SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Ryrie v Tanner (No 2)**
Citation:	**[2020] ACTSC 104**
Hearing Dates:	20–22 April 2020
Decision Date:	1 May 2020
Before:	Murrell CJ
Decision:	Judgment is entered for the plaintiff in the sum of $370,501. See [126]–[135].
Catchwords:	**DAMAGES** – PERSONAL INJURY – Motor vehicle accident – Spinal injury – Pre-existing condition in spine – Whether the accident rendered the pre-existing condition symptomatic – Whether spinal fusion surgery reasonable – Damages for economic and non-economic loss, past and future expenses, and voluntary assistance
Cases Cited:	*Cressy v Miloriad* [2016] ACTSC 303 *Gibson v Steinhoff Asia Pacific Ltd* [2012] ACTSC 139 *Griffiths v Kerkemeyer* (1977) 139 CLR 161 *Lewis v Woolworths* [2018] ACTSC 200 *Lumley v Sainsbury* [2017] ACTSC 40 *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 *Massouras v Kone Elevators Pty Ltd* [2020] ACTSC 66 *Pidcock v Milosis* [2019] ACTSC 209 *Purkess v Crittenden* (1965) 114 CLR 164 *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 *Thom v Carle* [2014] ACTSC 4
Parties:	Nyssah Ryrie (Plaintiff) Pat Tanner (First Defendant) Insurance Australia Ltd trading as NRMA Insurance (Second Defendant)
Representation:	**Counsel** S Whybrow (Plaintiff) M Nesbeth (First and Second Defendants) **Solicitors** Baker Deane & Nutt (Plaintiff) HWL Ebsworth Lawyers (First and Second Defendants)
File Number(s):	SC 352 of 2019

MURRELL CJ:

Introduction

1. The plaintiff claimed damages for injuries and disabilities (primarily, lower back pain) that she sustained in a motor vehicle accident on 17 August 2015. The first defendant was the driver of the motor vehicle that was responsible for the accident. The second defendant is the compulsory third party insurer of that vehicle.

2. Liability was admitted.

3. At the time of the accident, the plaintiff was a healthy 28-year-old woman. She was employed as an IT consultant. She was in a de facto relationship with Mr de Flumeri.

4. After leaving school in Year 11, the plaintiff commenced a hairdressing apprenticeship, worked in the retail industry and then joined the public service. Ultimately, she became an IT consultant, working for Fujitsu Australia (until 2016), Leidos Australia (from 2016 to 2019) and for Optus Australia (from 2019 to 2020).

5. In 2018, she took seven months' maternity leave; her daughter was born in October 2018. In 2019/2020, she took six months' maternity leave; her son was born in November 2019. In early May 2020, she will return to full-time employment at Leidos Australia, earning approximately $175,000 per annum.

The accident and its aftermath

6. At about 1:30 PM on 17 August 2015, the plaintiff was driving her Volvo motor vehicle north along Melrose Drive, Philip. The first defendant was driving a Subaru Forrester vehicle east along Theodore Street towards an intersection with Melrose Drive.

7. At the intersection, the first defendant's vehicle failed to give way to the plaintiff's vehicle and collided with it. The plaintiff had been travelling at about 60 km/h. The force of the collision caused the airbags of her vehicle to deploy. The vehicle could not be driven from the accident scene.

8. On the following day, 18 August 2015, the plaintiff consulted her general practitioner, Dr Tang, complaining of soreness in her right jaw, mid back, right wrist and lower chest wall.

9. The plaintiff took a few days off work and then returned to her full-time position as an IT consultant with Fujitsu Australia

10. On 1 September 2015, the plaintiff complained to Dr Tang of headaches and low back pain since the accident, neck pain and upper back pain, wrist pain, chest pain and a sore, clicking jaw.

11. Apart from the jaw problem and lower back pain, the plaintiff's injuries resolved within a few weeks. The jaw problem persisted for about two years; during that time, the plaintiff was fitted with a mouthguard to prevent her from grinding her teeth.

12. Thereafter, the only remaining disability related to the plaintiff's lower back. The plaintiff experienced a sensation of general pain or pressure on the back. However, the principal difficulty was with forward flexion, which the plaintiff found to be very painful; it caused her back to "lock up" and there was a pinching sensation.

13. Prior to the accident, the plaintiff had experienced no symptoms in her lower back. She said that an incident in April 2006 of "back pain when getting out of the car" had involved

quite different symptoms, from which she had recovered fully. There is no reason to link the back pain experienced since 2015 with the 2006 incident.

14. Through investigations undertaken since the accident, the plaintiff has discovered that she suffers from a congenital abnormality at the L5/S1 level of her spine.

15. Since the accident, the plaintiff has never recovered a full range of lumbar movement or experienced a period when she has been free of lumbar pain.

16. In late 2016, the plaintiff was referred to Dr Pik, a neurosurgeon. He advised her that the only possible surgical treatment was a spinal fusion, but that fusion was an intervention of last resort. Nevertheless, by March 2019, the plaintiff was committed to that course and had obtained a consent form to undertake the surgery. She did not proceed at the time because she discovered that she was pregnant with her second child. However, she intends to proceed with the surgery within the next year.

17. In 2019, the plaintiff and Mr de Flumeri sold their suburban house. They purchased a block of land. They intend to build a new house on the land. Meanwhile, since 26 December 2019, they have lived with Mr de Flumeri's mother. Knowing of the plaintiff's difficulties, she offered to assist them by providing accommodation and support.

Issues

18. The issues are:

    (a) Whether the accident rendered the plaintiff's underlying lumbar condition symptomatic, and if and when it would have become symptomatic without the accident;

    (b) Whether it is reasonable for the plaintiff to undergo an L4-S1 spinal fusion for her back condition; and

    (c) Damages for non-economic loss, past and future expenses, past and future economic loss, and voluntary assistance (in accordance with *Griffiths v Kerkemeyer* (1977) 139 CLR 161).

The plaintiff's credibility

19. The plaintiff was a very credible witness. She has given a consistent account of her lower back difficulties. In evidence, she made appropriate concessions and presented as a genuine and forthright witness. Her evidence was corroborated by that of her partner and his mother.

20. All doctors accepted that the plaintiff's account of pain at the L4-S1 levels of her spine was genuine. Dr Casikar, a neurosurgeon qualified on behalf of the defendants, had "no doubt" that the plaintiff experienced disabling back pain.

21. The defendants submitted that, in these proceedings, the plaintiff had overstated her pain levels in the period following the accident; that her evidence was inconsistent with descriptions of pain that had been given in 2016/2017.

22. I do not consider that the plaintiff's contemporaneous descriptions of pain were inconsistent with the retrospective account given in her evidence. The plaintiff has always said that her pain levels have fluctuated from day to day but that, generally, her pain levels have not changed other than during her pregnancies in 2018 and 2019. It is to be expected that, when a witness is endeavouring to recall her pain history over a

period of five years, there will be minor discrepancies in her account. The plaintiff's consistent interest in proceeding with a spinal fusion operation since the prospect was first raised in late 2016 attests to the fact that, since the accident, she has consistently experienced high pain levels.

23. The plaintiff impressed me as a person with a strong work ethic who was determined to make the most of her life. Given her personality, it seems most unlikely that she would develop an unwarranted focus on disability. The defendants' doctors raised that possibility as an explanation for the plaintiff's apparently genuine experience of pain, but there was no evidence to substantiate that theory.

24. I accept the plaintiff's account of events.

History of complaints and treatment for the lower back problem

25. Initially, the plaintiff treated her lower back problem with heat packs and painkillers.

26. On 14 October 2015, when the plaintiff first attended physiotherapy, she complained of strong pinching pains in her lower back with some pain radiation into her left posterior thigh. She had difficulty moving from sitting to a standing position, turning in bed and vacuuming. The plaintiff pursued physiotherapy, but it provided only temporary relief.

27. In January 2016, the plaintiff complained to Dr Tang of persistent low back pain despite physiotherapy and tenderness at L4-S1. He requested a CT scan.

28. The January 2016 CT scan showed bulging of the annulus fibrosis at the L4-5 level with no nerve root compression. There was a central disc bulge at L5-S1 level and developmental anomalies were observed: a right-side L5 pars defect, an L5 spina bifida occulta defect and absence of the right L5 intra-articular facet. No spondylosis was seen.

29. Despite physiotherapy, the plaintiff continued to complain to Dr Tang of a pinching pain in her lower back and tenderness at L5-S1. He provided her with a referral to Dr Pik.

30. In August 2016, a physiotherapist reported that the plaintiff had regained a full functional active range of motion in the lumbar spine but continued to have poor tolerance to forward flexion activities. Further, Pilates and acupuncture had failed to reduce her "pinching pain" and occasional numbness in the legs.

31. The reported improvement must have been brief. In September 2016, the plaintiff saw Dr Pik. She presented with pain in the lower back radiating both down legs and burning and paraesthesia in both feet. She described a "pinching sensation" in her lower back. She said that she experienced severe pain approximately four days a week (6–7 out of 10), reducing to mild pain (2 out of 10) on the "best" days. Prolonged sitting, prolonged standing and forward bending aggravated her symptoms. Dr Pik had access to the January 2016 CT scan. It was his impression that the plaintiff's symptoms came from degeneration at L4/5.

32. CT imaging taken later in September 2016 showed incomplete fusion of the posterior arch of the L5, congenital absence of the right L5/S1 facet joint, and a congenital pars defect. There was increased metabolic activity, consistent with strain or resolving trauma. An MRI taken in late September 2016 showed signs of early degenerative change: mild bilateral facet joint arthropathy at L4/5. The radiologist concluded that

there was early lumbar spondylosis with neuroforaminal exit narrowing at L4/5 and L5/S1 with suspicion of contact of the exiting right L4 and L5 nerve roots.

33. Having seen the September MRI and CT results, Dr Pik considered that the plaintiff's symptoms were attributable to degeneration at the L4/L5 level. He told Dr Tang that, if the plaintiff found her symptoms to be unbearable, he would offer an L4/5 interbody fusion, although the procedure should only be undertaken in patients "who have severe, disabling and intolerable pain". Dr Pik said that the plaintiff was considering her options.

34. In early May 2017, the plaintiff was referred to Dr Howse, a specialist sports physician. He found a focal tenderness over the left side of L4 and limited lumbar flexion. He diagnosed chronic discogenic pain and some facet joint symptoms in the lower lumbar spine. He referred the plaintiff to Dr Speldewinde, a consultant in rehabilitation, for possible facet joint injections.

35. In a letter to Dr Tang dated 2 May 2017, Dr Speldewinde diagnosed the plaintiff with persisting intrusive "left more than right" lumbosacral vertebral dysfunction and gave a long-term prognosis of recovery over the next three to five years. He suggested pain management education and physical therapy.

36. In May 2018, Dr Pik reported to Dr Tang that investigations had confirmed the presence of a degenerative L4/5 intervertebral disc without significant neural compromise as well as a congenital abnormality affecting the right L5/S1 facet joint with congenital right L5 pars defect, but there was no evidence of significant spondylolisthesis or nerve root compromise at L5/S1.

37. During her 2018 pregnancy, the plaintiff experienced increased back pain. The baby was in the breech position and was delivered by Caesarean section.

38. After the birth in October 2018, the plaintiff continued to experience a high level of back pain. Within months, she had entered her second pregnancy. During her second pregnancy, the level of the plaintiff's back pain was significantly less than that during her first pregnancy. The foetus was not in the breech position.

39. In January 2019, investigations showed moderate L4/5 facet joint osteoarthritis and a mild degenerative L4/5 posterior disc bulge and a disc annular tear.

40. Dr Bentivoglio said that the new tear could explain back pain with radiation to the legs. Dr Eaton said that annular tears were common and usually resolved in about 12 months. Having regard to this evidence, I accept that the tear was unrelated to the accident and may have been the cause of additional symptoms for about a year, coinciding with the plaintiff's first and/or second pregnancy. However, the history of the plaintiff's complaint shows that the tear did not significantly affect her overall disability and does not influence her current disability.

41. In February 2019, Dr Pik reviewed the plaintiff and considered the latest MRI. The plaintiff told him that she continued to experience significant low back pain with physical activities and that the pain had worsened since the last review. Dr Pik reported to Dr Tang that the latest MRI showed no significant change from 2016. In his opinion, the plaintiff's symptoms were suggestive of mechanical back pain from the L4/5 and L5/S1 segments. He stated that surgical fusion at L4-S1 was a reasonable treatment option but would not eliminate all aches and pains, and that the plaintiff could develop further

pain in the future, regardless of a successful spinal fusion. The plaintiff was considering her options.

42. In November 2019, the plaintiff gave birth to her second child. She said that, having done so, the level of her back pain returned to the level experienced prior to her first pregnancy, i.e. prior to early 2018.

43. The plaintiff described her current back pain as constant and more severe than in August/September 2015. She feels a pinch on the left-hand side of her lower back and tightness if she stands for an extended period. The pain may radiate down both legs. With extended walking or driving, the back may become tight or "seize up". Consequently, her capacity to stand or sit for a long period is limited. She avoids activities involving flexion, including forward bending and lifting, because they cause a sharp, pinching sensation. She does not lift or bathe her older child, who now weighs approximately 12 kg. The plaintiff's mother-in-law said that she lifts the child onto the plaintiff's lap because the plaintiff cannot do so herself.

44. The plaintiff takes prescription and over-the-counter medication for pain relief. The pain causes irritability and means that the plaintiff tires more easily.

45. Prior to the accident, the plaintiff's principal leisure activities were baking and walking her Great Dane dog. After the accident, her capacity to bake was greatly restricted, not only because her back injury made her tired and irritable, but also because she could not undertake the heavier aspects of baking, such as bending and kneading dough. She stopped walking the dog because she could not contain it when it pulled; her partner became responsible for walking the dog. The dog has now passed away.

Plaintiff's medicolegal reports

Dr Stening, neurosurgeon

46. In April 2019, Dr Stening found that the plaintiff's lumbar movements were approximately two thirds of the normal range in forward flexion, unimpeded in retroflexion and approximately one half of the normal range in lateral flexion. In April 2020, he found that her lumbar spine movements were two thirds of the normal range in forward flexion, one half of the normal range in retro flexion and unimpeded in lateral flexion.

47. Dr Stening said that the plaintiff suffered from a pre-existing congenital abnormality of the lower spine, in effect an absence of the right L5/S1 facet joint, that placed an increased lifelong strain on the intact left L5/S1 facet joint.

48. In his view, the motor accident had aggravated the degenerative change in the left L5/S1 facet joint, causing the back to become symptomatic; the plaintiff's continuing low back pain was attributable to the inflamed left L5/S1 facet joint. As inflammation was now established in the intact left L5/S1 facet joint, it was more likely than not that the condition would deteriorate.

49. At the plaintiff's first appointment in 2019, she was pregnant with her second child. However, it seems that Dr Stening did not know this and thought that her significant ongoing back pain was largely related to her first pregnancy. He attributed a significant portion of her condition (50 per cent) to the effect of her first pregnancy. However, by 2020 he had changed that opinion because he had the history of the second pregnancy, which was far less problematic than the first. After the second pregnancy, the plaintiff's

lumbar condition returned to the level that had existed prior to the first pregnancy. Consequently, Dr Stening revised his opinion and no longer thought that pregnancy had impacted on the plaintiff's underlying condition.

50. Dr Stening said that, in addition to the change at L5/S1, there was degeneration at L4/5 (possibly progressing from mild to moderate between the first and second radiological scans), but because of the absence of radiological examinations that were contemporaneous with the accident, it was impossible to know whether the degeneration had commenced before or after the accident.

51. In my view, the inability to date the commencement of radiological degeneration at L4/5 is irrelevant; whether or not it existed prior to the accident, it did not affect the plaintiff at that time. What is important is that, in the accident, the plaintiff sustained a significant injury to her lower lumbar spine, which first became symptomatic very shortly after the accident.

52. Dr Stening said that it was likely that the plaintiff's lower back pain had developed because of the accident rather than spontaneously. Prior to the accident, she had no back pain and did not even realise that she had an abnormality. The anomaly at the right L5/S1 facet joint was a bony abnormality. In the absence of undue spinal strain, the plaintiff may never have developed symptoms. However, the condition had increased her vulnerability to injury, especially through flexion/extension and twisting trauma. He said that, but for the accident, it is probable that the plaintiff would have been asymptomatic for many years. She may have developed back pain later in life, but not for many years or even decades.

Dr Bentivoglio, orthopaedic surgeon

53. In May 2019, Dr Bentivoglio examined the plaintiff and observed that she had both a spina bifida occulta and a congenital absence of the right L5/S1 facet joint.

54. In May 2020, he found three quarters of the normal range of motion in the lumbar spine.

55. Dr Bentivoglio said that the plaintiff's pre-existing abnormality meant that she had a permanent weakness and was more susceptible to damage at the L5/S1 level. He did not believe that she would have spontaneously developed low back pain without the August 2015 injury. In the absence of a specific injury, Dr Bentivoglio felt that it was likely that the plaintiff would never have developed back symptoms.

56. He said that the accident had caused the plaintiff's condition to become symptomatic and had caused some degree of distal damage at the L4/5 level and probably also at the L5/S1 level. She had been left with a permanent weakness at those two levels of her lumbar spine. He said that, once the plaintiff became symptomatic, there was only an even chance that her symptoms would resolve. Her underlying condition would have delayed recovery and may have made recovery impossible.

57. Dr Bentivoglio said that, while it was common for women to experience back pain during pregnancy, back symptoms usually resolved in the three to six months following the pregnancy.

58. He said that the plaintiff's prognosis was guarded. She had a permanent weakness at the lower two levels of her lumbar spine that would continue to cause intermittent symptoms.

Dr Eaton, occupational physician

59. Dr Eaton said that the absence of a right L5/S1 facet joint is a very rare abnormality. It means that the left side facet joint must bear the strains that would normally be borne by bilateral facet joints. The plaintiff's spinal abnormalities had made her more vulnerable to trauma. The left L5/S1 facet joint would have taken the full strain of the sudden jarring impact of the accident, rather than the trauma being shared by bilateral facet joints.

60. Dr Eaton opined that, but for the sudden, traumatic accident, it was highly unlikely that the plaintiff would have developed her current pain. Having studied the literature concerning the plaintiff's rare abnormality, he noted that it was usually asymptomatic. Consequently, he considered that, absent the accident, it was unlikely that the plaintiff would have developed back pain in August 2015, and she may not have developed any significant back pain or disability for many years.

61. He said that the plaintiff's general back pain and the radiation down her legs was related to the impact of the accident at the levels of L4/5 and L5/S1. It was difficult to distinguish the symptoms attributable to one level as opposed to the other. However, the plaintiff's pinching pain could be related to the left facet joint area.

62. In March 2020, Dr Eaton examined the plaintiff and found restrictions in lumbar flexion. Right and left lateral flexion was reduced and uncomfortable.

63. Dr Eaton diagnosed an aggravation of degenerative change in the lumbar spine resulting in disc lesions at L4/5 and L5/S1 and associated chronic spinal pain and dysfunction. He considered that the prognosis was guarded but may improve with time and the proposed surgical intervention.

64. The opinion that Dr Eaton expressed in March 2020 was significantly less optimistic than that which he had expressed in October 2017, when he first saw the plaintiff. At that time, Dr Eaton had found that the plaintiff's back movements were full in flexion and rotation, although right and left lateral flexion and extension were restricted. He had considered that, given the plaintiff's positive attitude and the fact that she had maintained employment, there was a reasonably good prospect of further improvement and a return to normal functional capacity with resolution of the symptoms.

65. However, in evidence, Dr Eaton said that he now attributed most of the plaintiff's problems to the L5/S1 congenital abnormality.

66. Dr Eaton accepted that the plaintiff's pregnancies may have temporarily exacerbated back pain.

Defendants' medicolegal reports

Dr Casikar, neurosurgeon

67. In March 2019, Dr Casikar reported that the accident had aggravated the plaintiff's pre-existing degenerative disease. However, he was surprised that her back pain had continued beyond about three months, opining that the ongoing pain seemed to be mainly due to the degenerative disease. He mentioned the possibility of "non-organic issues".

68. Dr Casikar found no radiological evidence that congenital anomalies in the lumbar spine were responsible for the plaintiff's pain; they had remained unchanged by the

accident and were not likely to deteriorate. He said that the congenital abnormalities in question seldom produced back pain. They would have put additional strain on other segments of the back, including but not confined to the left facet joint at L5/S1; he said that the strain would have been distributed throughout the five levels of the lumbar spine.

69. Dr Casikar emphasised that "pain is a symptom" and opined that the plaintiff probably had "a pain-focused personality" that was unrelated to the accident. He said that, in the absence of a psychological explanation for the plaintiff's experience of pain, it may be explained by the degeneration at L4/5, which "would become symptomatic due to the natural progression". He considered that her present complaints were mainly due to the degenerative disease. But for the accident, the degenerative condition would have become symptomatic at some point, but it was speculative as to when that would have occurred.

70. Dr Casikar agreed that pregnancy may have caused a temporary aggravation of back problems that settled following birth.

Dr Dias, occupational physician

71. Dr Dias saw the plaintiff once, in October 2016. At that time, he found bilateral tenderness at L4/S1, and particularly over the right L5/S1 facet joint region. She had full forward flexion, extension and lateral flexion of the lumbar spine, but with discomfort at the end of all ranges.

72. He opined that the accident had resulted in "transient aggravation of pre-existing developmental anomalies" that would have resolved within six months and that her ongoing symptomatology was no longer attributable to the accident.

73. He said that the plaintiff's congenital condition had predisposed her to developing early-onset degenerative changes in her lumbar spine which would have become symptomatic in early adulthood, i.e. in her 20s and/or 30s. Therefore, he attributed her condition to the pre-existing congenital defect. He opined that, because of the abnormal loading associated with the absence of the right L5 intra-articular facet joint, degenerative changes would have become symptomatic in the plaintiff's 20s or 30s. He considered that the fact that the plaintiff's lumbar spine condition had worsened with the passage of time supported a causal relationship with pre-existing constitutional changes.

74. He said that the plaintiff's pregnancies and need to care for young children would have impacted negatively on her underlying conditions, correlating with the worsening of her symptoms since the accident.

75. I found Dr Dias' opinions to be of very little assistance.

76. First, as he was neither a neurosurgeon nor an orthopaedic surgeon, he was far less qualified than some other experts to express an opinion about the impact of a relatively rare disorder on the plaintiff's presentation. He equated the plaintiff's response to the accident to that of others who suffered a traumatic road accident, making little (if any) allowance for the differences and complexity associated with her underlying spinal abnormalities.

77. Second, rather than answering questions in a direct and forthright manner and making appropriate concessions, he chose to answer questions by repeating his opinion, giving the appearance that he was advocating for the defendants.

78. Third, when pressed in cross-examination, he finally conceded that the critical opinion that he had expressed (that, in any event, the plaintiff's condition would have become symptomatic in early adulthood) was speculative.

79. Finally, his opinion was, in part, based on a misunderstanding of the plaintiff's pain history in the context of pregnancies and childcare. He did not appreciate that, following a difficult first pregnancy with a baby in the breech position, the plaintiff's pain level improved and that she did not experience a similar, dramatic increase in pain during her second pregnancy. Further, most of the heavy work associated with the care of the plaintiff's young children has fallen to her partner and his mother, not the plaintiff.

Findings concerning injury and disability

80. I make the following findings based on contemporaneous treatment records and the opinions of the medicolegal experts, among whom I consider there to be limited divergence concerning matters of critical relevance (excluding Dr Dias).

81. The plaintiff suffers from congenital abnormalities at the L5/S1 level of her spine, including the absence of bilateral facet joints, which renders the lumbar spine more vulnerable to trauma because any impact is distributed to only one L5/S1 facet joint, as well as the nearby levels, including the L4/L5 level. As at August 2015, the plaintiff may or may not have had radiologically visible degeneration at L4/5.

82. As at the date of the accident in August 2015, the plaintiff was a 28-year-old woman whose lumbar spine was asymptomatic. In the absence of trauma, it was unlikely that she would ever experience symptoms due to the L5/S1 congenital abnormality. Of course, she may have experienced a trauma at the L5/S1 level at some stage. It was likely that, at an indeterminate time in the future, she would experience symptoms associated with any radiologically visible degeneration that existed at L4/5.

83. Immediately after the accident, the plaintiff experienced significant pain in her lumbar spine, which has continued to the present time. As is normal with pregnancies (particularly where the baby is in the breech position), there was some exacerbation of back pain during pregnancy. However, following the plaintiff's second pregnancy, the level of her back pain returned to its pre-pregnancy level, reflecting the symptomatic impact of the accident only.

84. Some of the plaintiff's more significant symptoms (particularly restricted forward flexion and the associated pinching sensation) are associated with the congenital abnormality at L5/S1. As to other symptoms in the lower back, it is difficult to say whether they are related to the L4/L5 level, the L5/S1 level, or both. Inferentially, the plaintiff's treating surgeon considers that it is necessary to perform a fusion at both levels in order to ameliorate the plaintiff's pain.

85. It is unnecessary to attribute pain to one or other level of the plaintiff's lumbar spine; whatever the attribution, the accident rendered symptomatic a previously asymptomatic lumbar spine.

86. It is probable that the plaintiff's lumbar spine would have become symptomatic at the L4/L5 and/or L5/S1 levels at an indeterminate point in the future. Although the abnormality would not itself cause pain, it rendered the plaintiff more vulnerable to damage and associated pain at that level. However, it is speculative as to when, but for the accident, the plaintiff's lumbar spine would have become symptomatic at either or both levels.

87. The onus was on the defendants to establish that the plaintiff would have become symptomatic in any event and when that would have occurred. In *Lumley v Sainsbury* [2017] ACTSC 40 at [54], I summarised the relevant authorities:

> A defendant bears the evidential onus of showing that a plaintiff suffered from a pre-existing condition: *Purkess v Crittenden* (1965) 114 CLR 164 at 168. Where it is shown that the plaintiff did suffer from a pre-existing condition, the court is required to evaluate possibilities in order to estimate the likelihood that alleged hypothetical past events and possible future events would have occurred: *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, discussed by Ipp JA (with whom Mason P agreed) in *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [102]–[109] ('*Seltsam*'). A proper assessment of damages requires judgement as to the consequences that may have flowed from the worsening of a pre-existing condition if the accident had not occurred: *Seltsam* per Ipp JA at [107].

88. In this case, I am satisfied that the plaintiff's lumbar spine would have become symptomatic at the L4/L5 and/or L5/S1 levels at an indeterminate point in the future, but the defendants have failed to adduce reliable evidence that it would have occurred in early or middle adulthood. I proceed on the basis that it would not have occurred for many decades.

The surgery

89. The plaintiff is highly motivated to proceed with the fusion surgery because she wants to participate in normal activities with her children and otherwise enjoy a relatively normal life. She understands the risks associated with the surgery; that she may experience no improvement and may require further surgery in the future. She plans to undertake the surgery in late 2020/early 2021, when her younger child is 12 months old and more independent. The plaintiff and her partner do not intend to have any further children.

90. The plaintiff understands that, following the surgery, she will need to recuperate for a few months and pursue physiotherapy before returning to work. Depending upon her speed of recovery, she could return to work part-time before resuming full-time work.

91. As to the proposed surgery, Dr Stening said that surgical intervention was justified in the case of unbearable pain. In the present case, the plaintiff's condition was likely to deteriorate. Consequently, the spinal fusion suggested by Dr Pik was both reasonable and necessary.

92. Dr Bentivoglio doubted that significant benefit would result from surgical treatment. He said that it would not make the plaintiff entirely asymptomatic and, given her current symptoms, he did not support a fusion at this time. However, if the plaintiff's symptoms reached the level that "she [was] unable to live with them" then the operation would be reasonable. He said that a two-level spinal fusion would cost about $35,000.

93. In relation to the proposed spinal fusion surgery, Dr Eaton deferred to Dr Pik's opinion but noted that the outcome of such surgery was uncertain, "particularly with regard to a sustained reduction in spinal pain". He considered it to be a reasonable treatment

option that would at least be considered by most spinal surgeons and that the plaintiff should carefully consider the surgery and the advice of her treating neurosurgeon. Some people did very well after such surgery. He said that, following surgery, the plaintiff would require post-operative physiotherapy, hydrotherapy and a closely supervised strengthening exercise regime. She should take six to eight weeks away from work, followed by a graduated return to full-time work three months after the surgery.

94. Dr Dias considered that the plaintiff may be a candidate for a future spinal fusion but that her current level of functioning indicated that it was not justified at the present time.

95. Dr Casikar said that a spinal fusion was unlikely to relieve all symptoms and recommended "extreme caution" in relation to such surgery. He did not consider that spinal fusion was "necessary". However, he accepted that experts may differ and agreed that the decision was one for the treating surgeon to make in consultation with the patient. He said that Dr Pik was competent and well-regarded as a surgeon; he could not say that Dr Pik's opinion about the surgery was unreasonable.

96. In summary, the experts agreed that it was debatable as to whether the plaintiff should now proceed with the proposed L4/S1 spinal fusion surgery, but that ultimately it was a matter for the plaintiff and her treating surgeon to decide, based on an understanding of the risks and the plaintiff's capacity to cope with the level of pain that she was experiencing. While, individually, the experts may not have recommended that the plaintiff proceed, they accepted that her decision to proceed was reasonable.

97. I am satisfied that the plaintiff has every intention of proceeding with the surgery in the near future. For several years, that has been her intention; the delay is attributable to her pregnancies.

98. The plaintiff and her treating surgeon anticipate that the surgery will result in a significant reduction in pain, but they expect that there will be ongoing discomfort and that the plaintiff's spinal movements will be significantly restricted. The benefits of the surgery may well diminish over time. I consider that to be a reasonable expectation and will assess the plaintiff's non-economic loss on that basis.

Need for domestic assistance

99. Prior to the accident, the plaintiff and her partner lived in a suburban residence. The plaintiff undertook most of the domestic activities (she said 95 per cent, her partner said 99 per cent), including cooking, cleaning and laundry. Her partner was responsible for the garden, but she assisted him. Inside the house, the plaintiff's partner rendered some assistance and generally did the dishes and cleaned the kitchen after meals. The plaintiff estimated that, prior to the accident, she did about 18 hours of housework a week, two hours each weekday after work and eight hours at the weekend. She set high standards for housework.

100. After the accident, the plaintiff could not undertake the heavier housework, including heavier vacuuming and lifting heavy laundry. She could perform lighter activities, particularly those that did not involve forward flexion, such as light mopping or vacuuming tiles. She rarely cooked. She could not carry a heavy laundry basket, but if it was placed in an elevated position, she could hang the lighter items on a line. The plaintiff's partner had to undertake the heavier housework as well as learning how to cook. Her partner said that, after the accident, he did 95 per cent of the work.

101. The plaintiff's partner took about three months' paternity leave surrounding the birth of each child. Because of her weight, he must now bathe the older child and put her to bed.

102. As the couple is living with the plaintiff's mother-in-law, she undertakes much of the cooking and cleaning.

103. The plaintiff said that she now does about two hours of cleaning on weekends. The plaintiff's partner estimated that he and his mother each perform about 10 hours per week of housework and childcare and agreed that the plaintiff undertook about two hours of such work.

104. The plaintiff's mother-in-law confirmed that the plaintiff struggles to lift her daughter and performs very little housework. She said that she and her son undertake 90 to 95 per cent of the housework. She did not resent this division of labour; she emphasised that the plaintiff was not lazy but could not perform significant housework because she was in pain.

105. The plaintiff's partner said that the couple planned to live with his mother for the next 18 months or two years. The living arrangements had resulted from the plaintiff's disabilities and his mother's ability to provide support. But for the accident, upon selling their home, they would have rented premises.

106. The plaintiff's partner conceded that, regardless of the accident, he would have had to undertake more work around the house because of the new childcare responsibilities and the fact that children increased the amount of housework that was required.

107. All medical experts who expressed an opinion about the need for domestic assistance accepted that the plaintiff's accident-related disabilities had impaired her ability to carry out normal household duties but, because her employment was mainly sedentary, had not restricted her ability to work in her usual employment. Even Dr Dias considered that it was reasonable that the plaintiff had required approximately four hours per week of domestic assistance for three months after the accident to assist with meal preparation and strenuous domestic duties. The time limitation was attributable to Dr Dias's view that the plaintiff would have fully recovered from the impact of the accident within a period of six months.

108. The evidence of the plaintiff, her partner and his mother establishes that the plaintiff's partner and mother-in-law provide a high level of domestic assistance, undertaking all heavy housework and heavy childcare responsibilities. The plaintiff's claim is for six hours per week, which I consider to be reasonable.

109. Following the fusion surgery, it is expected that the plaintiff will experience lower pain levels. However, her capacity to undertake heavy work will remain restricted. Consequently, I will allow a very significant buffer for future domestic assistance.

Comparable cases

110. In *Lewis v Woolworths* [2018] ACTSC 200, the plaintiff, a 19-year-old university student, was injured at work when the work cage in which she was located was unexpectedly moved by a forklift. The accident caused immediate pain in her lower back and her legs. After the accident, she continued to experience back pain that radiated down her legs. She had difficulty with movement and sleeping. A CT scan indicated that there were bilateral pars defects with minor anterolithesis of L5 on S1. Medical reports

opined that the plaintiff had previously asymptomatic spondylolysis or mild spondylolisthesis.

111. Mossop J found that it was "more likely than not" that the accident was the cause of the plaintiff's ongoing pain. However, his Honour took into account the prospect that her underlying condition would have become symptomatic at some point. His Honour awarded general damages of $170,000, attributing $60,000 to the past.

112. In *Gibson v Steinhoff Asia Pacific Ltd* [2012] ACTSC 139, the plaintiff was injured while lifting a carton at work. At the time of the accident in March 1999, she was 24 years old. Following the accident, she suffered back pain which radiated into her right leg. She had difficulty sitting, standing or bending. Prior to 1999, there had been two incidents in which she had experienced pain in her lower back while doing similar tasks. A CT scan taken shortly after the incident showed that there was some herniation at the L5/S1 level, which had some effect on the nerve roots. In 2007, she had surgery but continued to experience back pain thereafter.

113. Burns J assessed general damages at $170,000, attributing $90,000 to the past. His Honour accepted that the plaintiff had a minor predisposition to back injury prior to the accident but found that the evidence did not establish a probability that she would have suffered the same or a similar injury if the accident had not occurred.

114. In *Pidcock v Milosis* [2019] ACTSC 209, the plaintiff was injured in a motor vehicle accident in 2014 when the defendant's vehicle collided with the rear of her vehicle at a stop sign. At the time of the accident, the plaintiff was 51 years old. The accident occasioned a temporary aggravation of the plaintiff's pre-existing neck and lower back pain which resolved after a couple of months. However, the accident also affected a Haglund's deformity in the plaintiff's left heel, causing daily pain in her lower left calf and ankle. She experienced pain while walking and could no longer run. She could no longer enjoy driving or riding her motorcycle, walking her dogs or playing freely with her granddaughters.

115. I found that, absent the accident, there was a possibility that, as an indeterminate time in the future, the plaintiff's underlying degenerative condition would have become symptomatic to some extent. However, it was highly unlikely that she would have developed a condition as serious as that which flowed from the motor vehicle accident.

116. I assessed non-economic loss at $95,000, attributing 50 per cent to the past.

117. In *Lumley v Sainsbury* [2017] ACTSC 40, a 54-year-old plaintiff was injured in a motor vehicle accident while driving to work when the defendant's vehicle collided with the rear of her vehicle. The accident aggravated the already symptomatic degeneration in her spine.

118. Prior to the accident, the plaintiff had performed heavy household work and relatively heavy outdoor work (including farm work), and had worked as a nurse two days a week as well as being an active sportswoman. After the accident, she struggled to perform heavier domestic tasks and her husband and daughters had to undertake them. She resumed working two days a week, although high levels of pain interfered with her concentration.

119. I considered that the aggravation that had been caused by the accident would gradually be overtaken by the underlying condition. I assessed general damages at $65,000, attributing $60,000 to the past.

120. In *Thom v Carle* [2014] ACTSC 4, the plaintiff, a 23-year-old carpenter, suffered a lower back injury at L4/5 and L5/S1 as he straightened from a bending or kneeling position. Prior to the accident, the plaintiff had experienced occasional left-sided back pain. About three weeks after the accident, he left his work because he could not perform his duties, returning to work as a traffic controller two years later. The plaintiff's leisure activities were significantly restricted, and he required support from his parents.

121. Master Harper accepted that the plaintiff's employment had caused an asymptomatic degenerative condition at the L4/5 and L5/S1 levels to become symptomatic. His Honour accepted that, but for the incident, the degenerative condition may have become symptomatic at some point, affecting the plaintiff's work capacity. His Honour awarded the plaintiff $75,000 for general damages, apportioned equally to the past and future.

122. In *Massouras v Kone Elevators Pty Ltd* [2020] ACTSC 66, a 42 or 43 year old plaintiff (Mrs Pattinson) was injured when a lift malfunctioned. For about six weeks after the incident, she experienced neck pain, shoulder pain and headaches. Thereafter, she experienced intermittent neck pain. Four years after the accident, she learned that she had a disc protrusion at the C5-6 level and a mild bulge at C3-4 level. She underwent surgery, having been informed that, if she did not do so, she may become a quadriplegic.

123. Burns J found a causal relationship; the incident had either caused the plaintiff's condition or accelerated a pre-existing condition. His Honour allowed $90,000 for general damages, attributing two thirds of that sum to the past.

124. In *Cressy v Miloriad* [2016] ACTSC 303, the 52-year-old plaintiff was involved in a four-car collision in 2011. Thereafter, she experienced stiffness and pain in her neck, hips, back, knee and legs. She had pre-existing degeneration in her right hip that would have required her to undergo a hip replacement at some stage. However, the hip was asymptomatic prior to the accident. Three and a half years after the accident, the plaintiff underwent total hip replacement surgery.

125. Mossop AsJ found that the condition of the plaintiff's hip was "such that it might have been rendered symptomatic by relatively minor events". His Honour observed that the existence and consequences of the underlying degenerative condition were very clearly established and there was a "degree of certainty" about the need for a hip replacement. His Honour awarded $80,000 in general damages, apportioning $70,000 to the past.

Damages

126. The plaintiff's non-economic loss is assessed on the basis that she is now 32 years old and has a life expectancy of another 54 years. I allow $160,000, with 50 per cent attributed to the past.

127. No past economic loss has been demonstrated. I accept that the plaintiff has taken some days off work due to her pain, but such absences have been comfortably covered by the plaintiff's entitlements to sick leave.

128. Following the spinal fusion operation, the plaintiff will be absent from work for two months and there will be a graduated return to work over a further month or two.

129. There will be future economic loss relating to absence from work for the fusion surgery. I will allow two months of full-time leave and two months of part-time leave (50 per cent), assessed on the basis of the plaintiff's salary of $175,000. This equates to three months of full-time leave. Otherwise, the plaintiff has not established future economic loss.

130. As stated above, past domestic assistance will be allowed at the rate of six hours per week. The parties agreed that the allowance should be quantified at the rate of $35 per hour.

131. Future domestic assistance will be allowed in the form of a buffer, but having regard to the current need of six hours per week and the fact that the surgery is likely to reduce the plaintiff's pain, it is unlikely to have a substantial impact on her capacity to consistently perform heavy work around the house or by way of childcare.

132. I accept that the bulk of the claimed past out-of-pocket expenses were expended in relation to injuries sustained in the accident (except for a sum of $21.15 that was conceded by the plaintiff's counsel).

133. Future out-of-pocket expenses include the costs of surgery. In that regard, I accept that the claim made in the plaintiff's schedule of damages is reasonable. I also accept that it is reasonable to allow a buffer for future expenditure on medication (although the need for painkilling medication will decrease following the surgery) and general practitioner and specialist attendances for the purpose of reviewing the plaintiff's condition.

134. I allow the following damages:

Non-economic loss	$	160,000
Interest on past non-economic loss ($80,000 x 2% x 4.66 years)	$	7,456
Future economic loss ($175,000 x 0.25)	$	43,750
Past domestic assistance ($35 per hour x 6 hours per week x 52 weeks x 4.66 years)	$	50,887
Future domestic assistance, including post-surgery (buffer)	$	50,000
Past out-of-pocket expenses	$	8,408
Future out-of-pocket expenses ($40,000 for surgery plus buffer)	$	50,000
Total	**$**	**370,501**

135. There will be judgment for the plaintiff in that sum.

Costs

136. Within seven days, each party is to email short submissions regarding costs (not exceeding two pages) to my associate and the other party.

137. Costs will be determined on the written submissions.

138. If no submissions are received, costs will follow the event.

I certify that the preceding one hundred and thirty-eight [138] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Chief Justice Murrell.

Associate:

Date: 1 May 2020