SUPREME COURT OF QUEENSLAND

CITATION:	*Barbina v McKenzie* [2026] QCA 134
PARTIES:	**SVETLANA BARBINA** (applicant) **v** **BRADLY ALEXANDER McKENZIE** (first respondent) **RACQ INSURANCE LIMITED** ABN 50 009 704 152 (second respondent)
FILE NO/S:	Appeal No 15513 of 2024 DC No 3008 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2024] QDC 153 (Dearden DCJ)
DELIVERED ON:	17 July 2026
DELIVERED AT:	Brisbane
HEARING DATE:	2 March 2026
JUDGES:	Bond JA, Brown JA, Freeburn J
ORDERS:	**1. Leave to appeal is refused.** **2. The applicant pay the second respondent's costs of the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – IN GENERAL – OBJECTIONS AND POINTS NOT TAKEN AT TRIAL – WHEN NOT ALLOWED TO BE RAISED – FAILURE TO TAKE OBJECTION – where the parties' expert orthopediatricians prepared competing reports prior to trial – where the experts did not produce a joint report which recorded their areas of disagreement – where the respondents' expert gave evidence during cross-examination which was unfavourable to the applicant – where the primary judge preferred the respondents' expert opinion over that of the applicant's expert – where the applicant did not object to that evidence, ask the primary judge to reject the respondents' expert evidence, permit the applicant to call evidence in rebuttal or recall the applicant's expert witness – whether the primary judge erred by accepting the evidence of the respondents' expert orthopediatrician

APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – IN GENERAL – where the respondent tendered the applicant's medical records through the manager of the medical practice at trial – where those records were admitted into evidence – where part of those records were relied on by the respondents' expert orthopediatrician to support his opinion – where those records did not involve an expert opinion by the medical practice or practitioners – where the maker of those records was not called to give evidence as to their meaning – whether the primary judge properly exercised his discretion as to the weight which should be placed on those medical records

APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the primary judge admitted the applicant's medical records into evidence as a book of account pursuant to sections 83, 84 and 85 of the *Evidence Act 1977* (Qld) – where the applicant did not challenge the tender of those medical records – where the applicant submits the maker of the medical records provided an opinion of the applicant's condition without providing any surrounding facts for which those statements were based – whether there is any basis to challenge the primary judge's decision to admit these records into evidence pursuant to section 85 of the *Evidence Act 1977* (Qld)

District Court of Queensland Act 1967 (Qld), s 118(3)
Evidence Act 1977 (Qld), s 52, s 83, s 84, s 85
Motor Accident Insurance Act 1994 (Qld), s 52

Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation [1983] 1 NSWLR 1, applied
Browne v Dunn (1893) 6 R 67 (HL), cited
MWJ v The Queen (2005) 80 ALJR 329; [2005] HCA 74, applied
Wang v Hur [2024] QCA 126, applied

COUNSEL:	D J Campbell KC, with S B Smith, for the applicant (pro bono) J O McClymont KC, with M J Forbes, for the respondents
SOLICITORS:	Four Bees Legal for the applicant Jensen McConaghy Lawyers for the respondents

[1] **BOND JA:** I agree with the reasons for judgment of Freeburn J and with the order proposed by his Honour.

[2] **BROWN JA:** I agree that leave to appeal should be refused and costs should follow the event for the reasons stated by Freeburn J and agree with his Honour's proposed orders.

[3] **FREEBURN J:** The applicant, Ms Svetlana Barbina, claimed damages for personal injury suffered in a motor vehicle accident on 3 June 2020 at Bahrs Scrub, Queensland. She claimed that the collision occurred because of the negligence of the

first respondent, Mr Bradly Alexander McKenzie, who was the driver of a BMW sedan which collided with the Toyota station wagon driven by the applicant.

[4] The second respondent, RACQ Insurance Limited accepted that it was liable for the negligence of the first respondent and for any consequential injury pursuant to s 52 of the *Motor Accident Insurance Act 1994* (Qld).

[5] The trial was heard in the District Court at Brisbane over three days in September 2024. As the primary judge explained:

> "The plaintiff [i.e. the applicant] was initially represented by a firm of solicitors who were responsible for the filing of the claim and statement of claim, but were granted leave to withdraw as solicitors on the record on 19 March 2024. The proceedings were conducted from that point on by the plaintiff, with the assistance of her son Dmitry Sevostjanov, who during the trial of this matter was permitted to remain at the bar table with the plaintiff as a 'McKenzie friend'. Given that the plaintiff required a Russian interpreter, Mr Sevostjanov was also given leave to ask questions and make submissions (where appropriate) on behalf of the plaintiff."[1]

[6] In October 2024, the primary judge ordered that the respondents pay the applicant a relatively modest sum of $15,320 in damages in respect of the injuries the applicant suffered in the motor vehicle collision on 3 June 2020.

[7] Because the judgment amount was less than the Magistrates Courts' jurisdictional limit, it was necessary for the applicant to file an application for leave to appeal. That application was filed by leave during the course of the hearing of the appeal.[2]

[8] Also, during the course of the hearing of the appeal, the applicant made an application to expand the proposed grounds of appeal to include a complaint that the primary judge failed in his duty to the applicant as a self-represented litigant.[3] That application was refused. Thus, there are three proposed grounds of appeal.

First Proposed Ground of Appeal

[9] The applicant's first ground of appeal is as follows:

> "The learned trial judge erred in accepting the evidence of Dr Morgan as to whether it was anatomically possible for the appellant to have a disc bulge at L5/S1 to be compromising the right L5 nerve route when such evidence was not put to the [applicant's] expert, Dr King, in cross-examination."

[10] First, it is necessary to explain the context.

The Factual Context

[11] The applicant's principal injury from the collision was her lower back injury.[4] The relevant factual issue was whether that lower back injury was a permanent injury

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1 *Barbina v McKenzie & RACQ Insurance Ltd* [2024] QDC 153 (**Reasons**) at [3].

2 Leave is required by s 118(3) of the *District Court of Queensland Act 1967* (Qld).

3 There was an issue as to whether the articulation of the proposed new ground enabled the applicant to challenge the primary judge's discharge of his duty to the self-represented plaintiff. As to the content of the duty see, for example, *Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337.

4 The applicant alleged a number of other injuries, including a psychiatric injury, but only the back injury is relevant for present purposes.

caused by the collision or whether the applicant's continuing symptoms were caused by a pre-existing arthritic condition. That factual issue depended on the expert medical evidence.

[12] At the trial, the applicant relied on the expert orthopaedic evidence of Dr L D King. The second respondent relied on the expert orthopaedic evidence of Dr David Morgan. Prior to the commencement of the trial, the experts prepared competing reports. By the time they gave their evidence the experts had the opportunity to consider each other's opinion[5] although there was no joint report which recorded their areas of agreement and disagreement.

[13] Dr King's report recorded his opinion that the applicant's back injury was an "*aggravation of disc bulge L5/S1 level causing right L5 radicular symptoms*" which he characterised as "*DRE lumbar impairment category II*".[6] Dr King assessed the applicant's percentage impairment of the whole person at 8%.

[14] Dr Morgan, on the other hand, identified a "*probable…flexion/extension acceleration injury of the cervical segment of the vertebral column…*[which] *could give rise to a musculoligamentous strain injury*" which, with gradual healing, makes it unlikely that the plaintiff "*sustained any injury of significance in the region of the cervical spine*".[7] Dr Morgan's evidence was that the applicant had regained a full range of motion and that there was no evidence of any neurological loss. He concluded that there was nothing more than a probable age-related degenerate disc at the lumbosacral junction. Dr Morgan assessed the applicant as having a 0% impairment of the whole person.

The Primary Judge's Reasons

[15] The primary judge noted that:

> "The starting point is that each of Dr King and Dr Morgan accept that the plaintiff did not sustain a lumbar disc injury de novo,[8] but rather suffered an aggravation of a pre-existing lumbar condition, either temporary (the opinion expressed by Dr Morgan) or a permanent aggravation making the pre-existing L5/S1 disc bulge significantly worse causing right L5 radicular symptoms (Dr King's view)."[9]

[16] Both Dr King and Dr Morgan gave evidence at the trial. The primary judge preferred Dr Morgan's expert opinion to that of Dr King. His Honour's reasons for that preference were that:

(a) the report of the CT scan of the lumbar spine, in which the reporting radiologist referred to "*neural exit foraminal stenosis more severe on the right, impinging the L5 nerves. There was lower lumbar facet joint arthrosis. There was an annular bulge of the L5-S1 discs*";

(b) the fact that those arthritic changes, visible radiographically, take years to develop;

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5 Dr Morgan produced a supplementary diary note that considered medical notes from the Blayney Family Medical Practice (see below).

6 Reasons at [15].

7 Reasons at [16].

8 The expression "*de novo*" means 'anew' or 'from the beginning'.

9 Reasons at [20].

(c) the applicant's medical records which recorded that the applicant had longstanding low back pain (which she had denied to Dr Morgan but ultimately seemed to accept in her evidence);

(d) the mechanism of the accident was likely to have only resulted in limited amplitude of the movement of the lumbar spine (given the lap/sash seatbelt); and

(e) Dr Morgan's opinion that there was a complete absence of objective evidence of a lumbar injury.[10]

[17] Reason (a) was developed a little further in the primary judge's reasons. His Honour accepted Dr Morgan's evidence that it was not anatomically possible for a L5/S1 disc bulge to be compromising the right L5 nerve route because the L5 nerve route leaves the spinal canal above the level of the L5/S1 disc. The L5 nerve then passes through the neural foramen which, in respect of the applicant, was stenosed (narrowed) meaning that "*it was the longstanding degenerative disease (facet joint arthritis) not the disc bulge that was compromising the nerve routes*".[11] The primary judge's acceptance of the evidence that it was "*not anatomically possible*" for a L5/S1 disc bulge to be compromising the right L5 nerve route assumed some significance in the applicant's submissions.

The Cross-Examination

[18] The primary judge's use of the words "*not anatomically possible*" is derived from the cross-examination of Dr Morgan by Mr Sevostjanov, the applicant's McKenzie friend (and her son). The relevant evidence stretches over a few pages[12] and includes the following:

> "MR SEVOSTJANOV: I see. What were the findings of this particular report?---The cervical spine was, essentially, normal. The lumbar spine had a number of abnormalities. One of them was that the L4-5 disc – and there was a slight evidence of degeneration, but the L5-S1 disc below that, there was a bulge, but it was still contained. Importantly, there was facet joint arthritis. So it's the small joints in the back in between each vertebral body were arthritic. And as a result, there was what's called exit foraminal or neural foraminal stenosis or narrowing. And the L5 nerve roots may have been compromised, especially on the right side. The really important part, though, for your question is it wasn't the disc – the bulging disc that was compromising the L5 nerve roots. It was the longstanding, pre-existent degenerative disease of facet joint arthritis that was compromising the nerve roots.
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> …
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> MR SEVOSTJANOV: That's fine. Is this concurrent[13] with the findings of the scan?---It is. Again, as I say, it's not the annular disc bulge that's causing the compromise. It's the longstanding pre-existent degenerative disease of the facet joints that's causing the compromising.

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10 Reasons at [27].
11 Reasons at [27(a)].
12 Transcript Day 3 at line 11, pages 7 to 9.
13 Presumably the word intended here was 'consistent'.

> What is root nerve impingement?---The spinal cord below Ll forms a whole pile of nerve roots. They look like hairs on a horse's tail. That's called the cauda equina. And those nerve roots are carrying messages from the brain above down to specific areas in the lower limbs below. And the nerve roots are numbered L1 to L5. There are also S1 to S5. The concept that you're using here is that the L5-S1 compromise is affecting the L5 nerve roots. As it turns out, the L5 nerve root is above the L5-S1 disc. It's not being compromised by the disc. It would be the S1 nerve root, if anything, that was compromised, and it's not.
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> …
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> [MR SEVOSTJANOV:] Could I just ask, how come a CT or MRI report say one thing and then – the scans and the report say, clearly, right impingement of the L5 nerves. How come you came to a different conclusion?---We've used different words. We've used different terminology. And I'd always prefer to use my own terminology since I can, therefore, defend it. But the terms that we've used are equivalent. So remember you said that the – early on in your question, you used the word "*compression*" and his Honour redirected you to my report and said it was "*compromise*", they are different things. So "*stenosis*" is a word which means narrowing. And the canal through which the nerve roots are existing are narrowed. They are stenosed. **But the nerve root itself is not being compressed. There is a potential for compromise, but there's no evidence on those scans in that report that the nerve root is being compressed**.
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> …
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> [MR SEVOSTJANOV:] So you've obviously read Dr King's report and - - -?---Yes, I have.
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> **[**MR SEVOSTJANOV:] - - - Dr King agrees with the CT scans. It's just that – would you find it – I understand that that's your opinion, but when another specialist agrees to – to the pre-existing records, doesn't that make it a bit more reliable?---If that was true, that might be the case, but it's not true because Dr King doesn't agree with the report. Dr King in his report has said that it is the broad based L5-S1 disc bulge that is compromising the right L5 nerve root. Now, **anatomically, that's just not possible**. **The L5 nerve root leaves the spinal canal above the level of the disc. It passes out through the neural foramen, the one that's stenosed, and it's compromised by the facet joint arthritis**. So the level that he has chosen is correct, but the causation is not correct. I believe that Dr King has misinterpreted the scan and is in error."
>
> [emphasis added]

[19] Those parts of the transcript demonstrate that Dr Morgan explained the differences between his expert opinion and the expert opinion of Dr King. Dr Morgan explained also that his opinion was consistent with the CT investigation and that Dr King's opinion was inconsistent with what was shown by the CT scans. The explanation, at least from the transcript, appears to have been a powerful explanation.

[20] The controversy was relatively clear. Dr King's opinion was that, at the L5/S1 level there was a diffuse disc bulge, and that there was impingement of the exiting right L5 nerve root.[14] The clear implication from Dr King's report was that those two things were connected, in that the disc bulge was causing the impingement of the exiting right L5 nerve root. Dr Morgan's point was that could not be correct because the path of the L5 nerve passed above the level of the disc bulge, and that what could be observed on the CT scan was a stenosed neural foramen – through which the L5 nerve root left the spinal canal – that was compromised by the facet joint arthritis.

The Forensic Choices

[21] In a case like this, where there is a conflict in the testimony of two experts, a party faces a number of forensic choices. Even before the trial commenced the parties may investigate the differences in the opinions of the experts as disclosed by their expert reports. Sometimes those differences are isolated by orders of the court requiring a joint report which identifies the areas of agreement and disagreement. Even in the absence of an order for a joint report, the parties may investigate the differences.

[22] The risks are greater if the investigation of the differences is left to the trial. Here, the applicant's expert, Dr King, had given evidence first. He had been cross-examined by the respondents' counsel. That cross-examination may have been effective or ineffective. Different people may have held different views on the state of the expert evidence controversy at that point. Dr Morgan gave his evidence second. The applicant and/or her McKenzie friend evidently decided to cross-examine Dr Morgan on a number of topics. One topic chosen for cross-examination was whether Dr Morgan's views were consistent with the CT scans and report. Dr Morgan gave what could be described as a powerful explanation.

[23] Again, the applicant and her McKenzie friend faced some forensic choices. They may have pursued the explanation further with Dr Morgan. They may have sought Dr King's views (perhaps with the benefit of an adjournment) and then put those views to Dr Morgan. Or they may have sought to re-call Dr King to give evidence in rebuttal. However, no evidence was sought to be led as to whether Dr King had an answer to Dr Morgan's evidence on this issue.

[24] Of course, the applicant and her McKenzie friend may not have acutely appreciated those forensic choices. However, the McKenzie friend's questions illustrate a reasonable understanding of the process and the particular issue. No doubt, when this issue was explored with Dr Morgan in cross-examination, the hope was that the answers he gave would be favourable to the applicant's case.[15] But the obvious risk of investigating this issue whilst the expert witness was in the witness box was that the witness may give an answer that was damaging to the applicant's case. Ordinarily, the trial judge is entitled to consider either a favourable or unfavourable answer to the cross-examiner's question.

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14 Independent Medical Examination Report of Dr L D King dated 12 May 2022 (Exhibit 2, Appeal Record Book) at page 6. Dr King also noted that there was broad based disc bulging at the L4/5 level with no neuro-compressive lesion identified.

15 As is explained in Heydon, *Cross on Evidence*, Lexis+ Australia at [17430]: "*The first object of cross-examination is to elicit information concerning facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted. The second is to cast doubt upon the accuracy of the evidence in chief given against that party*."

The legal context

[25] The primary judge's preference for the expert evidence of Dr Morgan was a finding of fact. It is a finding that is likely to have been affected by impressions about the credibility and reliability of these expert witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. Thus, the applicant's invitation to interfere with that finding of fact requires this court to exercise 'appellate restraint'.[16] In *Wang v Hur* that restraint has been explained in this way:

> "In such cases, a finding of fact is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact. The finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused [his or her] advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence', or which was 'glaringly improbable', or which was 'contrary to compelling inferences'."[17]

[26] Here, the applicant's proposed challenge to the primary judge's finding of fact does not fall within any one of those four categories.

The proposed ground 1

[27] In that context, the applicant's proposed appeal point is that the primary judge erred in accepting the evidence of Dr Morgan as to whether it was anatomically possible for the applicant to have a disc bulge at L5/S1 to be compromising the right L5 nerve route when such evidence was not put to the applicant's expert, Dr King, in cross-examination.

[28] There is an uncomfortable dual aspect to that proposed ground of appeal. *First*, the error said to have been made by the primary judge is his "*acceptance*" of Dr Morgan's 'anatomically impossible' evidence. That evidence is not said to be inadmissible. What is said is that the primary judge was wrong to accept it. I do not accept that submission. Once the evidence was within the pool of evidence, the primary judge was entitled to give that evidence the weight that he assessed it deserved. His Honour's reasoning on this factual issue did not fall into any of the four categories explained in *Wang v Hur* (see above). In any event, as explained, there were several other grounds that supported the primary judge's finding on this issue of fact.

[29] *Second*, the argument is that the primary judge ought to have rejected this 'anatomically impossible' evidence because that evidence was not put to Dr King. In other words, the argument is that the evidence offended the rule in *Browne v Dunn*.[18] In *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* Hunt J explained the rule:

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16 See *Wang v Hur* [2024] QCA 126 at [24]. The statement of principles there relies on these leading High Court authorities: *Warren v Coombes* (1979) 142 CLR 531; [1979] HCA 9 at 551; *Allesch v Maunz* (2000) 203 CLR 172; [2000] HCA 40 at [23]; *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [26]–[27]; *Robinson Helicopter Company Incorporated v McDermott* (2016) 90 ALJR 679; [2016] HCA 22 at [43]; and *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28 at [55].

17 *Wang v Hur* [2024] QCA 126 at [24(f)].

18 (1893) 6 R 67 (HL). The rule is discussed in detail in *Cross on Evidence* (supra) at [17430] and following.

> "I remain of the opinion that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination **the nature of the case upon which it is proposed to rely in contradiction of his evidence**, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings."[19]
>
> [emphasis added]

[30] Counsel for the applicants relied on three passages from the High Court's decision in *MWJ v The Queen*:

> "The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit."[20]
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> "One corollary of the rule is that **judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it**. A further corollary of the rule is that not only will cross-examination of a witness who can speak to the conduct usually constitute sufficient notice, but also, that any witness whose conduct is to be impugned, should be given an opportunity in the cross-examination to deal with the imputation intended to be made against him or her. An offer to tender a witness for further cross-examination will however, in many cases suffice to meet, or blunt a complaint of surprise or prejudice resulting from a failure to put a matter in earlier cross-examination…"[21]
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> "Reliance on the rule in *Browne v Dunn* can be both misplaced and overstated. If the evidence in the case has not been completed, **a party genuinely taken by surprise** by reason of a failure on the part of the other to put a relevant matter in cross-examination, **can almost always, especially in ordinary civil litigation, mitigate or cure any difficulties so arising by seeking or offering the recall of the witness to enable the matter to be put**."[22]
>
> [emphasis added]

[31] The 'anatomically impossible' evidence arose for the first time during Mr Sevostjanov's cross-examination of Dr Morgan. That cross-examination explored the reasons for the experts' disagreement. There was already a live issue as to whether the disc bulge was causing the impingement of the exiting right L5 nerve root. Dr Morgan's expert opinion was that it was not. To use the language of Hunt J in *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation*, the applicant had notice of 'the nature of the case' on which it was proposed to rely in contradiction of Dr King's evidence. The rule does not require that there be put to

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19 [1983] 1 NSWLR 1 at 26.
20 (2005) 80 ALJR 329; [2005] HCA 74 at [38].
21 (2005) 80 ALJR 329; [2005] HCA 74 at [39].
22 Ibid at [40].

the witness in cross- examination every point upon which his or her evidence might be used against him or her or against the party who calls the witness; it is not a rule designed to encourage or condone excessive cross-examination.[23]

[32] In any event, the rule requires only that the witness be given an *opportunity* to comment on or explain some matter about which the opposing party intends to make comment.[24] When Dr Morgan gave his explanation, the evidence had not concluded. If the applicant and/or her McKenzie friend were genuinely taken by surprise by this 'anatomically impossible' evidence, they could have contacted Dr King or sought to have him recalled so as to afford him an opportunity to respond. There was no suggestion of genuine surprise or of the prospect that Dr King should consider the evidence.

[33] Further, even if it is accepted that the rule in *Browne v Dunn* was breached, the consequence was that the trial judge had a discretion to accept or reject the evidence or to permit evidence in rebuttal or recall of the witness.[25] The primary judge was not asked to reject the evidence, or to permit rebuttal evidence, or to permit the recall of Dr King. There was no evident consternation or surprise, and the parties apparently accepted this point as a difference in the evidence of the two expert medical practitioners that the primary judge may need to resolve. The evidence appears to have been absorbed into the pool of evidence without objection. The primary judge was then required to decide which expert opinion he accepted. The primary judge accepted Dr Morgan's evidence. He was entitled to do so.

[34] In those circumstances, it can hardly be said that the primary judge's discretion has miscarried.

[35] It follows that this ground of appeal would fail.

Second Proposed Ground of Appeal

[36] The applicant's second proposed ground of appeal is that:

> "The learned trial judge erred by failing to give proper weight to the [Blayney] Medical Centre records entry of 9 August 2006 when the maker of those records, Dr Natalia Bakhilova, was not called to give evidence as to their meaning."

[37] The evidence admitted at the trial included the records of the Blayney Family Medical Practice said to be complete as at 13 September 2022.[26] Those records included various details such as the medical practice's contact details, the applicant's contact details, date of birth, marital status, allergies, family history, medications, immunisations, past medical history, and obstetric details.[27] Under the heading "*Progress Notes (Descending order)*" there are two notes. The first appears to be merely an administrative note on 13 September 2022. The second is a note of an attendance involving Dr Natalia Bakhilova on 9 August 2006. Under a sub-heading "*Actions*" the following appears:

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23 *Lord Buddha Pty Ltd (in liq) v Harpur* (2013) 41 VR 159; [2013] VSCA 101 at [205]; *Cross on Evidence* (supra) at [17440].

24 *AL v R* (2017) 266 A Crim R 1; [2017] NSWCCA 34 at [193]; *Cross on Evidence* (supra) at [17440].

25 As to the remedies where there is a breach of the rule see *Cross on Evidence* (supra) at [17460].

26 These records were tendered by the respondents as Exhibit 20 through the practice manager, Ms Sawyer.

27 Very little detail is actually recorded.

> "Pathology requested: FBE; UEC/LFTs; ESR; C-REACTIVE PROTEIN - **Long standing low back pain** OE:NAD, unable to do stright [sic] leg rising on Rt., ref CT scan"
>
> [emphasis added]

[38] The words "*Long standing low back pain*" were relied on by Dr Morgan as supporting his opinion that it was the facet joint arthritis, rather than the broad based L5-S1 disc bulge, that was compromising the right L5 nerve root.

[39] Whilst it is not clear from the evidence, the records seem to be prepared and maintained by the medical practice staff, but the progress notes were recorded by the treating medical practitioner, Dr Bakhilova in August 2006. What can be observed under the sub-heading "*Actions*" appears to involve four things:

(a) pathology requests: full blood examination, liver function test, urea, electrolytes and creatinine (a testing of kidney functions), erythromycin sedimentation rate (regarding clotting of the blood);

(b) long standing low back pain – which appears to record what the applicant told the medical practitioner;

(c) what the medical practitioner observed, namely, on examination – no abnormality detected; unable to do straight leg raising on right; and

(d) a referral for a CT scan.

[40] None of that appears to involve an expert opinion.[28] In particular, the comment "*Long standing low back pain*" appears merely to record what the applicant told the medical practitioner. As the primary judge noted, the applicant, after initially stating that she did not recall the reason why she saw that doctor on that occasion, ultimately conceded that "*probably there was long-standing back pain that I've forgotten about*".[29]

[41] That is the context in which the applicant complains that the weight that the primary judge placed on the significance of the term 'long-standing' was too great. The assessment of the weight of the evidence was a matter for the trial judge. It has not been shown that the primary judge here "*has failed to use or has palpably misused* [his or her] *advantage*", or has acted on evidence which was "*inconsistent with facts incontrovertibly established by the evidence*", or which was "*glaringly improbable*", or which was "*contrary to compelling inferences.*[30]

[42] In any event, as explained, there were a number of reasons why the primary judge accepted Dr Morgan's evidence and arrived at the view that the applicant had not established that the accident had caused her permanent injury.

[43] This proposed ground of appeal does not have any prospect of success.

Third Proposed Ground of Appeal

[44] The third proposed ground of appeal is that:

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28 Possibly (c) is an exception – but that is not relevant here.

29 Reasons at [24] referring to the transcript Day 1, page 20.

30 See the discussion of *Wang v Hur* above.

> "The learned trial judge erred in admitting into evidence the [Blayney] Medical Centre records entry of 9 August 2006 as a book of account pursuant to sections 83-85 of the *Evidence Act 1977* (Qld)"

[45] In support of that proposed ground of appeal, counsel for the applicant makes this submission:

> "It appears possible from the brief description that the statement maker is providing an opinion as to the applicant's condition, being long standing low back pain, as there is no surrounding narration indicating whether this entry is a diagnosis or on what facts the entry is based…
>
> …as a matter of procedural fairness, where a statement by a doctor contains an opinion (or likely contains an opinion), the doctor should be called as a witness to the proceeding particularly in circumstances where the statement does not provide for any surrounding facts for which the statement is based."[31]

[46] I do not accept that submission. The comment "*Long standing low back pain*" has not been shown to be an opinion of the medical practitioner or a diagnosis of the medical practitioner at all. In its context, it is likely to be nothing more than a recording of what the medical practitioner was told.

[47] At the trial there was no challenge to the tender of the Blayney Family Medical Practice records. There is no basis for a challenge to the primary judge's decision to admit these records into evidence pursuant to s 85 of the *Evidence Act 1977* (Qld).

[48] In any event, as the respondents submit, there can be no procedural unfairness to the applicant in circumstances where the Blayney Family Medical Practice records entry simply confirmed what the applicant had already admitted, namely, that she had previously experienced long-standing lower back pain.

Conclusions

[49] Leave to appeal under s 118(3) of the *District Court of Queensland Act 1967* (Qld) is discretionary and is usually granted where there is both a reasonable argument that there is an error to be corrected, and an appeal is necessary to correct a substantial injustice to the applicant.[32]

[50] Here, I do not accept that there is a reasonable argument that there is an error of the primary judge to be corrected. I would refuse leave to appeal. Costs should follow the event. The orders should be that:

(a) leave to appeal is refused; and

(b) the applicant pay the second respondent's costs of the appeal.

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31 These two passages are from the applicant's amended submissions at [40] and [43].

32 *Johnson v Queensland Police Service* [2014] QCA 195 at [29].