

ON APPEAL FROM THE COURT OF APPEAL OF
THE SUPREME COURT OF VICTORIA

BETWEEN:

TRANSPORT ACCIDENT COMMISSION

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Appellant

and

MARIA KATANAS

Respondent

APPELLANT'S SUBMISSIONS

Part I – Certification

1. The appellant certifies that these submissions are in a form suitable for publication on the Internet.

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Part II – Concise Statement of Issues

2. The issue is whether the majority of the Victorian Court of Appeal (Ashley & Osborn JJA) erred in finding that the primary judge misdirected himself when stating the range of comparable cases at [82] as follows –

“... At one end of the spectrum is mild anxiety as a result of trauma, easily overcome without medical intervention. At the other end of the spectrum are those disorders which provoke the most extreme symptoms and consequences, including psychoses, admission to psychiatric hospitals as an inpatient, delusional beliefs and thoughts, suicidal ideation and suicide

Filed on behalf of

The appellant

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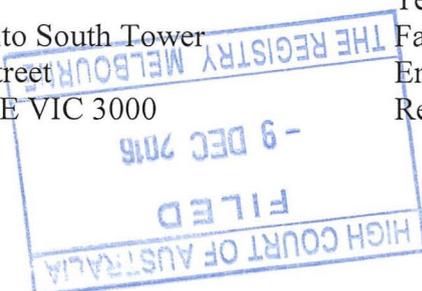
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attempts. Such conditions require extensive treatment and medication. It follows that for a mental disorder to be described as 'severe', it is at the upper echelon of those disorders in the possible range."

Part III – Section 78B Notice

3. The appellant certifies that it considers there to be no constitutional issue that requires notice to be given to the Attorney General in compliance with s 78B of the *Judiciary Act* 1903 (Cth).

Part IV – Citation of Reported Reasons for Judgment

- 10 4. The judgment of the Court of Appeal of the Supreme Court of Victoria is reported at (2016) 76 MVR 161. The medium neutral citation is [2016] VSCA 140. The judgment of the primary judge is unreported. The medium neutral citation is [2015] VCC 1156.

Part V – Narrative Statement of Relevant Facts¹

- 20 5. At about 7.00pm on 10 July 2010, Mrs Katanas was driving on Princes Highway, Mulgrave, on her way home from her son's house. As she entered the intersection at Springvale Road, after having stopped at a red light, another vehicle struck the driver's side of her vehicle. She remained in the vehicle. She had severe chest pain. It is not clear whether she lost consciousness. She suffered multiple left rib fractures, seatbelt bruising, a laceration to her left knee and damage to some teeth in her lower jaw. She was conveyed by ambulance to the Alfred Hospital and treated. She was discharged from hospital on 14 July 2010. At the date of the accident she was approximately 65 years of age. She had not worked in employment for some years.
6. Mrs Katanas was born in Greece in 1945 and immigrated to Australia in 1962. She married in 1964 and her husband died in 2005. From 1995 she had looked after

¹ The following is primarily drawn from the factual findings and reasons of the primary judge, which neither party challenged or criticised in any relevant respect on appeal below.

various of her grandchildren on a regular basis. In the period from 1998 she had obtained her VCE and also several tertiary and other qualifications. She had an extensive medical history although, ultimately, as the primary judge found, none of that bore upon the consequences of her transport accident on 10 July 2010. She also suffered another transport accident in 2014, when she drove into the back of a caravan after her brakes failed, although the primary judge also found that this had been minor.

7. After discharge from hospital in July 2010, Mrs Katanas attended her General Practitioner, Dr Chan. She was prescribed pain medication and referred for physiotherapy. She attended Dr Chan on several occasions thereafter and complained of pain and lowered mood. On 26 October 2010 Mrs Katanas reported to Dr Chan that she had returned to seventy percent of her pre-accident function.
8. In November 2010, Dr Chan referred Mrs Katanas to a psychologist, Dr Alvarenga, in respect to her complaints of nightmares and daytime thoughts of the accident. Mrs Katanas continued in that treatment until about mid 2014 and then resumed it again shortly prior to the trial. In the course of that treatment, Dr Alvarenga referred Mrs Katanas to a clinical psychologist, Dr Raj, for 'eye movement desensitisation and reprocessing treatment' in respect to her complaints of flashbacks and distressing memory of being trapped in the car. Dr Alvarenga reported that after treatment by Dr Raj, Mrs Katanas had expressed relief from her intrusive memories.
9. Through 2011 and 2012 Mrs Katanas continued to attend Dr Chan in respect to neck, back, hand and knee pain associated with the transport accident. She also attended in relation to non-accident related symptoms. In 2011 Dr Chan had offered anti-depressant medication, which Mrs Katanas declined. Dr Chan had also offered her a referral to a psychiatrist, which she also declined.
10. In April 2013, Mrs Katanas felt that she needed more psychological treatment in respect to recurrent flashbacks, and Dr Chan prescribed her anti-depressants and

Mrs Katanas commenced treatment with a psychiatrist, Associate Professor Mazumdar.

11. In February 2014, Mrs Katanas presented to the emergency department at Monash Medical Centre and saw a psychiatric nurse in respect to nightmares since taking anti-depressants. The nurse taught her breathing techniques.
12. In 2014, Mrs Katanas commenced treatment with a clinical psychologist, Dr D'Abbs, in the course of a pain management program. Dr D'Abbs reported that Mrs Katanas had found the psychological input in the program helpful. Mrs Katanas continued to see Dr D'Abbs after completing the pain management program and up until the date of trial in August 2015.
13. Mrs Katanas' psychiatric condition as a consequence of the transport accident was assessed and diagnosed by her treating medical practitioners and also by other practitioners who had seen her for medico-legal purposes². Several practitioners identified symptoms of post-traumatic stress disorder, and some of them diagnosed that condition. Other psychiatric diagnoses were also made.
14. At trial, Mrs Katanas claimed her psychiatric injury to be "severe" by reason of her need for continuing treatment with Dr Chan, Dr Alvarenga, Associate Professor Mazumdar and Dr D'Abbs, her need for daily anti-depressant medications in a setting of intermittent nightmares and flashbacks of the accident, claimed difficulties in relaxing and feeling safe, the ability to drive a car but only for short distances, an inability to look after her grandchildren in the manner in which she had prior to the accident, difficulties in concentration and organising her thoughts that affected her ability to read and cook and has inhibited her from further studies, and the interruption of sleep and restriction in her social pursuits.

² Namely, Dr Kornan (consultant psychiatrist), Associate Professor Mendelson (consultant psychiatrist) and Dr Krapivensky (consultant psychiatrist). See, Primary judge, [66]-[75].

15. The extent of the claimed ‘severity’ of Mrs Katanas’ psychiatric injury and consequences was the subject of cross-examination, which concerned the degree of her continuing involvement in the lives of her children and grandchildren, her ongoing relations with friends including walking with neighbours for 45 minutes about 4 days a week, her independence in domestic matters and involvement in her investment properties and other matters.
16. The primary judge found Mrs Katanas to be an “*unsatisfactory witness*”. She refused to answer questions directly put in cross-examination and regularly denied histories that she had been recorded as having given to treating and other medical practitioners. She sought to explain away those histories in a manner that his Honour found to be evasive and unimpressive. She was unresponsive and evasive in the course of various aspects of the cross-examination³. She sought to argue and prevaricate regularly when matters were clearly put to her. The primary judge did not wholly reject Mrs Katanas’ evidence, but expressed “*reservations about the extent to which her psychological symptoms have impacted on her life*” because “*she did not answer questions in the manner I would expect of an honest witness*”⁴.
17. At [79], the primary judge accepted the opinions of the treating psychological and other practitioners that Mrs Katanas had suffered a post-traumatic stress disorder and either a major depressive disorder or an adjustment disorder following the accident. The primary judge also determined that the transport accident was primarily responsible for Mrs Katanas’ current state, as many of her symptoms related to the happening of that event, including nightmares and flashbacks.
18. At [82], the primary judge identified the “*real issue*” as whether, “*given the reservations about Mrs Katanas’ credibility*”, the psychological symptoms and consequences “*meet the test for ‘severe’ injury as prescribed by the Act*”. In the balance of that paragraph, the primary judge considered the comparable range or

³ Primary judge, [77].

⁴ Primary judge, [78].

spectrum of mental disorders in a manner that the majority of the Court of Appeal (Ashley & Osborn JJA; Kaye JA dissenting) later determined to amount to misdirection.

19. From [83], the primary judge analysed the claimed symptoms and consequences of Mrs Katanas in a manner that all members of the Court of Appeal later confirmed to have been “*conventional in form*” or correct⁵. The primary judge accepted that Mrs Katanas had suffered a range of symptoms arising out of the accident, including flashbacks and nightmares that had prevented her from undertaking any ongoing studies and affected her sleep and her ability to look after her grandchildren and had required psychological treatment and medication. However, the primary judge considered that in the setting in which he had reservations about her description of her symptoms and the effect upon her of the psychological condition, he did not accept that her condition was “*as extreme as she would have it*”⁶. In that regard, the primary judge considered the evidence that Mrs Katanas had retained a range of capacities notwithstanding her treatment. Such evidence included living independently and the undertaking of most usual domestic tasks, driving for short distances, an ability to look after her grandchildren and involvement in their lives, a retained degree of social life and the ability to manage properties and a taxi licence with the assistance of agents. The primary judge also noted that Mrs Katanas had received treatment and medication, but had not been a psychiatric inpatient nor suffered the more extreme symptoms of psychological trauma such as psychotic symptoms, psychiatric hospitalisations or suicidal ideation or attempts. Upon balancing the evidence, the primary judge was not satisfied that Mrs Katanas met the statutory test.

⁵ Ashley & Osborn JJA, [14] & [21], Kaye JA, [78] & [82].

⁶ Primary judge, [85].

20. On appeal to the Court of Appeal of the Supreme Court of Victoria, the majority (Ashley & Osborn JJA) determined that the primary judge erred in the range or spectrum stated at [82]. Kaye JA dissented.

Part VI - Argument

21. In 1986 the Victorian Government introduced the *Transport Accident Bill* which sought to implement a ‘no-fault’ liability scheme in the place of the common law rights of those injured in motor vehicle accidents. The Bill was opposed and its passage through the Parliament ultimately depended upon a compromise, namely the inclusion of what came to be Part 6 entitled “*Legal Rights Outside this Act*”⁷.
- 10 22. The *Transport Accident Act* 1986 (Vic) (the **Act**) came into force on 1 January 1987 and Division 1 of Part 6 of the Act commences with s 93. For presently relevant purposes, s 93 bars a person from recovering damages in respect of injury as a result of a transport accident unless the injury is a “*serious injury*”. That expression was and is defined as follows –

“(17) *In this section –*

...

‘*Serious injury*’ means –

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

23. The terms “*serious*” and “*severe*” were and are undefined in the Act.

⁷ The relevant legislative history is traced by Crockett and Southwell JJ in *Humphries v Poljak* [1992] 2 VR 129, particularly at 131-133.

24. In *Humphries v Poljak* [1992] 2 VR 129, the Full Court of the Supreme Court considered five appeals that turned upon the definition of “serious injury”⁸. The issue was whether the term “serious” ought to be interpreted strictly or liberally. For the guidance of trial judges, Crockett and Southwell JJ stated, at 140-141—

10 “... the task of a judge confronted with the requirement to determine an application made pursuant to sub-s(4)(d) [of s 93] when reliance is placed upon sub-s(17)(a) [of the ‘serious injury definition’] may be stated in the following terms: he is to be affirmatively satisfied (the burden of proof being borne by the applicant) that the injury complained of is in fact a serious injury. To qualify for such a description, there must be an impairment or loss of a body function which as a result of the infliction of the injury complained of is both serious and long-term. We think “long-term” is not an expression likely to give rise to difficulty. To be “serious” the consequences of the injury must be serious to the particular applicant. Those consequences will relate to pecuniary disadvantage and/or pain and suffering. In forming a judgment as to whether, when regard is had to such consequence, an injury is to be held to be serious the question to be asked is: can the injury, when judged by comparison with other cases and the range of possible impairments or losses, be fairly described at least as “very considerable” and certainly more than “significant” or “marked”? Beyond such guidance is, we think, not possible to go. The only other assistance in the resolution of such applications that can be gained will derive from the trends that will emerge from the determination in the future, from time to time of a range of applications including those, the adjudication of which is now our responsibility.

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We should add that, having regard to what we have already said, we do not think that any other general observations are called for with respect to applications that call for a consideration of sub-s (17)(c) [of the ‘serious injury definition’]. ...”.

30 [Emphasis added]

25. That approach was undisturbed in an application for special leave to appeal to this Court in *Fleming v Hutchinson*; *Conroy v Veit* (1991) 66 ALJR 211, in which Mason CJ, Brennan and Dawson JJ stated, relevantly —

⁸ Namely, the cases of *Humphries v Poljak*, *Fleming v Hutchinson*, *Stone v Jarvis*, *Maloney v Muling* and *Viet v Conroy*.

“... in each case the court must apply the test of “seriousness” by evaluating the plaintiff’s condition and such evaluation does not depend on any legal principle. It depends upon the opinion of a judge familiar with a range of conditions within which the instant condition occurs”.

26. In 1997, in *Mobilio v Balliotis* [1998] 3 VR 833, the Victorian Court of Appeal determined that it should decline to reconsider *Humphries*. At 844-845, Brooking JA (with whom Winneke P, Ormiston, Phillips & Charles JJA relevantly agreed) stated –

10 “... I should not be in favour of departing from the [*Humphries*] formulation which has been uniformly acted on for the last six years. I regard it as a satisfactory formulation, which is consistent with the statute and is a guide that has in practice been found, by both primary and appellate judges, to be workable. With the use of the guide, in the past six years, as was contemplated by *Crockett and Southwell JJ* at 140-1, trends have emerged from the determination from time to time of a range of applications; and so the degree of uncertainty in a necessarily uncertain area has been somewhat reduced. ...

20 *In my opinion, this court should now simply decline to reconsider Humphries v Poljak in this respect and should say that we will stand by our decisions. There are, as I have said, at least six decisions of the Full Court and Court of Appeal supporting the ‘very considerable’ test.”*

27. In *Mobilio*, the Court of Appeal also determined that the word “severe”, in relation to mental or behavioural disturbances or disorders, is of stronger force than the word “serious”⁹.
28. From time to time the Victorian Parliament has amended the Act, including s 93¹⁰. However, the definition of “serious injury” has been retained, and the terms “serious” and “severe” remain undefined in the Act¹¹.

⁹ *Mobilio v Balliotis* [1998] 3 VR 833 at 835 (Winneke P), 846 (Brooking JA), 854 (Ormiston JA), 858 (Phillips JA) and 860-861 (Charles JA).

¹⁰ *Transport Accident (General Amendment) Act*, s 10 (No.84/1994), *Transport Accident (Amendment) Act* 1998 (No.34/1998), s 14, *Transport Accident (Amendment) Act* 2000, s 30 (No.84/2000), *Transport Accident (Amendment) Act* 2004, s 11 (No.94/2004) and *Compensation and Superannuation Legislation Amendment Act* 2008, s 5 (No.65/2008).

29. In respect to workplace injuries, since 2000 the *Humphries* formulation has had the force of statute¹².
30. It follows that since 1991 the determination of the question of “*serious injury*” by practitioners, County Court judges and the Victorian Court of Appeal¹³ has been guided by –
- (a) subjectively, whether the nature, symptoms and consequences of injury are “*serious*” to the particular claimant (or, in the case of a mental or behavioural disturbance or disorder, “*severe*”); and
 - (b) objectively, whether the injury is “*serious*” (or “*severe*”) when compared with the range or spectrum of comparable cases¹⁴.
31. Thus, by the date of trial in the present case both the *Humphries* formulation and the meaning of the term “*severe*” were long settled¹⁵. In that regard –

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¹¹ Save for the following historical curiosity: the *Transport Accident Amendment Act* 2013, s 27, (No.71/2013) inserted sub-s (17A) which, in particular respects, limited sub-paragraph (c) of the “*serious injury*” definition relating to severe long-term mental or severe long-term behavioural disturbances or disorders. That sub-section came into force on 16 October 2013. Sub-s (17A) was, however, repealed by the *Transport Accident Amendment Act* 2016 (No.18/2016) with effect from 16 October 2013.

¹² See, *Accident Compensation Act* 1985 (Vic), s 134AB(38)(b)-(d). When reading the *Accident Compensation (Common Law and Benefits) Bill* for a second time, the Minister for WorkCover stated “*The narrative serious injury test contained in the bill has been codified to broadly reflect the test established by the full court in Humphries v Poljak (Full Court of the Supreme Court of Victoria 1992 2 VR at 129) ...*”. The legislative history of s 134AB was traced by the Court of Appeal in *Barwon Spinners v Podolak* (2005) 14 VR 622. See also, *Workplace Injury Rehabilitation and Compensation Act* 2013 (Vic), sub-s 325(2)(b)-(d).

¹³ See, for example, *Rodda v Transport Accident Commission* [2008] VSCA 276 at [76]-[77], *Transport Accident Commission v Kamel* [2011] VSCA 110 at [61]-[66] and *Philippiadias v Transport Accident Commission* [2016] VSCA 1 at [24]-[25].

¹⁴ In more recent cases the Victorian Court of Appeal has also referred to the “*range*” as the “*spectrum*”: see, *Dwyer v Calco Timbers Pty Ltd (No.2)* [2008] VSCA 260 at [7], per Ashley JA (Nettle & Dodds-Streeton JJA agreeing), *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181 at [42], per Ashley JA & Beach AJA and *Sutton v Laminex Group* (2011) 31 VR 100 at 117 [89], per Tate JA, Ashley JA & Hargrave AJA agreeing.

¹⁵ Cf., *Barbianaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 22-24 (Wilson & Dawson JJ) and 29-30 (Brennan & Deane JJ).

(a) the primary judge observed, correctly, at [4], that –

“... *The statutory scheme set forth in the Act which prescribes and regulates applications of this nature, and the principal authorities of the Court of Appeal, are well known, and it is unnecessary for me to re-visit the various relevant sections and those authorities.*”

(b) there was no suggestion either at trial or on appeal to the Court of Appeal that the *Humphries* formulation was wrong or should be re-visited;

(c) in responding to the application for special leave to appeal to this Court, the respondent submitted “... *there is no dispute between the present parties as to the correctness of the statement in Humphries v Poljak*”¹⁶.

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32. In the present case, Mrs Katanas sought leave to commence common law proceedings in respect to psychological injury. She claimed loss or restriction in a range of social, recreational and domestic pastimes and activities. It was not controversial that she had suffered a psychological injury as a result of the motor accident – she was being treated, including with medication. However, her credit and reliability as a witness in respect to her claimed symptoms and consequences was in issue.

33. In that regard, the credit and reliability of a claimant has long been recognised as of “*great importance*” in the determination of serious injury applications because, often enough, the acceptance of the case depends upon the honesty and reliability of the claimant in the description of his or her consequential symptoms, restrictions and disabilities, including what he or she says to medical practitioners who must form medical opinions on the basis of what they have been told¹⁷.

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34. In that context, the question for determination in the present case was whether the injury and its consequences were “*severe*”.

¹⁶ Response of the Respondent dated 3 August 2016, paras [11] & [12].

¹⁷ See, *Palmer Tube Mills v Semi* [1998] 4 VR 439 at 448, per Brooking JA, Tadgell & Buchanan JJA agreeing. See also, *Haidar v Transport Accident Commission* (2016) 77 MVR 121 at [30].

35. That question fell to be answered with guidance from *Humphries* – namely, by reference to a consideration of the extent to which Mrs Katanas’ subjective claims of impact upon her social, recreational and domestic activities could be accepted and whether her psychological injury was “*severe*” when judged by reference to the range of comparable cases.
36. During the addresses of counsel, the primary judge identified “*the real nub of the case*” as whether the injury was “*severe*”. His Honour said —

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*“There is a lot of authority to say severe is, as the word would suggest, a stronger word than serious and often accompanied by the more significant symptoms of serious psychiatric disorder. Suicidal ideation, hospitalisation, psychoses and things. Not always, but sometimes.”*¹⁸

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37. Senior Counsel for the TAC specifically relied upon “*the sorts of psychological cases and people with mental behavioural illnesses that come before the court*” and submitted that “*this woman does not fit a severe category*”¹⁹.
38. Senior Counsel for Mrs Katanas did not take issue with the primary judge’s statement referred to above, or specifically engage with the submission of Senior Counsel for the TAC concerning the range of cases that come before the court. Senior Counsel for Mrs Katanas simply submitted that her claimed consequences of injury were “*severe*”²⁰.
39. At [82], the primary judge correctly identified “*the real issue*” to be whether, given his reservations concerning Mrs Katanas’ credibility, her psychological symptoms and consequences met the test for “*severe*” injury under the Act. His Honour also identified, correctly, and consistently with *Mobilio*, that “*severe*” is a word of greater force and indicates that a more significant injury and consequences are required to meet the test. The primary judge then identified the range of cases

¹⁸ T148.4-148.23

¹⁹ T153.7-153.12

²⁰ T165.22-165.27, 166.8-166.16 & 169.6-169.20

comparable with that of Mrs Katanas, namely mental disorders ranging from mild anxiety overcome without medical treatment to extreme symptoms and consequences such as psychoses, psychiatric hospitalisation, delusions, suicidal ideation and attempts. This range accommodated the case of Mrs Katanas: it was the range of comparable cases or conditions.

40. Thereafter, the primary judge took account of Mrs Katanas' treatment, medication and claimed consequences and, at [85], identified the consequence of his reservations concerning Mrs Katanas' credit: "*I do not accept her condition is as extreme as she would have it*". His Honour took account of the capacities that Mrs Katanas had retained, and the fact that she had not been a psychiatric inpatient nor suffered any of the more extreme symptoms referred to at [82]. That it was correct to take account of such matters had been confirmed by an earlier Court of Appeal²¹. The primary judge was, ultimately, not satisfied that Mrs Katanas' injury and consequences met the statutory threshold and her application was, accordingly, dismissed.
41. On appeal, the majority (Ashley & Osborn JJA) determined the primary judge to have erred at [82] by stating the range or spectrum of cases in a "*false and incomplete way*" because it would not accommodate cases such as –
- (a) a claimant with a psychiatric disorder requiring modest treatment but with associated pecuniary or occupational consequences²²; and
- (b) a claimant who had obtained "*much treatment*", but unnecessarily²³.
42. However, such cases were of a kind quite different to – and incomparable with – the case of Mrs Katanas, who did not complain of pecuniary or occupational consequences, and about whom there was no suggestion of unnecessary treatment.

²¹ *Papamanos v Commonwealth Bank of Australia* [2014] VSCA 167 at [44].

²² Ashley & Osborn JJA, [13] & [18]. See also, [20].

The range stated by the primary judge accommodated the case of Mrs Katanas. There could be no misdirection in stating a range appropriate to the instant case on the basis that it did not accommodate cases of a kind different to and incomparable with the present.

43. Further, it was not misdirection for the primary judge to consider that the case should be in the upper echelon of the comparable range in order to be considered “severe”. That was consistent with the plain and settled meaning of that word as interpreted in *Mobilio*.

10 44. However, at [19] the majority went further and determined that the range or spectrum framed by the primary judge was “only one amongst a number of ways in which the question of severity might be approached, each of them being incomplete in itself”, and thereafter framed a sequence of ‘spectra’ directed to various disaggregated consequences and symptoms. The majority then stated –

20 “In our opinion, the correct thing to do, in each case, is to first identify and next bring to account all relevant circumstances personal to the claimant; and then to apply the statutory test, making a value judgment as described by *Crockett and Southwell JJ* In making that value judgment, a judge must give to each identified relevant circumstance the weight which appears to be appropriate. He or she will be assisted, of course, by personal experience of cases which have fallen on one side of the line or the other.”²⁴

45. At [20], Ashley and Osborn JJA concluded that “[t]hese propositions illustrate, to our mind, the limited utility of the spectrum”.

46. The approach of the majority, whilst referring to the *Humphries* formulation in passing, cannot be reconciled with it —

²³ Ashley & Osborn JJA, [20].

²⁴ Ashley & Osborn JJA, [19].

- (a) the *Humphries* formulation identifies a “*comparison with other cases in the range*” as part of “*the question to be asked*”²⁵;
- (b) Ashley and Osborn JJA, however, found that all ways in which the range or spectrum might have been framed would be “*incomplete*” – which was the very reason why their Honours found the range framed by the primary judge to be erroneous;
- (c) their Honours thereafter proposed what was said to be “*the correct thing to do*” – but in terms that referred only to ‘bringing into account’ the subjective symptoms and consequences claimed by an applicant and made no mention at all of the assessment of those claims objectively in light of the range or spectrum of comparable cases;
- (d) in so doing, the majority also introduced a new and unexplained concept – “*the line*” – which, on any view, is distinct from if not the conceptual opposite of “*the range*”; and
- (e) ultimately, their Honours stated that the range is of “*limited utility*”.
47. Therefore, the majority relegated what in *Humphries* is an important part of “*the question*” to a matter of “*limited utility*”. Further, it is evident from their Honours’ reasoning at [19] to [20] that any future endeavour to frame a range or spectrum would be at risk of being “*incomplete*” and therefore “*false*” and ultimately erroneous.
48. To have done so was, with respect, fundamentally wrong –
- (a) the *Humphries* formulation was long settled;

²⁵ *Fleming v Hutchinson; Conroy v Viet* (1991) 66 ALJR 211 had also confirmed the relevance of the “*range of conditions within which the instant condition occurs*” to the ultimate issue to be determined by a County Court judge.

- (b) neither party had submitted that *Humphries* was wrong or should be re-visited;
- (c) in fact, the Court of Appeal had long said that it should not reconsider *Humphries*;
- (d) the reasoning of the majority had the effect of displacing or trampling upon that part of the *Humphries* formulation directed to the evaluation of an instant case against the range of comparable cases; and
- (e) the reasoning also placed any County Court judge who reasoned by reference to the range of comparable cases in a quandary – how could reasons for judgment be framed by reference to that issue if any statement of the range would inevitably be erroneous for incompleteness?²⁶

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49. Just as fundamentally, it was erroneous for the majority to –

- (a) displace the statement of the range of comparable cases by the primary judge on the basis that it did not accommodate cases of a kind incomparable with the present; and
- (b) criticise the primary judge for taking into account the fact that Mrs Katanas had not been an inpatient in any psychiatric institution nor suffered the more extreme psychological symptoms such as psychoses and suicidal ideation, when an earlier Court of Appeal had confirmed that it was, in fact, “*correct*” to do so²⁷.

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50. By contrast, Kaye JA, in dissent, disagreed that there was any misdirection by the primary judge. His Honour considered that –

“... it is relevant, and indeed important, for a judge, considering an application under s 93 of the Act, to assess how the disorder, suffered by

²⁶ Cf., *Hunter v Transport Accident Commission* (2005) 43 MVR 130.

²⁷ *Papamanos v Commonwealth Bank of Australia* [2014] VSCA 167 at [44].

*the applicant, fits within the range of such possible disorders. In Humphries v Poljak, Crockett and Southwell JJ prescribed the test to be applied in respect of a physical injury, in terms that have been approved and applied during the last 25 years. ...*²⁸.

51. Kaye JA also observed, relevantly, that –

10 “... the test for determining whether a mental disorder is severe for the purposes of s 93(17)(c) of the Act is particularly stringent, requiring, as the judge correctly pointed out, that the disorder be properly characterised as involving a more significant injury and consequences than an injury that is ‘very considerable’.”²⁹

52. Kaye JA considered it to be “clear that the judge articulated a test that correctly took into account each of the relevant considerations”³⁰.

53. In short, the dissenting decision of Kaye JA confirmed *Humphries* and the relevance and importance of a comparison with the range or spectrum of comparable conditions when determining the issue of “serious injury”, but the majority decision of Ashley and Osborn JJA trampled upon and displaced it.

54. The majority decision is both wrong and an invitation to further error in other courts. The long settled *Humphries* formulation – which neither party in the present case suggested should be interfered with – should be restored; as should the
20 underlying decision of the primary judge, which was correct.

Notice of Contention

55. By notice of contention, the respondent claims that the reasons of the primary judge were inadequate, presumably in the sense that the primary judge did not

²⁸ Kaye JA, [70]. See also, Kaye JA, [71].

²⁹ Kaye JA, [72]

³⁰ Kaye JA, [76]-[77] & [81].

properly consider her case³¹. The appellant will respond to that contention in its reply.

Part VII – Relevant Statutory Provisions

56. The relevant statutory provisions are contained in Annexure “A”. Section 93 of the Act appears in the form in which it existed at the date of the transport accident on 10 July 2010.

Part VIII – Orders Sought

57. The appellant seeks the following orders in the appeal –

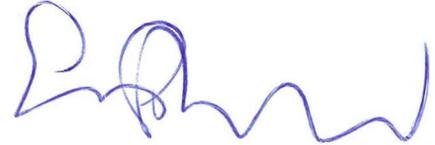
- 10
- (1) The appeal be allowed.
 - (2) Save for order 2 below relating to the issue of costs, the orders of the Court of Appeal be set aside.
 - (3) The orders of the County Court following trial be restored.
 - (4) The appellant pay the respondent’s costs of this appeal including costs of the application for special leave to appeal.
 - (5) Such other orders as the Court thinks appropriate.

Part IX – Time Estimate

20 58. The appellant estimates that 1½ hours will be required for the presentation of the appellant’s oral argument.

³¹ Cf., *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 321 at [62]-[63], per Gleeson CJ, McHugh and Gummow JJ.

DATED: 9th December 2016



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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M160 of 2016

ON APPEAL FROM THE COURT OF APPEAL OF
THE SUPREME COURT OF VICTORIA

BETWEEN:

TRANSPORT ACCIDENT COMMISSION

Appellant

and

MARIA KATANAS

Respondent

ANNEXURE "A" TO APPELLANT'S SUBMISSIONS

STATUTORY PROVISIONS

- A. Transport Accident Act 1986 (Vic), s 93 (as at 1 July 2010)
- B. Accident Compensation Act 1985 (Vic), s 134AB(38)(b)-(d)
- C. Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) sub-s 325(2)(d)
- D. Transport Accident (General Amendment) Act 1994 (Vic) s 7, s 10, s 40
- E. Transport Accident (Amendment) Act 1998 (Vic) s 14(b)
- F. Transport Accident (Amendment) Act 2000 (Vic) s 28-29
- G. Transport Accident (Amendment) Act 2004 (Vic) s 11(5)(f)
- H. Compensation Superannuation Legislation Amendment Act 2008 (Vic) s 5

Transport Accident Act 1986
No. 111 of 1986
Part 6—Legal Rights Outside this Act

s. 93

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PART 6—LEGAL RIGHTS OUTSIDE THIS ACT

Division 1—Damages in respect of death or serious injury

93 Actions for damages¹⁷

(1) A person shall not recover any damages in any proceedings in respect of the injury or death of a person as a result of a transport accident occurring on or after the commencement of section 34 except in accordance with this section.

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S. 93(1A)
inserted by
No. 65/2008
s. 5.

(1A) For the avoidance of doubt, it is hereby declared that the effect of subsection (1) is that any person, whether or not a natural person, cannot recover any damages in any proceedings to which that subsection applies unless the person is a natural person in which case the natural person can only bring proceedings in accordance with this section to recover damages in respect of the injury sustained by him or her or the death of a person specified in subsection (1).

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(2) A person who is injured as a result of a transport accident may recover damages in respect of the injury if—

S. 93(2)(a)
substituted by
No. 32/1988
s. 21(1)(a).

- (a) the Commission has determined the degree of impairment of the person under section 46A, 47(7) or 47(7A); and
- (b) the injury is a serious injury.

40

(3) If—

S. 93(3)(a)
substituted by
No. 32/1988
s. 21(1)(b).

- (a) under section 46A, 47(7) or 47(7A), the Commission has determined the degree of impairment of a person who is injured as a result of a transport accident; and

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Transport Accident Act 1986
No. 111 of 1986
Part 6—Legal Rights Outside this Act

s. 93

10 (b) the degree so determined is 30 per centum or more—

S. 93(3)(b) substituted by No. 32/1988 s. 21(1)(b).

the injury is deemed to be a serious injury within the meaning of this section.

(4) If—

20 (a) under section 46A, 47(7) or 47(7A), the Commission has determined the degree of impairment of a person who is injured as a result of a transport accident; and

S. 93(4)(a) substituted by No. 32/1988 s. 21(1)(c).

(b) the degree so determined is less than 30 per centum—

S. 93(4)(b) substituted by No. 32/1988 s. 21(1)(c).

the person may not bring proceedings for the recovery of damages in respect of the injury unless—

30 (c) the Commission—

(i) is satisfied that the injury is a serious injury; and

(ii) issues to the person a certificate in writing consenting to the bringing of the proceedings; or

(d) a court, on the application of the person, gives leave to bring the proceedings.

40 (5) A copy of an application under subsection (4)(d) must be served on the Commission and on each person against whom the applicant claims to have a cause of action.

S. 93(5) substituted by No. 57/1989 s. 3(Sch. Item 203.1).

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

Transport Accident Act 1986
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Part 6—Legal Rights Outside this Act

s. 93

- 10
- S. 93(6A)
inserted by
No. 84/2000
s. 28.
- (6A) Despite anything to the contrary in any other Act, a party may in proceedings under this section when adducing evidence on the question of whether any person was at the time of the transport accident under the influence of intoxicating liquor or any other drug, use the analysis or the results of the analysis of a blood sample or breath analysis lawfully taken under the *Road Safety Act 1986* at or after the time of the transport accident.
- 20
- S. 93(6B)
inserted by
No. 84/2000
s. 28.
- (6B) A party must not adduce material referred to in subsection (6A) in evidence in proceedings under this section unless—
- (a) the party provides to all other parties in the proceedings, copies of the document or documents which form the evidence at least 6 weeks before the commencement of the trial of the proceedings; and
- 30
- (b) if notice is given to that party by another party at least 2 weeks before the commencement of the trial of the proceedings, the party causes the person who supplied the information contained in the document or documents to attend the trial of the proceedings for the purpose of cross-examination.
- 40
- S. 93(6C)
inserted by
No. 84/2000
s. 28.
- (6C) Subsections (6A) and (6B) as inserted by section 28 of the *Transport Accident (Amendment) Act 2000* apply to and in respect of a transport accident which occurs on or after the commencement of that section.
- S. 93(7)
substituted by
No. 84/1994
s. 10(1).
- (7) Damages of any kind in respect of an injury cannot be recovered in proceedings in accordance with subsections (2), (3) and (4) other than damages¹⁸—

Transport Accident Act 1986
No. 111 of 1986
Part 6—Legal Rights Outside this Act

s. 93

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(a) for pecuniary loss but only if—

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(i) the assessment of damages before any reduction in respect of the person's responsibility for the injury is more than \$30 520 but less than \$686 840, in which case the amount that can be recovered is that amount so assessed as reduced first under subsection (11) and secondly in respect of the person's responsibility for the injury; or

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(ii) the assessment of damages before any reduction in respect of the person's responsibility for the injury is more than \$686 840, in which case the amount that can be recovered is \$686 840 as reduced first under subsection (11) and secondly in respect of the person's responsibility for the injury;

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(b) for pain and suffering but only if—

(i) the assessment of damages before any reduction in respect of the person's responsibility for the injury is more than \$30 520 but less than \$305 250, in which case the amount that can be recovered is that amount so assessed as reduced first under subsection (11) and secondly in respect of the person's responsibility for the injury; or

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(ii) the assessment of damages before any reduction in respect of the person's responsibility for the injury is more than \$305 250, in which case the amount that can be recovered is \$305 250 as reduced first under subsection (11) and secondly in respect

Transport Accident Act 1986
No. 111 of 1986
Part 6—Legal Rights Outside this Act

s. 93

10 of the person's responsibility for the injury.

(8) A person may recover damages under Part III of the **Wrongs Act 1958** in respect of the death of a person as a result of a transport accident.

(9) A court must not, in proceedings under Part III of the **Wrongs Act 1958** award damages in accordance with subsection (8) in respect of the death of a person in excess of \$500 000.

20 (10) Damages awarded to a person under this section shall not include damages in respect of—

S. 93(10)(a) amended by No. 84/1994 s. 10(2).

(a) in the case of an award of pecuniary loss damages under subsection (7), any pecuniary loss suffered in the period of 18 months after the transport accident¹⁹; or

(b) any loss suffered or that may be suffered as a result of the incurring of costs or expenses of a kind referred to in section 60; or

30 (c) the value of services of a domestic nature or services relating to nursing and attendance—

(i) which have been or are to be provided by another person to the person in whose favour the award is made; and

(ii) for which the person in whose favour the award is made has not paid and is not and will not be liable to pay.

40 (11) Damages under subsection (7) are to be reduced²⁰—

S. 93(11) amended by No. 32/1988 s. 21(1)(d), substituted by No. 84/1994 s. 10(3).

(a) in the case of damages for pecuniary loss—

(i) if the person was entitled to compensation under this Act, by the amount of compensation paid in respect of the injury under sections 49, 50 and 51; or

Transport Accident Act 1986
No. 111 of 1986
Part 6—Legal Rights Outside this Act

s. 93

10 (ii) if the person was not entitled to compensation under this Act because of section 37, by the amount of any compensation paid in respect of lost earnings other than earnings lost in the first 18 months after the transport accident; and

(b) in the case of damages for pain and suffering—

20 (i) if the person was entitled to compensation under this Act, by the amount of compensation paid in respect of the injury under sections 47 and 54; or

S. 93(11)(b)(i) amended by No. 94/2004 s. 11(5)(f).

(ii) if the person was not entitled to compensation under this Act because of section 37, by the amount of any compensation paid otherwise than in respect of lost earnings or other pecuniary loss.

30 (11A) Damages under subsection (8) are to be reduced—

S. 93(11A) inserted by No. 84/1994 s. 10(3).

(a) if compensation was payable in respect of the death under this Act, by the amount of compensation paid under sections 57, 58 and 59; or

40 (b) if compensation was not payable in respect of the death under this Act because of section 37, by the amount of any compensation paid in respect of the loss of expectation of financial support (other than of the kind to which section 60 applies) under any compensation scheme specified in section 37²¹.

Transport Accident Act 1986
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s. 93

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(12) Subject to the discretion of the court—

(a) in proceedings relating to an application for leave of the court under subsection (4)(d)— costs are to be awarded against a party against whom a decision is made; and

(b) in proceedings for the recovery of damages in accordance with this section—

(i) if no liability to pay damages is established, costs are to be awarded against the claimant; and

(ii) if damages are assessed but cannot be awarded under this section, each party bears its own costs; and

(iii) if damages are awarded, costs are to be awarded against the defendant.

20

S. 93(12A)
inserted by
No. 84/1994
s. 10(4).

(12A) Damages awarded in accordance with subsection (8) in respect of the death of a person must not include damages in respect of services in the nature of housekeeping or the care of a child which would have been provided by the deceased person²².

30

(13) Where an award of damages in accordance with this section is to include compensation, assessed as a lump sum, in respect of damages for future loss which is referable to—

(a) deprivation or impairment of earning capacity; or

(b) loss of the expectation of financial support; or

(c) a liability to incur expenditure in the future—

40

the present value of the future loss must be qualified by adopting a discount rate of 6 per centum in order to make appropriate allowance for

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Transport Accident Act 1986
No. 111 of 1986
Part 6—Legal Rights Outside this Act

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inflation, the income from investment of the sum awarded and the effect of taxation on that income.

(14) Except as provided by subsection (13), nothing in that subsection affects any other law relating to the discounting of sums awarded as damages.

(15) A court must not, in relation to an award of damages in accordance with this section, order the payment of interest, and no interest shall be payable, on an amount of damages, other than damages referable to loss actually suffered before the date of the award, in respect of the period from the date of the death of or injury to the person in respect of whom the award is made to the date of the award.

S. 93(15)
amended by
No. 34/1998
s. 14(b).

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(16) Except as provided by subsection (15), nothing in that subsection affects any other law relating to the payment of interest on an amount of damages, other than special damages.

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(17) In this section—

pain and suffering damages means damages for pain and suffering, loss of amenities of life or loss of enjoyment of life;

pecuniary loss damages means damages for loss of earnings, loss of earning capacity, loss of value of services or any other pecuniary loss or damage;

serious injury means—

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(a) serious long-term impairment or loss of a body function; or

(b) permanent serious disfigurement; or

(c) severe long-term mental or severe long-term behavioural disturbance or disorder; or

(d) loss of a foetus.

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A. Transport Accident Act 1986 (Vic), s 93 (as at 1 July 2010)

Transport Accident Act 1986
No. 111 of 1986
Part 6—Legal Rights Outside this Act

s. 93

- 10
- (18) Nothing in subsection (1)—
- (a) affects a right to compensation under this Act or an Act or enactment referred to in section 37 or 38; or
- S. 93(18)(b) amended by Nos 32/1988 s. 21(2), 84/1994 s. 7.
- (b) applies to the recovery of damages in respect of a transport accident involving an organized motor vehicle race or speed trial or a test in preparation for such a race or trial by a person who, by reason of section 41, is not entitled to compensation in accordance with this Act in respect of that accident²³; or
- 20
- S. 93(18)(c) inserted by No. 84/1994 s. 7.
- (c) applies to the recovery of damages in respect of a transport accident to which section 41A or 41B applies by a person who, by reason of that section, is not entitled to compensation in accordance with this Act in respect of that accident²⁴.
- 30
- S. 93(18A) inserted by No. 84/2000 s. 29.
- (18A) Despite subsection (18), if an award of damages under this section includes an amount for the future cost of services of a kind set out in section 60 if provided in Australia, the Commission is released from any further liability for compensation under that section.
- S. 93(18B) inserted by No. 84/2000 s. 29.
- (18B) Subsection (18A) as inserted by section 29 of the **Transport Accident (Amendment) Act 2000** applies to and in respect of a transport accident which occurs on or after the commencement of that section.
- 40
- S. 93(19) inserted by No. 84/1994 s. 40.
- (19) Notwithstanding anything to the contrary in this Act, for the purposes of the **Limitation of Actions Act 1958**, the cause of action in respect of an injury arises on the day of the transport accident or on the day on which the injury first manifests itself.

Transport Accident Act 1986
No. 111 of 1986
Part 6—Legal Rights Outside this Act

s. 93D

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(20) For the avoidance of doubt it is hereby declared that all the provisions of this section contain matters that are substantive law and are not procedural in nature.

S. 93(20) inserted by No. 84/1994 s. 40.

93D Directions²⁵

S. 93D inserted by No. 84/2000 s. 30.

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- (1) For the purposes of section 93, the Minister may issue directions for or with respect to procedures under that section.
- (2) The directions must be published in the Government Gazette.
- (3) The directions may include directions about the provision of information by affidavit and the attending of conferences.
- (4) A person to whom a direction under this section applies, and the legal representatives and agents of such a person, must comply with the direction.

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Division 2—Indemnity by Commission

94 Indemnity

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- (1) The Commission is liable to indemnify—
 - (a) the owner or driver of a registered motor vehicle in respect of any liability in respect of an injury or death of a person caused by or arising out of the use of the motor vehicle in Victoria or in another State or in a Territory; and
 - (b) the operator, owner or driver of a railway train or tram, and the manager of the railway or tramway on which a railway train or tram is operated, in respect of any liability in respect of an injury or death caused by or arising out of the use of the railway train or tram in Victoria—

S. 94(1)(a) amended by No. 127/1986 s. 102(Sch. 4 Item 29.2).

S. 94(1)(b) amended by Nos 84/1994 s. 45(a), 104/1997 s. 56(3).

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B. Accident Compensation Act 1985 (Vic), s 134AB(38)(b)-(d)

Accident Compensation Act 1985
No. 10191 of 1985
Part IV—Payment of compensation

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- (b) permanent serious disfigurement; or
 - (c) permanent severe mental or permanent severe behavioural disturbance or disorder; or
 - (d) loss of a foetus.

(38) For the purposes of the assessment of *serious injury* in accordance with subsections (16) and (19)—

20

(a) the following definitions apply—

foetus has the same meaning as in section 98C(5);

income from personal exertion has the same meaning as in section 6(2) of the **Transport Accident Act 1986**;

30

(b) the terms *serious* and *severe* are to be satisfied by reference to the consequences to the worker of any impairment or loss of a body function, disfigurement, or mental or behavioural disturbance or disorder, as the case may be, with respect to—

- (i) pain and suffering; or
- (ii) loss of earning capacity—

40

when judged by comparison with other cases in the range of possible impairments or losses of a body function, disfigurements, or mental or behavioural disturbances or disorders, respectively;

(c) an impairment or loss of a body function or a disfigurement shall not be held to be serious for the purposes of subsection (16) unless the pain and suffering consequence or the loss of earning capacity consequence is, when judged by comparison with other cases in the range of possible impairments or losses of a

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B. Accident Compensation Act 1985 (Vic), s 134AB(38)(b)-(d)

Accident Compensation Act 1985
No. 10191 of 1985
Part IV — Payment of compensation

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body function, or disfigurements, as the case may be, fairly described as being more than significant or marked, and as being at least very considerable;

20

(d) a mental or behavioural disturbance or disorder shall not be held to be severe for the purposes of subsection (16) unless the pain and suffering consequence or the loss of earning capacity consequence is, when judged by comparison with other cases in the range of possible mental or behavioural disturbances or disorders, as the case may be, fairly described as being more than serious to the extent of being severe;

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(e) where a worker relies upon paragraph (a), (b) or (c) of the definition of serious injury in subsection (37), the Authority or self-insurer shall not grant a certificate under subsection (16)(a) and a court shall not grant leave under subsection (16)(b) on the basis that the worker has established the loss of earning capacity required by paragraph (b) unless the worker establishes in addition to the requirements of paragraph (c) or (d), as the case may be, that—

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(i) at the date of a decision under subsection (16)(a) or at the date of the hearing of an application under subsection (16)(b), the worker has a loss of earning capacity of 40 per centum or more, measured (except in the case of a worker referred to in item 1 of Schedule 1A or a worker under the age of 26 years at the date of the injury) as set out in paragraph (f); and

S. 134AB
(38)(e)(i)
amended by
No. 67/2013
s. 638(4) (as
amended by
No. 44/2014
s. 24(32)).

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Workplace Injury Rehabilitation and Compensation Act 2013
No. 67 of 2013
Part 7—Actions and proceedings for damages

10

325 Definitions

(1) In this Division—

determination date, in relation to an injury,
means—

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(a) if the worker is assessed under
Division 4 of Part 5 or under
section 104B of the **Accident
Compensation Act 1985** to have a
degree of impairment of 30 per cent or
more, the date on which the worker
receives advice under section 330(1)(a);
or

(b) the date on which the Authority or self-
insurer issues a certificate under
section 335(2)(c) consenting to the
bringing of proceedings; or

30

(c) if the Authority or self-insurer fails to
advise the worker in writing as required
by section 330(1) within the period
referred to in section 330(1), the date
on which, under section 330(3), the
injury is deemed to be a serious injury;
or

(d) the date—

40

(i) unless subparagraph (ii) applies,
on which a court gives leave under
section 335(2)(d); or

(ii) on which an appeal by the
Authority, self-insurer or worker
in relation to a decision of a court
under section 335(2)(d) is
determined—

whichever is the later date;

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Workplace Injury Rehabilitation and Compensation Act 2013
No. 67 of 2013

Part 7—Actions and proceedings for damages

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medical report means—

- (a) a statement in writing on medical matters concerning the worker, made by a medical practitioner; and
- (b) includes any document which the medical practitioner intends should be read with the statement, whether the document—
 - (i) was in existence at the time the statement was made; or
 - (ii) was a document which he or she obtained or caused to be brought into existence subsequently;

20

pain and suffering includes loss of amenities of life or loss of enjoyment of life;

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pecuniary loss damages means damages for loss of earnings, loss of earning capacity, loss of value of services or any other pecuniary loss or damage;

response date means the date on which the period of 28 days after the determination date expires;

serious injury means—

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

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Workplace Injury Rehabilitation and Compensation Act 2013
No. 67 of 2013

Part 7—Actions and proceedings for damages

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(2) For the purposes of the assessment of *serious injury* in accordance with section 335(2) and (5)—

(a) the following definitions apply—

foetus has the same meaning as in section 214(2);

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income from personal exertion has the same meaning as in section 6(2) of the **Transport Accident Act 1986**;

(b) the terms *serious* and *severe* are to be satisfied by reference to the consequences to the worker of any impairment or loss of a body function, disfigurement, or mental or behavioural disturbance or disorder, as the case may be, with respect to—

(i) pain and suffering; or

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(ii) loss of earning capacity—

when judged by comparison with other cases in the range of possible impairments or losses of a body function, disfigurements, or mental or behavioural disturbances or disorders, respectively;

(c) an impairment or loss of a body function or a disfigurement is not to be held to be serious for the purposes of section 335(2) unless—

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(i) the pain and suffering consequence; or

(ii) the loss of earning capacity consequence—

is, when judged by comparison with other cases, in the range of possible impairments or losses of a body function, or disfigurements, as the case may be, fairly described as being more than significant or

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Workplace Injury Rehabilitation and Compensation Act 2013
No. 67 of 2013

Part 7—Actions and proceedings for damages

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marked, and as being at least very
considerable;

(d) a mental or behavioural disturbance or
disorder is not to be held to be severe for the
purposes of section 335(2) unless —

(i) the pain and suffering consequence; or

(ii) the loss of earning capacity
consequence —

20

is, when judged by comparison with other
cases, in the range of possible mental or
behavioural disturbances or disorders, as the
case may be, fairly described as being more
than serious to the extent of being severe;

(e) if a worker relies upon paragraph (a), (b)
or (c) of the definition of *serious injury* in
subsection (1), the Authority or self-insurer
must not issue a certificate under
section 335(2)(c), and a court must not grant
leave under section 335(2)(d), on the basis
that the worker has established the loss of
earning capacity required by paragraph (b)
unless the worker establishes in addition to
the requirements of paragraph (c) or (d), as
the case may be, that —

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(i) at the date of a decision under
section 335(2)(c) or at the date of the
hearing of an application under
section 335(2)(d), the worker has a loss
of earning capacity of 40 per cent or
more, measured (except in the case of a
worker referred to in item 1 of
Schedule 2 or a worker under the age of
26 years at the date of the injury) as set
out in paragraph (f); and

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Workplace Injury Rehabilitation and Compensation Act 2013

No. 67 of 2013

Part 7—Actions and proceedings for damages

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(ii) the worker (including a worker referred to in item 1 of Schedule 2 or a worker under the age of 26 years at the date of the injury) will, after the date of the decision or of the hearing, continue permanently to have a loss of earning capacity which will be productive of financial loss of 40 per cent or more;

20

(f) for the purposes of paragraph (e)(i), a worker's loss of earning capacity is to be measured by comparing—

(i) the worker's gross income from personal exertion (expressed at an annual rate) which the worker is—

(A) earning, whether in suitable employment or not; or

(B) capable of earning in suitable employment—

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as at that date, whichever is the greater, and—

(ii) the gross income (expressed at an annual rate) that the worker was earning or was capable of earning from personal exertion or would have earned or would have been capable of earning from personal exertion during that part of the period within 3 years before and 3 years after the injury as most fairly reflects the worker's earning capacity had the injury not occurred;

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(g) a worker does not establish the loss of earning capacity required by paragraph (b) if the worker, taking into account the worker's capacity for suitable employment after the injury and, where applicable, the

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Workplace Injury Rehabilitation and Compensation Act 2013
No. 67 of 2013

Part 7—Actions and proceedings for damages

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reasonableness of the worker's attempts to participate in rehabilitation or retraining—

(i) has; or

(ii) after rehabilitation or retraining, would have—

20

a capacity for any employment including alternative employment or further or additional employment which, if exercised, would result in the worker earning more than 60 per cent of gross income from personal exertion as determined in accordance with paragraph (f) had the injury not occurred;

(h) the psychological or psychiatric consequences of a physical injury are to be taken into account only for the purposes of paragraph (c) of the definition of *serious injury* and not otherwise;

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(i) the physical consequences of a mental or behavioural disturbance or disorder are to be taken into account only for the purposes of paragraph (c) of the definition of *serious injury* and not otherwise;

(j) the assessment of serious injury must be made at the time that the application is heard by the court, unless sections 348 and 358 apply;

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(k) the monetary thresholds and statutory maximums specified by or under section 340 must be disregarded for the purposes of the assessment of serious injury.

326 Actions for damages

A worker who is, or the dependants of a worker who are, or may be, entitled to compensation in respect of an injury arising out of, or in the course of, or due to the nature of, employment must not,

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Transport Accident (General Amendment) Act 1994
Act No. 84/1994

s. 7

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time that the transport accident occurred.”.

41B. *Uninsured motor vehicle accidents on private land*

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(1) The Commission is not liable to pay compensation in accordance with this Act in respect of the owner of an uninsured motor vehicle who is injured or dies as a result of transport accident involving the driving of that motor vehicle on private land.

(2) In sub-section (1)—

“private land” has the same meaning as in section 41A (2);

30

“uninsured motor vehicle” means a motor vehicle in respect of which the transport accident charge has not been paid for at least 12 months.’.

7. *Amendment consequential to section 6*

After section 93 (18) (b) of the Principal Act insert—

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“; or

(c) applies to the recovery of damages in respect of a transport accident to which section 41A or 41B applies by a person who, by reason of that section, is not entitled to compensation in accordance with this Act in respect of that accident.”.

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8. *Amendment of section 43*

(1) In section 43 (1) (b) of the Principal Act after “(b)” insert “subject to sub-sections (1A), (1B) and (1C),”;

Transport Accident (General Amendment) Act 1994
Act No. 84/1994

s. 10

10 (3) For section 60 (2) of the Principal Act substitute—

“(2) If a parent or guardian of a dependent child injured and admitted to hospital as a result of a transport accident incurs reasonable travelling or accommodation expenses by reason of visiting the dependent child in hospital, the Commission is, subject to this Act, liable to pay as compensation, payments in respect of those expenses.”.

20

10. Amendment of section 93—damages

(1) For section 93 (7) of the Principal Act substitute—

“(7) Damages of any kind in respect of an injury cannot be recovered in proceedings in accordance with sub-sections (2), (3) and (4) other than damages—

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(a) for pecuniary loss but only if—

(i) the assessment of damages before any reduction in respect of the person's responsibility for the injury is more than \$30 520 but less than \$686 840, in which case the amount that can be recovered is that amount so assessed as reduced first under sub-section (11) and secondly in respect of the person's responsibility for the injury; or

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(ii) the assessment of damages before any reduction in respect of the person's responsibility for the injury is more than \$686 840, in which case the amount that can be recovered is \$686 840 as reduced first under sub-section (11) and secondly in respect of the person's responsibility for the injury;

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(b) for pain and suffering but only if—

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(i) the assessment of damages before any reduction in respect of the person's responsibility for the injury is more than \$30 520 but less than \$305 250, in which case the amount that can be recovered is that amount so assessed as reduced first under sub-section (11) and secondly in respect of the person's responsibility for the injury; or

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(ii) the assessment of damages before any reduction in respect of the person's responsibility for the injury is more than \$305 250, in which case the amount that can be recovered is \$305 250 as reduced first under sub-section (11) and secondly in respect of the person's responsibility for the injury.”

(2) In section 93 (10) of the Principal Act for “before the entitlement of the person to compensation under this Act was reviewed under section 46” substitute “in the period of 18 months after the transport accident”.

(3) For section 93 (11) of the Principal Act substitute—

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“(11) Damages under sub-section (7) are to be reduced—

(a) in the case of damages for pecuniary loss—

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(i) if the person was entitled to compensation under this Act, by the amount of compensation paid in respect of the injury under sections 49, 50 and 51; or

(ii) if the person was not entitled to compensation under this Act because of section 37, by the amount of any compensation paid in respect of lost earnings other

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than earnings lost in the first 18
months after the transport accident;
and

(b) in the case of damages for pain and
suffering—

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(i) if the person was entitled to
compensation under this Act, by the
amount of compensation paid in
respect of the injury under sections
47, 48 and 54; or

(ii) if the person was not entitled to
compensation under this Act
because of section 37, by the
amount of any compensation paid
otherwise than in respect of lost
earnings or other pecuniary loss.

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(11A) Damages under sub-section (8) are to be
reduced—

(a) if compensation was payable in respect
of the death under this Act, by the
amount of compensation paid under
sections 57, 58 and 59; or

40

(b) if compensation was not payable in
respect of the death under this Act
because of section 37, by the amount of
any compensation paid in respect of the
loss of expectation of financial support
(other than of the kind to which section
60 applies) under any compensation
scheme specified in section 37.”.

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(4) After section 93 (12) of the Principal Act insert—

“(12A) Damages awarded in accordance with
sub-section (8) in respect of the death of a
person must not include damages in respect of
services in the nature of housekeeping or the care
of a child which would have been provided by the
deceased person.”.

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s. 40

10 **40. Amendment of section 93—actions**

After section 93 (18) of the Principal Act insert—

“(19) Notwithstanding anything to the contrary in this Act, for the purposes of the **Limitation of Actions Act 1958**, the cause of action in respect of an injury arises on the day of the transport accident or on the day on which the injury first manifests itself.

20 (20) For the avoidance of doubt it is hereby declared that all the provisions of this section contain matters that are substantive law and are not procedural in nature.”

41. Sections 96 and 97 substituted

For sections 96 and 97 of the Principal Act substitute—

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‘96. Transport accidents involving unidentified or unindemnified vehicles

(1) Where a person is injured or dies as a result of a transport accident involving the driving of an unidentified vehicle or an unindemnified vehicle, a natural person who could have obtained a judgment against the owner or driver of that vehicle may recover in proceedings against the Commission a sum equivalent to the lesser of —

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(a) the amount for which the person could have obtained judgment against the owner or driver of that vehicle; or

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(b) the amount for which the Commission would have been liable if that vehicle had been identified and subject to the indemnity under section 94.

E. Transport Accident (Amendment) Act 1998 (Vic) s 14(b)

Transport Accident (Amendment) Act 1998

Act No. 34/1998

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within the period of time specified in sub-section (1) and".

(2) After section 77(2) of the **Transport Accident Act 1986** insert—

"(2A) The amendment to sub-section (2) made by section 13(1) of the **Transport Accident (Amendment) Act 1998** does not apply in respect of an application received by the Tribunal before 9 April 1998."

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14. Minor amendments

In the **Transport Accident Act 1986**—

(a) in section 89 for "and judge" substitute "adjudge";

(b) in section 93(15) after "made to" insert "the";

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(c) in section 96(8) in the definition of "unindemnified vehicle" for "is respect" substitute "in respect";

(d) section 96(9) is repealed;

(e) in section 102(2)(a) before "a serious" insert "of";

(f) in section 153 before "If" insert "(1)".

15. Indemnity by third party

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(1) In section 104(1) of the **Transport Accident Act 1986**—

(a) after "injury" (wherever occurring) insert "or death";

(b) for "pecuniary loss" substitute "any loss".

(2) For section 104(2) of the **Transport Accident Act 1986** substitute—

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Transport Accident (Amendment) Act 2000

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"(3) An applicant must comply with a notice under sub-section (2) within 90 days of being given the notice.

(4) The Commission must hold a conference or conclude the review within 28 days of receiving the particulars and information required under sub-section (2).

20

(5) If the Commission has not received the particulars and information required under sub-section (2) within 180 days of giving the notice, the Commission may apply to the Tribunal to have the proceedings dismissed or struck out."

(4) After section 79(2) of the **Transport Accident Act 1986** insert—

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"(3) This section is subject to sections 112 to 115 of the **Victorian Civil and Administrative Tribunal Act 1998**."

(5) For section 80(2) of the **Transport Accident Act 1986** substitute—

"(2) Within 14 days of holding a conference or concluding the review under section 78(4), the Commission must give notice in writing to the applicant and the Tribunal that it has determined to—

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(a) re-affirm the decision; or

(b) vary or revoke the decision as specified in the notice.

(3) If the Commission fails to comply with section 78(2) or 78(4) or fails to give notice under sub-section (2), the Commission is deemed to have determined to re-affirm the decision."

28. Evidence as to alcohol or drugs

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Transport Accident (Amendment) Act 2000

Act No. 84/2000

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After section 93(6) of the **Transport Accident Act 1986** insert—

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"(6A) Despite anything to the contrary in any other Act, a party may in proceedings under this section when adducing evidence on the question of whether any person was at the time of the transport accident under the influence of intoxicating liquor or any other drug, use the analysis or the results of the analysis of a blood sample or breath analysis lawfully taken under the **Road Safety Act 1986** at or after the time of the transport accident.

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(6B) A party must not adduce material referred to in sub-section (6A) in evidence in proceedings under this section unless—

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(a) the party provides to all other parties in the proceedings, copies of the document or documents which form the evidence at least 6 weeks before the commencement of the trial of the proceedings; and

(b) if notice is given to that party by another party at least 2 weeks before the commencement of the trial of the proceedings, the party causes the person who supplied the information contained in the document or documents to attend the trial of the proceedings for the purpose of cross-examination.

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(6C) Sub-sections (6A) and (6B) as inserted by section 28 of the **Transport Accident (Amendment) Act 2000** apply to and in respect of a transport accident which occurs

Transport Accident (Amendment) Act 2000

Act No. 84/2000

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on or after the commencement of that section."

29. Release from liability for payments under section 60

After section 93(18) of the **Transport Accident Act 1986** insert—

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"(18A) Despite sub-section (18), if an award of damages under this section includes an amount for the future cost of services of a kind set out in section 60 if provided in Australia, the Commission is released from any further liability for compensation under that section.

(18B) Sub-section (18A) as inserted by section 29 of the **Transport Accident (Amendment) Act 2000** applies to and in respect of a transport accident which occurs on or after the commencement of that section."

30

30. Procedures under section 93

After section 93C of the **Transport Accident Act 1986** insert—

"93D. Directions

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- (1) For the purposes of section 93, the Minister may issue directions for or with respect to procedures under that section.
- (2) The directions must be published in the Government Gazette.
- (3) The directions may include directions about the provision of information by affidavit and the attending of conferences.
- (4) A person to whom a direction under this section applies, and the legal representatives and agents of such a person, must comply with the direction."

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G. Transport Accident (Amendment) Act 2004 (Vic) s 11(5)(f)

Transport Accident (Amendment) Act 2004

Act No. 94/2004

s. 11

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- (b) any reference to permanent impairment in the A.M.A. Guides is to be read as a reference to current impairment.

Note: This section, as amended by section 10 of the **Transport Accident (Amendment) Act 2004** (which amended sub-sections (1) and (1A) and inserted sub-sections (1AA)–(1AD), (1C)–(1E) and (8)) applies with respect to all transport accidents that occurred on or after the day that is 18 months before the date of commencement of section 10—see section 188."

20

- (6) After section 71(1) of the **Transport Accident Act 1986** insert—

"(1A) Sub-section (1) also applies to a person if the Commission is required to make a determination of the person's degree of impairment as a result of a transport accident.

Note: Sub-section (1A) applies with respect to all transport accidents that occurred on or after the day that is 18 months before the date of commencement of section 10 of the **Transport Accident (Amendment) Act 2004**—see section 188."

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11. Payment of impairment benefits

- (1) In section 47 of the **Transport Accident Act 1986** insert the following heading—

"**Impairment benefit**".

- (2) At the foot of section 47(1) of the **Transport Accident Act 1986** insert—

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"Note: This section, as amended by section 11 of the **Transport Accident (Amendment) Act 2004** (which substituted sub-section (2) and amended sub-section (6)), only applies to a person who was injured in a transport accident that occurs on or after the date of commencement of section 11—see section 189."

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G. Transport Accident (Amendment) Act 2004 (Vic) s 11(5)(f)

Transport Accident (Amendment) Act 2004

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s. 11

- (3) For section 47(2) of the **Transport Accident Act 1986** substitute—

(2) The impairment benefit is the amount shown, or the amount calculated in accordance with the formula, in column 2 of the following table that is opposite the person's degree of impairment—

<i>Degree of impairment</i>	<i>Impairment benefit</i>
10% or less	0
11% – 19%	$\$4\,500 + ((D - 10) \times \$1000)$
20% – 49%	$\$15\,000 + ((D - 20) \times \$1500)$
50% – 59%	$\$60\,250 + ((D - 50) \times \$1750)$
60% – 79%	$\$78\,000 + ((D - 60) \times \$2000)$
80% – 89%	$\$120\,000 + ((D - 80) \times \$4000)$
90% – 99%	$\$164\,000 + ((D - 90) \times \$8000)$
100%	$\$252\,000$

where "D" is the person's degree of impairment expressed as a number.

- (2A) If a degree of impairment of 11% or more is the result of more than one transport accident, section 48 applies.
- (4) Sections 47(6)(a) and 55(1) of the **Transport Accident Act 1986** are repealed.
- (5) In the **Transport Accident Act 1986**—
- (a) in sections 40(2) and 40(3) omit "48,";
 - (b) in section 53(3), omit "48," (wherever occurring);

Transport Accident (Amendment) Act 2004

Act No. 94/2004

s. 12

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(c) in section 56(1)—

(i) for "sum of the impairment annuity under section 48 and" **substitute** "amount of";

(ii) for "that annuity and" **substitute** "those";

(d) in section 56(2) **omit** "an annuity under section 48 or";

(e) in section 61(2) **omit** "or 48(1)";

(f) in section 93(11)(b)(i) **omit** ", 48".

20

12. Interim payments of lump sum impairment benefits

(1) For section 47(3A) of the **Transport Accident Act 1986 substitute—**

"(3A) The Commission may pay an interim benefit under this section at any time to a person who is injured as a result of a transport accident if it is satisfied—

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(a) that, given the nature of the person's injuries, the person's permanent impairment is likely to be at least 30%;
or

(b) that the person's injuries are substantially stable.

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Note: Sub-section (3A) applies with respect to all transport accidents that occurred on or after the day that is 18 months before the date of commencement of section 12 of the **Transport Accident (Amendment) Act 2004—** see section 190."

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Victorian Legislator and Parliamentary Documents

Compensation and Superannuation Legislation Amendment Act 2008
No. 65 of 2008

Part 2—Transport Accident Act 1986

10 s. 3

PART 2—TRANSPORT ACCIDENT ACT 1986

3 Amendment of section 46A—Degree of impairment

20 See:
Act No.
111/1986.
Reprint No. 11
as at
17 April 2008
and
amending
Act No.
12/2008.
LawToday:
www.
legislation.
vic.gov.au

In section 46A(1A) of the **Transport Accident Act 1986** after "a transport accident" insert "who has made a claim for compensation in their own right within the period of time provided by this Act that has been accepted by the Commission".

4 Amendment of section 47—Impairment benefit

30 In section 47(7)(a) of the **Transport Accident Act 1986** before "is" insert "has made a claim for compensation in their own right within the period of time provided by this Act that has been accepted by the Commission and".

5 Amendment of section 93—Actions for damages

After section 93(1) of the **Transport Accident Act 1986** insert—

40 "(1A) For the avoidance of doubt, it is hereby declared that the effect of subsection (1) is that any person, whether or not a natural person, cannot recover any damages in any proceedings to which that subsection applies unless the person is a natural person in which case the natural person can only bring proceedings in accordance with this section to recover damages in respect of the injury sustained by him or her or the death of a person specified in subsection (1)."