IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M160 of 2016

BETWEEN:

TRANSPORT ACCIDENT COMMISSION
Appellant

and

MARIA KATANAS
Respondent

10

RESPONDENT'S SUBMISSIONS

PART I – CERTIFICATION FOR PUBLICATION ON THE INTERNET:

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

PART II – CONCISE STATEMENT OF THE ISSUES PRESENTED BY THE APPEAL:

2. The issues presented by the appeal and the notice of contention are –

   (a) did the Court of Appeal err in holding that the primary judge had misdirected himself in determining whether the respondent had a 'serious injury' as defined in paragraph (c) of s 93(17) of the *Transport Accident Act 1986* (Vic) (**the Act**); and

20 (b) if there was no misdirection, did the primary judge give adequate reasons for his decision?

PART III – SECTION 78B OF THE JUDICIARY ACT 1903 (CTH):

3. The respondent considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV – MATERIAL FACTS:

4. The facts set out in Part V of the appellant's submissions are substantially accurate.

5. In addition, the respondent refers to the evidence that –

   (a) the respondent worked as a sewing machinist until about 1995, then aged 50, when she became full-time carer for her first grandchild for three years, and

Date of document: 25 January 2017

Zaparas Lawyers Pty Ltd
3 Chester Street
OAKLEIGH VIC 3166

DX: 16608 Oakleigh
Tel: (03) 8527 0200
Fax: (03) 9563 4596
Ref: Isabelle Murphy

thereafter part-time carer for her several grandchildren until the transport accident on 10 July 2010;[1]

(b) she was limited in her ability to care for her grandchildren after the accident;[2]

(c) after completing her Bachelor of Arts in 2009 the respondent had planned to complete a Masters degree in Greek history, but after the accident she was not able to return to her studies;[3] and

(d) at the time of the hearing, the respondent continued to require one and a half tablets of Pristiq per day as well as Ativan twice a day, which were anti-depressant and anxiety medications prescribed by her psychiatrist, A/Prof Mazumdar.[4]

10 **PART V – LEGISLATION:**

6. The relevant provisions are in Annexure A to the appellant's submissions.

PART VI – ARGUMENT:

7. There are significant differences between the submissions of the respondent and of the appellant in relation to the correct understanding of the reasons of the majority of the Court of Appeal. If the respondent's submissions as to the correct understanding of the majority's reasons are accepted, then no point of principle arises for consideration on this appeal.

8. The majority of the Court of Appeal were correct to hold[5] that the primary judge was in error in two respects in his formulation of the principles to be engaged in determining
20 whether the respondent's injury was to be characterised as a 'serious injury' for the purposes of s 93 of the Act –[6]

(a) *first*, by setting a range for comparison which related only to the extent of treatment required for a mental disorder; and

---

1 Affidavit of the respondent sworn on 8 March 2013 at [3]-[4] (**AB-##**).

2 *Katanas v TAC* [2015] VCC 1156 at [84] (**AB-##**) (Judge O'Neill); affidavit of the respondent sworn on 8 March 2013 at [13] (**AB-##**).

3 [2015] VCC 1156 at [7] (**AB-##**) and [83] (**AB-##**); further affidavit of the respondent sworn on 1 May 2015 at [26] (**AB-##**).

4 [2015] VCC 1156 at [22] (**AB-##**); further affidavit of the respondent sworn on 1 May 2015 at [17] (**AB-##**).

5 [2016] VSCA 140 at [12] (**AB-##**) and [18] (**AB-##**) (Ashley and Osborn JJA).

6 In the latter part of paragraph [82] (**AB-##**) of the reasons for judgment.

(b) *secondly*, by setting a required benchmark for a mental disorder to qualify as 'severe' as being one at the '*upper echelon*' of a range which spanned from mild anxiety '*without medical intervention*' to psychoses, delusions, and suicide attempts requiring '*extensive treatment and medication*'.

9. The respondent sought leave under s 93(4)(d) of the Act to bring proceedings for the recovery of damages in respect of her psychological injury caused by the transport accident. It has been held that the effect of s 93 of the Act is to extinguish contingently the common law cause of action,[7] with the result in this case that, without leave of the Court, the respondent had no cause of action in negligence against the driver of the car who struck her vehicle.

10. The County Court could not grant leave to the respondent unless satisfied that her injury was a 'serious injury': s 93(6). The term 'serious injury' is defined by s 93(17), and the respondent relied upon paragraph (c) of the definition, which concerns mental or behavioural disturbances or disorders. The burden on the respondent was to establish a '*severe long-term mental or severe long-term behavioural disturbance or disorder*'.

11. The term 'severe' is not defined in the Act. And what might constitute a severe mental disorder, or how a court is to analyse whether a mental disorder is severe,[8] are not matters dealt with by the provisions of the Act.

12. However, it has been accepted for over 25 years since the Full Court's decision in *Humphries v Poljak*[9] that the following guidance is to be applied to the question of characterisation of an injury raised by s 93(4) and (17) of the Act. *First*, the evaluation of an injury focuses on the consequences of the injury.[10] *Secondly,* the consequences must be 'serious' to the particular claimant.[11] *Thirdly,* 'serious' in para (a) of the definition is to be understood as meaning at least 'very considerable', and more than 'significant', or 'marked'.[12] *Fourthly*, the assessment of whether an injury is to be characterised as a 'serious

---

7 *Wilson v Nattrass* (1995) 21 MVR 41 at 54 and 59; *Swannell v Farmer* [1999] 1 VR 299 at 307 [21]-[25]; *Primary Health Care Ltd v Giakalis* (2013) 38 VR 165 at 177 [50], 178 [53] and 179 [55].

8 All members of the Court of Appeal correctly held that it is not only the nature and severity of the disorder itself that must be considered, but also its resulting symptoms, treatment and other consequences: [2016] VSCA 140 at [11] (**AB-##**) (Ashley and Osborn JJA) and [73] (**AB-##**) (Kaye JA).

9 [1992] 2 VR 129.

10 Ibid, at 140.43.

11 Ibid, at 140.43.

12 Ibid, at 140.48.

injury' is objective to the extent that the consequences of an injury to a claimant are '*judged by comparison with other cases in the range of possible impairments or losses*'.[13] *Finally*, following the decision of a five member bench of the Court of Appeal in *Mobilio v Balliotis*, 'severe' is to be regarded a stronger word than 'serious'.[14]

13. The appellant submits to this Court at AS [46]-[47] that the decision of the majority of the Court of Appeal below cannot be reconciled with *Humphries v Poljak*, and at AS [53] submits that the majority decision 'trampled upon and displaced' *Humphries v Poljak*. For the following reasons, the appellant's submissions should be rejected.

14. *First,* the majority expressly endorsed the approach in *Humphries v Poljak*.[15] There is nothing in the majority's reasons to support the idea that there was any departure from *Humphries v Poljak*. On the contrary, in their reasons at [19] the majority referred to the application of the statutory test, to the making of a value judgment as described by Crockett and Southwell JJ in *Humphries v Poljak*, and referred to the material passage from *Humphries v Poljak*[16] which they had set out at [9] of their reasons.

15. *Secondly*, the appellant's submissions, in particular at AS [44]-[48], rest upon an incorrect characterisation of paragraphs [18]-[20] (**AB-##**) of the majority's reasons.

16. At [18] the majority focused on the errors exposed by the reasons of the primary judge. The errors were essentially two-fold, namely –

    (a) positing a 'spectrum'[17] of cases that focused upon the extent of medical treatment; and

    (b) holding that for any disorder to be 'severe' it must be such that it was at the 'upper echelon' of the treatment range posited by the primary judge.

17. As to the first aspect, the primary judge's approach was not a correct application of the definition of 'serious injury' in s 93(17), having regard to the guidance given in *Humphries v Poljak*. Mental disorders will vary in their nature, and in their consequences. The

---

[13] Ibid, at 140.47.

[14] [1998] 3 VR 833 at 834.51-835.2 (Winneke P), 846.34-.36 (Brooking JA), 854.19-.22 (Ormiston JA), 858.17-.19 (Phillips JA), and 860.51-861.1 (Charles JA).

[15] [2016] VSCA 140 at [9], [11], and [19] (**AB-##**).

[16] [1992] 2 VR 129 at 140.34-.50.

[17] '[S]pectrum' was the term used by the primary judge at [2015] VCC 1156 at [82] (**AB-##**), and had been used by Phillips JA who delivered the reasons of the Court of Appeal in *Barwon Spinners Pty Ltd v Podolak* (2005) 14 VR 622 at 637 [28], 644 [48], and 645 [49].

question in this case was whether the respondent's mental disorder, considering its nature and the resulting symptoms, treatment, and all of the consequences for the respondent, when judged objectively by comparison with other potential disorders was to be correctly characterised as 'severe'. The primary judge's focus on the extent of medical treatment distorted the enquiry required by the statute. The majority in the Court of Appeal were correct to find error on this basis.

18. The second error by the primary judge was to substitute the evaluation required by s 93 of the Act with an evaluation referable to a different criterion, namely that the respondent's disorder had to be at the 'upper echelon' of possible mental disorders. To do so imposed a more stringent requirement not found in the text of the Act. The primary judge erroneously placed a burden on the respondent to show that her injury was so grave as to approach a situation in which she was a psychiatric in-patient suffering from delusions and attempting suicide. Neither the text of s 93 of the Act nor the guidance in *Humphries v Poljak* supported the primary judge's approach. Indeed, the members of the Court in *Mobilio v Balliotis* refrained from giving guidance as to the meaning of 'severe' beyond saying that it was a stronger term than 'serious'.[18] This aspect of *Mobilio v Balliotis* reflects an approach to statutory construction which focuses on legislative text, and which eschews judicial formulations as a substitute for text.[19] The choice of language in the Act, requiring a 'severe' disorder to be evaluated without reference to any formulae, standards, or criteria, stands in contrast to other legislative regimes requiring the satisfaction of a calculable threshold.[20]

19. It is next necessary to refer to the majority's reasons at [19], which may be captured as follows –

    (a) the extent of treatment of a mental disorder may cast light on whether a disorder is to be characterised as 'severe';

---

[18] [1998] 3 VR 833 at 834.51-835.2 (Winneke P), 846.34-.36 (Brooking JA), 854.19-.22 (Ormiston JA), 858.17-.19 (Phillips JA), and 860.51-861.1 (Charles JA).

[19] *Baini v* R (2012) 246 CLR 469 at 476 [14], citing (inter alia) *Brennan v Comcare* (1994) 50 FCR 555 at 572-573 (Gummow J) and *Ogden Industries Pty Ltd v Lucas* (1968) 118 CLR 32 at 39; [1970] AC 113 at 127 (PC).

[20] See, for example, *Motor Accidents Compensation Act 1999* (NSW), s 131; *Workers Compensation Act 1987* (NSW), s 151H; *Workers Rehabilitation and Compensation Act 1988* (Tas), s 138AB; *Workers' Compensation and Injury Management Act 1981* (WA), s 93K(4)(d); *Return to Work Act 2014* (SA), s 72; and *Workers' Compensation and Rehabilitation Act 2003* (Q), s 237(1) (prior to its replacement by s 6 of the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2015* (Q)). See also *Wrongs Act 1958* (Vic), ss 28LE, 28LF and 28LB (definition of 'threshold level').

(b) however, the 'spectrum' which the primary judge described, and which the majority held at [18] (**AB-##**) was a spectrum referable to the extent of medical treatment, was only one aspect of the consequences relevant to the evaluation required by s 93 of the Act;

(c) a 'spectrum' could be framed for other consequences in a particular case, including flashbacks, nightmares, inhibitions on daily activities, and inhibitions upon a claimant's occupation or further education;

(d) for each such consequence for which a 'spectrum' could be framed, the spectrum would be an incomplete analysis of the evaluation required by s 93;

(e) the correct thing to do is to bring to account all relevant circumstances personal to the claimant, and then to apply the statutory test in accordance with the guidance given by Crockett and Southwell JJ in *Humphries v Poljak*.[21]

20. Paragraph [19] (**AB-##**) of the majority's reasons is unexceptionable.

21. As to paragraph [20] (**AB-##**) of the majority's reasons, the majority commence by referring to the 'spectrum' which the judge set up in the present case. The majority referred to submissions made below on behalf of the respondent to this appeal that a psychiatric disorder may have consequences which are severe to a claimant who has not undergone much treatment, and that on the other hand, the fact of treatment may not tell in favour of a disorder being severe, unless the symptoms and consequences called for that level of treatment. The majority considered that these submissions illustrated the limited utility of the 'spectrum'. This is to be understood as the 'spectrum' of the extent of medical treatment set up by the primary judge, to which the majority had referred in the first sentence of paragraph [20] (**AB-##**) of their reasons.

22. As to the appellant's criticisms of the majority's reasons, the respondent responds to AS [46]-[48] as follows –

(a) In response to AS [46(a)], the idea of assessing against a range is an analytical tool that ensures the objective assessment of applications. Nothing said by the majority below departs from *Humphries v Poljak*, because, as submitted at [19(e)] above, the majority affirmed at [19] that the statutory test was to be applied in accordance with the guidance essayed by Crockett and Southwell JJ in *Humphries v Poljak*.

---

[21] [1992] 2 VR 129 at 140.34-.50.

(b) The appellant's submission at AS [46(b)] is incorrect. The majority did not find that, '*all ways in which the range or spectrum might have been framed would be "incomplete"*'. The submission equates 'spectrum' with 'range'. In their reasons at [18]-[20] the majority did not themselves use the term 'range'. The majority referred at [18]-[20] to the 'spectrum' that had been set up by the primary judge, and at [19] referred to the prospect that other spectra might be set up in relation to other consequences. Because each posited spectrum was concerned only with particular features, each spectrum was incomplete in itself. Nothing in the majority's reasons indicates that a 'spectrum' is to be equated with the 'range' in the sense used by Crockett and Southwell JJ in *Humphries v Poljak*, and the majority's express reference at [19] to the guidance essayed in *Humphries v Poljak* shows otherwise.

(c) The appellant's submission at AS [46(c)] does not correctly reflect the majority's reasons. The majority held that once all subjective symptoms and consequences are brought to account, the statutory test is to be applied in accordance with the guidance essayed by Crockett and Southwell JJ in *Humphries v Poljak*. The application of that guidance includes comparison with other cases in the range.

(d) In response to AS [46(d)], the majority's reasons at [19] are not to be understood as referring to, '*a new and unexplained concept – "the line"*'. In the final sentence of paragraph [19] the majority are to be understood as referring to the assistance a judge will have from personal experience of cases in which leave is given, and of cases in which leave is refused. This is no more than a reflection of the reference by Crockett and Southwell JJ in *Humphries v Poljak* to the assistance that will be derived from trends that will emerge from the determination from time to time of a range of applications.[22]

(e) The appellant's submission at AS [46(e)] is also incorrect. The majority did not say that, '*the range is of "limited utility"*'. As submitted at [22(b)] above, the majority did not themselves use the term 'range' in this context, and when the majority

---

[22] [1992] 2 VR 129 at 140.50-141.3. See also, *Mobilio v Balliotis* [1998] 3 VR 833 at 836.38-.51 (Brooking JA), referring to the reasons for refusing special leave in *Fleming v Hutchinson* (1991) 66 ALJR 211. Cf, *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117 [52] and 133 [112]. See also, *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 131 [15], where reference is made to *Barwon Spinners Pty Ltd v Podolak* (2005) 14 VR 622 at 644, and in fn (29) to what was said by Brooking JA in *Mobilio v Balliotis* at 836-837.

said at [20] (**AB-##**) that the 'spectrum' was of limited utility, they were referring to the 'spectrum' which the primary judge had set up, which concerned only one feature of the respondent's consequences, namely the extent of medical treatment.

(f) At AS [47] the appellant submits that the majority relegated what in *Humphries* is an important part of "*the question*" to a matter of "*limited utility*". For the reasons set out above, the appellant's submission at AS [47] does not correctly reflect the majority's reasons. Furthermore, the submission at AS [47] equates 'range' with 'spectrum' when the majority used the term 'spectrum' in relation to particular features of a claimant's consequences, and not to the totality of the consequences, which the majority held at [19] (**AB-##**) are to be assessed in accordance with the guidance in *Humphries v Poljak*.

(g) The appellant's submissions at AS [48] and [53] are infected by the appellant's incorrect characterisation of the majority's reasons at AS [46]-[47], and in consequence should also be rejected.

23. Kaye JA (dissenting) disagreed with the majority's characterisation of the test postulated and applied by the primary judge. For the reasons advanced at [16] to [18] above, the majority's decision was correct. With respect, Kaye JA's analysis[23] did not engage with the second aspect of the submission made – and recorded by his Honour[24] – that the error also lay in requiring that the respondent's mental disorder be in the upper echelon of the treatment range formulated by the primary judge.

24. Having set an erroneous test, the primary judge then went on to apply that test, which is shown by –

(a) the primary judge's statement in para [86] (**AB-##**) that the respondent did not meet '*the requisite statutory test*' – which meant the requirements as he saw them in para [82] (**AB-##**); and

(b) the final dot point in para [85] (**AB-##**) where the primary judge took up the 'extent of treatment' analysis by judging the severity of the respondent's disorder against the absence of in-patient treatment ,and applied the 'upper echelon' test noting the absence of '*the more extreme symptoms of psychological trauma described above*'.

---

[23] [2016] VSCA 140 at [75]-[82] (**AB-##**) (Kaye JA).

[24] [2016] VSCA 140 at [64(a)] (**AB-##**) (Kaye JA).

25. The above remarks were manifestations of the erroneous principle referred to by his Honour in the latter part of para [82] (**AB-##**). The majority correctly so held.[25] Because the primary judge wrongly held that a person affected must be at the very top end of the range, the primary judge made an error of principle, and the Court of Appeal was correct to set aside the decision and to remit the matter for rehearing.

PART VII – NOTICE OF CONTENTION:

26. By her notice of contention, the respondent contends that the Court of Appeal erred in rejecting her ground of appeal that the primary judge failed to give adequate reasons for his decision.[26] The contention is material only if the Court accepts the appellant's case that the Court of Appeal erred in holding that the primary judge misdirected himself.

27. The primary judge's reasons were inadequate in two respects: *first*, in dealing with the credibility of the respondent; and *secondly*, in the analysis of the medical evidence.

28. The primary judge at para [86] (**AB-##**) gave only a bare and conclusory statement of the result. There was no sufficient explanation as to how the primary judge arrived at that result. In this case, which had the consequence that any common law claim by the respondent was foreclosed, adequate reasons required an evaluation of the facts, with an explanation as to why those facts support the judgment made.[27] In substance, the dismissal of the application was finally determinative of the respondent's rights – it was the end of the road for the respondent.[28]

29. The relevant principles to be applied to this case are those essayed by Nettle JA in *Hunter v Transport Accident Commission*,[29] which concerned an application for leave under s 93 of the Act –

---

[25] [2016] VSCA 140 at [22]-[25] (**AB-##**) (Ashley and Osborn JJA).

[26] [2016] VSCA 140 at [101]-[103] (**AB-##**) (Kaye JA, Ashley and Osborn JJA agreeing at [1] (**AB-##**)).

[27] Cf, the observation in *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 130 [9] in relation to similar provisions of the *Accident Compensation Act 1985* (Vic) that the "real fight" takes place at the stage of the leave application. Note, for completeness, that s 134AE (since repealed) of the *Accident Compensation Act* referred to in *Dwyer* at [9] has no corresponding provision in the *Transport Accident Act 1986* (Vic).

[28] *Hunter v Transport Accident Commission* (2005) 43 MVR 130 at 137 [22] (Nettle JA, Batt and Vincent JJA agreeing).

[29] (2005) 43 MVR 130 at 136-137 [21] (Nettle JA, Batt and Vincent JJA agreeing), cited with approval in *Police Federation of Australia v Nixon* (2011) 198 FCR 267 at 284 [67] (Lander, Gilmour and Gordon JJ). Cf *Kovan Engineering (Aust) Pty Ltd v Gold Peg International Pty Ltd* (2006) 234 ALR 241 at 248-249 [44]-[45] (Heerey and Weinberg JJ, Allsop J agreeing). See also *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 257D-258E (Kirby P) and 280D-281D (McHugh JA); cf at 273E-G (Mahoney JA). See further *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-215 [54]-[58] (French CJ and Kiefel J).

> ... while the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those finding are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion. ... If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected. There may be exceptions. .... (footnote omitted)

30. In assessing the credibility of the respondent, the primary judge said he held '*reservations about the extent to which [her] psychological symptoms have impacted upon her life*'. His Honour left this credit finding insufficiently explained.[30] The reasons do not go on to record how the credibility finding affected his Honour's analysis of severity. In paras [83] to [84] (**AB-##**) his Honour accepted certain symptoms suffered by the respondent, and the impact they had upon her life. But immediately thereafter in para [85] (**AB-##**) his Honour said –

> However, as earlier stated, I have some reservations about Mrs Katanas' description of her symptoms and the effect upon her of the diagnosed psychological condition. I do not accept her condition is as extreme as she would have it.

31. That statement was cryptic and did not reveal whether, and if so how, those reservations undermined the accepted consequences referred to in paras [83] to [84] (**AB-##**).[31] Did it mean some of those consequences were not in fact accepted? Did it mean that those consequences were accepted but were of lesser impact, and if so to what degree? To what level of extremity did the primary judge actually accept the respondent's condition?

32. If, as the appellant would contend,[32] the credibility finding was critical to the rejection of the respondent's application, then the impact of a critical finding on the analysis of the respondent's consequences was left insufficiently explained. There was no path of reasoning exposed from a critical finding to the ultimate result.

33. His Honour's statement of capacities retained by the respondent in para [85] (**AB-##**) does not provide the path of reasoning. First, the extent to which a person has retained

---

[30] A credit finding with similar characteristics was considered in *Transport Accident Commission v Campbell* [2015] VSCA 7 at [89]-[91] (Santamaria JA, Neave JA agreeing) and [109]-[111] (Ginnane AJA).

[31] Further, in para [84] (**AB-##**) his Honour accepted that '*to some extent*' the respondent had difficulty sleeping and caring for her grandchildren, which was a vague finding even absent the unexplained impact of his Honour's '*reservations*'.

[32] See AS at [33].

capacities is only relevant insofar as it *confirms* the absence of serious consequences.[33] Secondly, a listing of the activities the respondent was still able to perform did not explain why an older woman, suffering from PTSD and a major depressive disorder or an adjustment disorder, who required daily anti-depressant medication, ongoing sessions with her psychiatrist and psychologist, and had lost the ability to pursue tertiary studies (her main vocational activity having not worked for some years) did not have sufficient consequences to amount to serious injury.

34. The statement of conclusion in para [86] (**AB-##**) was an *ipse dixit.* The primary judge did not explain what the severity of the consequences were for the respondent, and thus failed to explain why the respondent failed to meet the statutory test. There was no intelligible explanation of how the findings led to the ultimate conclusion. As such, the reasons were inadequate and the primary judgment should also have been set aside on that ground.

35. Furthermore, the primary judge's reasons did not adequately deal with the expert opinion evidence of medical practitioners led by the respondent. The primary judge found that the respondent suffered from Post-Traumatic Stress Disorder and a major depressive disorder or adjustment disorder.[34] His Honour accepted the opinions of Dr Chan, Dr Alvarenga and A/Prof Mazumdar as to the diagnosis of the respondent's condition. His Honour noted that their reports '*refer to a range of psychological symptoms of which the [respondent] complained*'. However, his Honour did not state whether he accepted or rejected the views of those treating practitioners as to the severity of the respondent's condition, and its impact upon her. He had earlier said he had '*some reservations about the opinion of Dr Alvarenga*' but did not explain what that meant for the strength of the opinions of Dr Alvarenga on matters other than diagnosis.

---

[33] See *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 at [27] (Ashley JA, Nettle and Dodds-Streeton JJA agreeing) in the context of s 134AB of the *Accident Compensation Act.*

The primary judge's description of a 'balancing' exercise in [86] did not accurately reflect the relevance of the extent of the respondent's ability to maintain her limited involvement in certain recreational and domestic activities. Section 93(17) does not require a balancing of what is lost by way of impairment and what is retained.

[34] [2015] VCC 1156 at [79] (**AB-##**).

36. In particular, his Honour did not make any findings as to Dr Alvarenga's opinion that the respondent suffered from –

> ... moderate to severe depression and anxiety... as well as sensory difficulties which have contributed to the development of new fears, increased her mental anguish and diminished her quality of life.

37. Dr Alvarenga also opined that the respondent had a '*grossly altered sense of self efficacy, socialisation, capacity for recreational pursuits and quality of life*' (**AB-##**).

38. His Honour did not make any other findings as to the opinions of Dr Chan and A/Prof Mazumdar, which his Honour had summarised at paras [48]-[53] and [62]-[64]. A/Prof Mazumdar opined that the respondent's prognosis was guarded, inter alia, because her condition was becoming resistant to treatment (**AB-##**). Dr Chan did not anticipate improvement in the respondent's condition given the chronicity and worsening of her symptoms (**AB-##**).

39. Moreover, the primary judge did not make any findings as to the opinions of Dr D'Abbs, treating clinical psychologist,[35] including her opinion that the respondent had severe levels of depression, extremely severe levels of anxiety and moderate stress levels (**AB-##**). There was also no finding as to the acceptance or rejection of the reports of Dr Kornan, medico-legal psychiatrist, including his most recent opinion that the respondent had '*developed a very significant, ongoing psychiatric ill health condition of chronic, moderately severe intensity*' which had a poor prognosis (**AB-##**).

40. The primary judge was required to state which parts of the lay evidence and opinion evidence he accepted, and which parts he rejected. His Honour did not do so. The reasons were also inadequate in that respect.

PART VIII – ORAL ARGUMENT:

41. The respondent estimates that she will require about 90 minutes for the presentation of oral argument.

---

[35] See [2015] VCC 1156 at [26]-[28] and [65], summarising the opinions of Dr D'Abbs (**AB-##**).

DATED: 25 January 2017

Michael Wheelahan
Aickin Chambers
Tel: (03) 9225 8475
Email: mfwheelahan@vicbar.com.au

Matthew Hooper
Aickin Chambers
Tel: (03) 9225 6216
Email: mhooper@vicbar.com.au