

TRANSPORT ACCIDENT COMMISSION v KATANAS (M160/2016)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2016] VSCA 140

Date of judgment: 17 June 2016

Date special leave granted: 18 November 2016

The respondent issued a proceeding in the County Court of Victoria by which she sought leave, pursuant to s 93(4)(d) of the *Transport Accident Act* 1986 (Vic) ('the Act'), to commence proceedings at common law in respect of psychological injury sustained by her as a result of a transport accident on 10 July 2010. The judge who heard her application (Judge O'Neill) was not satisfied that the mental disorder suffered by the applicant constituted a 'severe' injury as required by s 93(17)(c) of the Act, and accordingly dismissed the application.

The respondent's appeal to the Court of Appeal (Ashley and Osborne JJA, Kaye JA dissenting) was successful. The majority of the Court found that Judge O'Neill misdirected himself in the following passage of his judgment:

In order to satisfy the test posed in ss (c), the consequences arising from a transport accident must be more substantial than the test posed under ss (a); that is, they must be more than 'very considerable' when a comparison is made with other cases in the possible range of impairments. Thus, consideration must be given to the vast array of mental disorders which may be encountered following a transport accident. 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 attempts. Such conditions require extensive treatment and medication. It follows that for a mental disorder to be described as being 'severe', it is at the upper echelon of those disorders in the possible range.

The majority found that the effect of what the judge said in the impugned passage was that the spectrum of least case to worst case was established by setting up, at the one end, a mild condition not requiring treatment; and at the other end, grave psychiatric disorders provoking the most extreme symptoms and consequences, such as to require extensive treatment and medication; and then to say that it followed that for a mental disorder to be described as 'severe', it was 'at the upper echelon of those disorders in the possible range.'

While not doubting that the extent of treatment made necessary by a psychiatric disorder may cast light on whether the disorder should be accounted as severe, the majority found that the spectrum which the judge described was only one amongst a number of ways in which the question of severity might be approached, each of them being incomplete in itself. But whilst each spectrum would be relevant to determine whether the statutory test was satisfied in the particular case, no one of them, by itself, would answer the critical question. The correct thing to do, in each case, was 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 in *Humphries v Poljak* [1992] 2 VR 129. In making that value judgment, a judge must give to each identified relevant circumstance the weight which appears to be appropriate.

Kaye J considered that an analysis of the judge's reasons made it plain that the judge did not adopt or apply a test that focused solely, or primarily, on determining whether the symptoms of the applicant's disorder, and the treatment she had received for it, were such that the disorder might be described as 'severe'. Rather, the judge correctly and appropriately applied a test that took into account, as it should, the nature of the applicant's disorder, its symptomatology, its treatment, and the consequences of it to her.

The ground of appeal is:

- The Court of Appeal erred in finding that the primary judge misdirected himself at [82] of the judgment.