangle the consequences of separate physical injuries which cannot be aggravated and also the consequences of the physical injuries from any psychiatric injuries.

### Range

- Difficulties with meeting the statutory threshold for seriousness can often arise from the previously discussed issues: e.g. range and disentanglement.
- Always give consideration to what lay witness evidence might be appropriate and/or helpful (e.g. family members, friends, or work colleagues).
- In relation to pain and suffering consequences, give consideration to how much detail is appropriate to be included in the plaintiff's affidavits.