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

APPELLANT'S REPLY

Part I – Certification

1. The appellant certifies that this reply is in a form suitable for publication on the Internet.

Part II – Reply

2. The respondent's argument rests upon the two contentions stated at [8(a) & (b)]. Neither is sound.

3. As to [8(a)], the primary judge did not set "*a range for comparison which related only to the extent of treatment*". Both parties and all members of the Court of Appeal agreed that the opening passage in the primary judge's reasons at [82] is

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correct[1]. That passage commences by identifying the issue as being whether the applicant's "*symptoms and consequences*" meet the test for 'severe' injury. The word "*consequences*" there appears three times. The impugned passage follows[2], and again refers to "*symptoms and consequences*" and also to "*psychoses ... delusional beliefs and thoughts, suicidal ideation and suicide attempts*". None of those features are "*treatment*" and in no part of [82] did the primary judge say that the issue was to be determined "*only*" by reference to "*treatment*". Nor was the case determined on that basis: among other things, at [85] (7th bullet point) the primary judge acknowledged that the respondent had "*received considerable treatment and medication*", but made the point that she had nonetheless not "*suffered the more extreme symptoms of psychological trauma*".

4. Further, there is nothing in the respondent's endeavours to muddy the terms 'spectrum' and 'range'. At [82] the primary judge used both terms to describe the same thing: the array of comparable conditions. That was consistent with authority, as referred to by Kaye JA at [70]-[71]. To the extent that Ashley and Osborn JA might be taken to have been referring to something different, that would serve to underline their error at [19] in stating "*the critical question*" with reference to only subjective claims and the so-called "*line*" and without any stated requirement to compare objectively against the range of comparable conditions.

5. As to [8(b)], the primary judge referred, correctly, to the range of comparable mental disorders as a "*consideration*" against which the respondent's subjective claims must objectively be evaluated. The comparable range was thereafter identified. There was no error in the primary judge there stating: "... *for a mental disorder to be described as being 'severe', it is at the upper echelon of those disorders in the possible range*". The primary judge was there referring, in terms, to the statutory requirement that the disorder be 'severe'. That meant that it must

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[1] The passage: "*The real issue to be determined ... vast array of mental disorders which may be encountered following a transport accident*". See, Ashley & Osborn JJA at [10].

[2] The passage: "*At one end of the spectrum is ... those disorders in the possible range.*"

be more than 'very considerable' to the extent of being 'severe'[3]. As Kaye JA observed at [72], that requirement is "*particularly stringent*". It is unsurprising, then, that the primary judge considered that the disorder should be in the "*upper echelon*". The primary judge did not hold that it "*must be at the very top end of the range*", which is what is asserted in the respondent's argument at [25].

Part III – Notice of Contention

6. That judicial reasons for decision must be legally adequate is not in doubt, but the content of that obligation depends upon both the issue presented and its context[4].

7. *Hunter*, on which the respondent relies, was a classic case of inadequate reasons: the primary judge in that case had "*failed altogether to deal with a major aspect of the applicant's case*"[5]. The present case is wholly different.

8. The present issue was whether the respondent's mental disorder was, in the opinion of the primary judge, 'severe'. The respondent bore the onus of "*affirmative satisfaction*"[6]. The determination of the issue involved elements of "*fact, degree and value judgment*" and was reversible on appeal only by establishing specific error or that the ultimate conclusion was 'plainly wrong', 'wholly erroneous' or 'patently unsustainable'[7].

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[3] *Mobilio v Balliotis* [1998] 3 VR 833

[4] *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 321 at [60]-[63], *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at [130], *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar* (2008) 237 CLR 66 at [120]-[121], *Murray v Sheldon Commercial Interiors Pty Ltd* [2016] NSWCA 77 at [62]-[68] and *MM Constructions (Aust) Pty Ltd v Port Stephens Council* [2012] NSWCA 417 at [133]-[138].

[5] *Hunter v Transport Accident Commission* (2005) 43 MVR 130 at [29]

[6] *Humphries v Poljak* [1992] 2 VR 129 at 140

[7] *Mobilio v Balliotis* [1998] 3 VR 833 at 836. See also, *Bezzina v Phi* [2012] VSCA 161 at [27], *Murray Goulburn Co-op Co Ltd v Filliponi* [2012] VSCA 230 at [28] and *Phelan v Transport Accident Commission* [2013] VSCA 306 at [3].

9. All members of the Court of Appeal considered that the primary judge's reasoning following the impugned passage at [82] was "*conventional*". Further, Kaye JA, with whom the other members of the Court agreed, determined, at [103], that –

> "... *The judge set out, in substantial detail, the reasons why he had reservations concerning the evidence given by the applicant, particularly about the extent to which her psychological symptoms had impacted upon her life. The judge adequately noted the range of symptoms, and effects on the applicant, that he found to have been established as consequences of her mental disorder. His Honour then concluded that, in light of the applicant's residual capacities (that he described in some detail), he did not conclude that the psychological consequences to her were sufficient to meet the required statutory test. In that way, the reasons adequately disclosed to the applicant, and to this Court, the basis upon which the judge found that the application must fail.* ..."

10. In short, having evaluated the respondent's evidence the primary judge was not affirmatively satisfied that the symptoms and consequences of her psychological injury were 'severe'.

11. In this regard, unlike the case of *Hunter*, no 'major aspect' of the case was overlooked. Further, and contrary to the respondent's argument at [31], there was nothing "*cryptic*" in the primary judge's determination at [85] that the respondent's condition was not "*as extreme as she would have it*". The matters informing that finding are identified in the seven bullet points that follow. The finding is also informed by the credit finding at [77], which was not 'glaringly improbable' or 'contrary to compelling inferences'. Complaints about 'inadequate' reasoning should not be permitted to displace the principles governing credit based and factual findings reached at trial[8].

12. In this context, it was not necessary for the primary judge positively to find "*to what degree*" the respondent's claimed symptoms and consequences affected her: the respondent bore the onus and, for the reasons explained and perceived clearly by the Court of Appeal, the primary judge could not be affirmatively satisfied that

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[8] *Robinson Helicopter Company Inc v McDermott* (2016) 331 ALR 550 at [43].

it had been discharged. That conclusion is expressed at [86] and is not a mere *ipse dixit*, as it is explained by the paragraphs of reasoning that precede it.

13. Finally, the passages from various medical reports extracted in the respondent's argument at [35] to [39] do not render the primary judge's reasons inadequate. The primary judge had to determine the issue objectively and not simply by the subjective claims of the respondent or the opinions of psychiatrists that were necessarily based upon her subjective claims[9]. Further, it is not evident that any of these passages were emphasised in address before the primary judge. To the contrary, in address Senior Counsel for the respondent disclaimed any relevance in the differing psychiatric diagnoses. Shortly thereafter, the primary judge summarised the situation and Senior Counsel said "*If your Honour pleases, I won't take you to the medical evidence*"[10]. In that context, the issue presented was whether the respondent's claims satisfied the statutory threshold, and, on the evidence and issues presented, the primary judge was not satisfied that they did. No major issue was overlooked and no party could be mystified as to the reasons for the determination made. Put simply, in this case the principles relating to 'inadequate' judicial reasons are not engaged.

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[9] *Mobilio v Balliotis* [1998] 3 VR 833 at 836, *Mason v Transport Accident Commission* [2014] VSCA 267 at [101] and *Philippiadis v Transport Accident Commission* [2016] VSCA 1 at [25]

[10] T161.17-161.19 & 164.20-165.15.