HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, CALLINAN AND HEYDON JJ

CSR LTD & ANOR — APPELLANTS

AND

ARTURO DELLA MADDALENA — RESPONDENT

CSR Ltd v Della Maddalena [2006] HCA 1
2 February 2006
P36/2005

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 2 and 3 of the orders of the Full Court of the Supreme Court of Western Australia made on 13 October 2004 and, in their place, order that:*

   (a) the judgment and orders of the District Court of Western Australia made on 17 December 2002 be set aside; and

   (b) there be a new trial of the action.

On appeal from the Supreme Court of Western Australia

Representation:

B W Walker QC with J G Mengler for the appellants (instructed by Jackson McDonald)

B F Quinn with P D Nicholas for the respondent (instructed by Slater & Gordon)

CATCHWORDS

CSR Ltd v Della Maddalena

Practice and procedure – Appeal – Credibility of witness – Whether intermediate appellate court entitled to substitute its own findings as to credibility for that of trial judge – Whether court erred in ordering retrial limited to assessment of damages.

Courts – Appeal – Procedural fairness – Expert witnesses – Court expressed preference for evidence of particular expert witnesses – Whether court's reference to such expert witnesses as "well known to the court" constituted a breach of procedural fairness – Whether matter should be remitted for rehearing.

Words and phrases – "procedural fairness", "retrial".

Supreme Court Act 1935 (WA), s 58(1)(a).

1 GLEESON CJ. I agree with the orders proposed by Kirby J. For the reasons explained by Kirby J, the Full Court of the Supreme Court of Western Australia was justified, in accordance with the principles re-affirmed by this Court in *Fox v Percy*[1], in reversing the decision of the primary judge on the principal issue in the appeal. The remark about the Full Court's high regard for some of the expert witnesses in the case was capable of being misunderstood, but in the end it is not a matter to which I would attach importance. I also agree that the disposition of the case by the Full Court was inappropriate in that there should be a retrial.

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1 (2003) 214 CLR 118.

2 KIRBY J. This is an appeal from a judgment of the Full Court of the Supreme Court of Western Australia[2]. By that judgment, the Full Court unanimously[3] ordered that a judgment of the District Court of Western Australia (O'Sullivan DCJ)[4] against Mr Arturo Della Maddalena (the respondent) and in favour of his former employers, CSR Ltd and Midalco Pty Ltd (the appellants), be set aside.

3 In place of the judgment at trial, the Full Court concluded that the respondent "suffered a psychiatric injury caused by his exposure to asbestos while in the employ of at least one of the [appellants] at Wittenoom and that his injury was caused by the [appellants'] negligence"[5]. Because of an unresolved conflict as to the respective liabilities of the former employers[6], the Full Court ordered that the proceedings be remitted to the trial judge for determination in accordance with the Full Court's judgment. This required that the trial judge determine the liability of the first appellant, CSR Ltd, having regard to the denial in its defence that it owned, occupied or managed the mine and mill at Wittenoom where the subject exposure to asbestos was alleged to have occurred. Subject to the resolution of that question, the Full Court determined that the primary judge should assess the damages to which the respondent was entitled[7].

4 The starting points for an understanding of the foregoing conclusions, reached by the Full Court, must be stated at the outset of these reasons. Only by appreciating them may the conclusion reached, and the orders made, by the Full Court be understood. The starting points involve what are substantially uncontested propositions, respectively of fact and law.

The uncontested or established facts

5 *Physiological and psychological injuries*: There were many disagreements between the parties, at trial and on appeal, concerning the facts of this case. However, by the time the proceedings were concluded in this Court certain issues of fact were not in serious contest.

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2 *Maddalena v CSR Ltd* [2004] WASCA 231.

3 Templeman J (Steytler and Wheeler JJ concurring).

4 *Della Maddalena v CSR Ltd* [2002] WADC 260.

5 [2004] WASCA 231 at [169].

6 [2004] WASCA 231 at [170].

7 [2004] WASCA 231 at [171].

6 The respondent had alleged in his pleading and in his case as initially presented at trial that, in the course of the work that he had performed as a young man between 1961 and 1966 at the asbestos mill in Wittenoom, the appellants had negligently exposed him to asbestos. As a result, he initially claimed that he suffered asbestosis, pleural disease, respiratory degeneration and pain and breathlessness as a consequence of his heavy exposure to asbestos dust and the physical injuries that it had produced.

7 By the time the evidence at trial had concluded, as found by the primary judge[8], the respondent's symptoms "could not be explained by the extent of his physical degeneration"[9]. The physiological condition produced by exposure to asbestos dust (known as asbestosis) was found to be unproved on the evidence[10]. In the Full Court (and before this Court) the respondent did not suggest otherwise. Nor did he contest the primary judge's rejection of the alternative contention that his symptoms of pain, breathlessness, lethargy and depression were the result of pleural disease or pleural plaques caused by exposure at work to asbestos dust[11]. In this way, at both levels of appeal, the question became whether the respondent had established that he was suffering from a psychiatric injury (with depression, morbidity and anxiety symptoms), causing incapacity, because of his reaction to the exposure to asbestos.

8 For the reasons that he gave, the primary judge rejected this additional or alternative claim advanced by the respondent[12]. It was this part of the primary judge's reasoning that the Full Court found to have been erroneous, authorising that Court to substitute its own conclusions, based on the evidence, favourable to the respondent. It is the Full Court's conclusion in this regard that, by special leave, the appellants now challenge in this Court.

9 *Uncontested objective facts*: Before going to the detail of the issues argued in the appeal, it is necessary to collect the most important, uncontested, objective facts that provide the circumstances that help to explain the conclusions of the Full Court. Those facts were that:

(1) The respondent migrated to Australia from Italy at the age of eighteen, following an older brother (or step-brother), Walter, who had preceded

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8 [2002] WADC 260 at [45], [49].

9 See [2004] WASCA 231 at [22]-[23].

10 [2002] WADC 260 at [45].

11 [2002] WADC 260 at [49].

12 [2002] WADC 260 at [106].

him and who introduced the respondent to the work at Wittenoom, eventually with both of the appellants, between 1961 and 1966;

(2) Between the stated years, the respondent was heavily exposed to asbestos dust at the asbestos mill in Wittenoom;

(3) In about 1985, at the Perth Chest Clinic, nearly twenty years after quitting the work at Wittenoom, the respondent was informed that he had evidence of asbestosis. The fact that, eventually, a diagnosis of asbestosis was not made is irrelevant to the impact on the respondent of this communication;

(4) In 1988, the respondent saw Walter die a slow and painful death at the age of 54 years. His death was explained at the time as related to Walter's exposure to asbestos at Wittenoom, for part of a working period overlapping the employment of the respondent in the same place;

(5) After Walter's death, the respondent consulted Professor A W Musk, Professor of Respiratory Medicine, and underwent tests that revealed that he did in fact have evidence of asbestos in his lungs;

(6) Whilst establishment of asbestosis and pleural disease was not affirmatively demonstrated, the existence of "benign asbestos lung disease in the form of pleural plaques" was shown, with changes in the lung bases from early in 1997, and with a CT scan showing some areas of pleural thickening;

(7) Although physical injury to the requisite degree was not established by reference to the "rather artificial criteria" of the diagnostic protocol "which devalues the reality of these disorders through overuse"[13], the possible future progression of the respondent's "very early"[14] interstitial lung disease could not be ruled out simply because, to the time of the trial, the likelihood of such a development had not been affirmatively proved;

(8) After Walter's death from asbestos-related causes, the respondent saw several friends die painful deaths from mesothelioma and other asbestos-related conditions. By the late 1990s, there were "at least" twenty friends whom he had visited in hospital and who suffered from diseases related to asbestos exposure;

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13 Professor German's report quoted by the Full Court: [2004] WASCA 231 at [34].

14 Professor Musk's report quoted by the Full Court: [2004] WASCA 231 at [21].

(9) The respondent knew thirteen people from his village in Italy who had come to Australia and, like him, worked at Wittenoom. All but four of them had died of mesothelioma, related to asbestos exposure;

(10) In 1997, the respondent had attended the funeral of a friend at Karrakatta cemetery. Whilst there he had purchased a grave plot for himself. It was close to Walter's grave;

(11) The respondent's educational level in Italy was extremely limited. He had grown up in a small village and attended school only to about fourteen years of age. After he left school he worked as a labourer[15]. In more recent years, before the trial, the respondent's limited social connections had included the Asbestos Diseases Society of Western Australia, where he met, and worked as a volunteer with, friends and colleagues, attending to their medical and hospital care and their funerals when they died; and

(12) A psychiatric disorder, involving severe depression, in persons who have been exposed to asbestos dust, and are thus at special risk of later developing asbestos-caused cancers and serious disabilities, is a "recognisable psychiatric injury ... of some substance"[16]. The existence or absence, in the respondent's case, of that recognised psychiatric injury was the essential issue for trial, once it was accepted that the respondent had not (yet) been able to prove a diagnosis of asbestosis based on the "rather artificial criteria" which medical protocols laid down for a progressing pleural disease of physiological origin.

10 The great bulk of the evidence called in the trial described the respondent as an unsophisticated person "of a basically credulous cultural background"[17]. He presented to his medical advisers as "terrified" that he would die, just as his brother and many friends had done, and for the same reasons. With high uniformity, the treating doctors described the respondent as a person with morbid self-concern and depression resulting from a life of living in fear of death from his undoubted heavy exposure to asbestos at Wittenoom[18]. These medical witnesses, virtually with one voice, were not impressed with the appellants' evidentiary "trump card", namely video surveillance film suggesting disparities in the respondent's medical condition and his evidence. After reserving his

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15 [2004] WASCA 231 at [10].

16 The report of Professor German: see [2004] WASCA 231 at [34].

17 [2004] WASCA 231 at [34].

18 [2004] WASCA 231 at [34].

decision for eight months, the primary judge was persuaded by the arguments of the appellants to find against the respondent.

11 Against the background of the foregoing facts, it is unsurprising that the Full Court, in the appeal before it, decided to look very closely at the premises upon which the primary judge had reached his conclusion adverse to the respondent. That close scrutiny led the Full Court to a conclusion which was seemingly more harmonious with the uncontested facts just described. The primary question for this Court in this appeal is whether, in giving effect to that conclusion, the Full Court erred in its approach or in its conclusion.

12 In affirming another decision of the Full Court, also correcting a judgment of the District Court[19], this Court recently pointed out that it must approach an appeal before it in a particular way:

> "[T]his Court's function is to correct any error that has been shown in the decision and hence the resulting orders of the Full Court. It is not, as such, to exercise for itself the powers of the Full Court, absent demonstrated error."

The powers and duties of the Full Court

13 *Statutory foundations*: The second starting point for an appreciation of the reasoning of the Full Court is an understanding of the powers and duties of the Full Court in discharging its appellate functions in the appeal before it. There was no contest in this Court concerning the ambit of those powers and functions[20]. However, it is important to restate them in order to avoid the risk of a return to erroneous past legal understandings.

14 The source of the respondent's appellate right was s 79 of the *District Court of Western Australia Act* 1969 (WA). At the relevant time, s 79(1) permitted "[a] party to an action or matter [in the District Court] who is dissatisfied with ... a final judgment" of the District Court, to appeal from that judgment to the Full Court constituted under the *Supreme Court Act* 1935 (WA). Section 58(1)(a) of the *Supreme Court Act*, as it stood at the relevant time, conferred on the Full Court jurisdiction to hear and determine "applications for a new trial or rehearing of any cause or matter". Under the Rules of the Supreme Court (WA), the Full Court was empowered "to draw inferences of fact and to

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19 *Manley v Alexander* [2005] HCA 79 at [14] per Gummow, Kirby and Hayne JJ.

20 They had been so expressed in *Commissioner of Main Roads v Jones* (2005) 79 ALJR 1104 at 1117-1118 [71]-[73]; 215 ALR 418 at 434-436.

give any judgment, and make any order which ought to have been made, and to make such further or other order as the case may require"[21].

15 The powers so conferred are "very ample, indeed generally unconfined"[22]. They envisage an appeal by way of "rehearing"[23]. The rehearing contemplated is the same as that described by this Court in *Fox v Percy*[24]:

> "The 'rehearing' does not involve a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits."

No fresh evidence was admitted by the Full Court in the present appeal.

16 *Requirements and limitations*: The form of rehearing so provided "shapes the requirements, and limitations, of such an appeal"[25]. The relevant "requirements" are that the appellate court is obliged to conduct a thorough examination of the record and a real rehearing. It is not confined to reconsideration of the record in order to correct errors of law, although that will certainly be encompassed in such an appeal. It is required to consider suggested errors of fact-finding. Experience teaches that many errors of this kind arise at first instance, more perhaps than errors of law. Having conducted a rehearing as so described, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance"[26]. This involves, where, as here, there is no jury, conducting a thorough review of the primary judge's

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21 Rules of the Supreme Court (WA), O 63, r 10(2) (since repealed).

22 See *Jones* (2005) 79 ALJR 1104 at 1117 [72]; 215 ALR 418 at 435.

23 See *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-622; *Eastman v The Queen* (2000) 203 CLR 1 at 40-41 [130]; *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [23], 187 [44].

24 (2003) 214 CLR 118 at 125 [22]. See also *Shorey v PT Ltd* (2003) 77 ALJR 1104 at 1107 [15]; 197 ALR 410 at 413; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1610-1611 [65]-[68]; 200 ALR 447 at 464-465; *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934 at 1942-1944 [49]-[59]; 201 ALR 470 at 481-484; *Pledge v Roads and Traffic Authority* (2004) 78 ALJR 572 at 581-582 [43]; 205 ALR 56 at 67-69.

25 *Fox v Percy* (2003) 214 CLR 118 at 125 [23].

26 *Dearman v Dearman* (1908) 7 CLR 549 at 561 cited in *Fox v Percy* (2003) 214 CLR 118 at 125 [23].

reasons and engaging in the tasks of "weighing conflicting evidence and drawing … inferences and conclusions"[27].

17 The "limitations" introduced into the rehearing based on the record of the trial are those necessarily involved in that form of appellate procedure[28]. Such limitations include those occasioned by the resolution of any conflicts at trial about witness credibility based on factors such as the demeanour or impression of witnesses; any disadvantages that may derive from considerations not adequately reflected in the recorded transcript of the trial; and matters arising from the advantages that a primary judge may enjoy in the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from that evidence, viewed as a whole[29].

18 When performing its function of deciding an appeal to it, it was common ground that the Full Court was bound by the principles stated by this Court in its then recent decision in *Fox v Percy*[30]. The Full Court referred to that authority and to other decisions of this Court which had applied that authority. No party suggested that such authority was inapplicable or that, for any reason, it should be reconsidered or re-expressed.

19 *Adhering to Fox v Percy*: In *Fox v Percy* there was an important change in the statement by this Court of the jurisdiction and powers of intermediate appellate courts. Like many other principles re-expressed by this Court in recent years, the change was one founded in a close analysis of the statutory provisions governing the legal task in issue[31]. It involved a shift to some degree from the more extreme judicial statements commanding deference to the findings of

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27 *Dearman v Dearman* (1908) 7 CLR 549 at 564 cited in *Fox v Percy* (2003) 214 CLR 118 at 127 [25].

28 *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Scott v Pauly* (1917) 24 CLR 274 at 278-281; *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23].

29 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 330 [90]; 160 ALR 588 at 619; cf *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23]; *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210.

30 (2003) 214 CLR 118.

31 cf *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249]; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 10 [24]; *Weiss v The Queen* [2005] HCA 81 at [41].

primary judges said to be based on credibility assessments. It involved a reminder of the obligations of the appellate court, so far as it properly could, to perform its statutory functions of appellate review by way of rehearing, in a real and substantive way as the enacted law mandates.

20 In the present appeal the Full Court recognised the shift in instruction expressed in *Fox v Percy*[32] and as restated and applied in *Pledge v Roads and Traffic Authority*[33]. Correctly, the Full Court examined whether the reasoning of the primary judge in the present case fell within the category that could properly be described as resting on a credibility determination. Or whether, alternatively, such reasoning rested on inferences drawn from facts that were undisputed or found by the trial judge[34].

21 Even in the case of expressed credibility findings, the statutory duty to conduct a real "rehearing" remains. It may sometimes justify reversal of a decision by a primary judge who has "failed to use or has palpably misused his advantage" or where "incontrovertible facts or uncontested testimony" demonstrates the findings to be erroneous; or where they are "glaringly improbable" and "contrary to compelling inferences"[35].

22 However, where the conclusion of the primary judge depends on inferences drawn from undisputed facts or facts that have been found but can equally be redetermined by the appellate court, without relevant disadvantage, the duty of the appellate court is clear. It derives from the parliamentary enactment. It "will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it"[36].

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32 (2003) 214 CLR 118 at 139 [66] cited in [2004] WASCA 231 at [154].

33 (2004) 78 ALJR 572 at 581-582 [43]; 205 ALR 56 at 67-69 cited in [2004] WASCA 231 at [155], [163].

34 This is an important and often decisive distinction, as recognised by McHugh J in *Fox v Percy* (2003) 214 CLR 118 at 146 [88].

35 *Fox v Percy* (2003) 214 CLR 118 at 128 [28]-[29], 139 [66], 165-166 [148]. Cases treated as turning on credibility findings include *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472; *State Rail Authority (NSW)* (1999) 73 ALJR 306; 160 ALR 588; *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599.

36 *Warren v Coombes* (1979) 142 CLR 531 at 551. See eg *Voulis v Kozary* (1975) 180 CLR 177; *Fox v Percy* (2003) 214 CLR 118; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598; 200 ALR 447; *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934; 201

(Footnote continues on next page)

23 It would be a misfortune for legal doctrine if, so soon after *Fox v Percy* corrected the non-statutory excesses of earlier appellate deference to erroneous fact-finding by primary judges, the old approach was restored, as, for example, by reversion to the previous formulae about the "subtle influence of demeanour" that could have affected the primary judge's conclusion, even though no express reference was made to such consideration[37]. A survey of the history of the approach by this and other appellate courts to the principles of appellate review bears witness to varying attitudes over time to questions of this kind[38]. However, this Court should not now restore the pre-*Fox v Percy* approach. It has no foundation in the statutory provisions governing intermediate courts. On the contrary, it frustrated the performance by those courts of their statutory obligation to conduct an appeal by rehearing. It would involve such courts returning to non-statutory inhibitions upon the provision of appellate relief based on nothing more than the suggestion that the present is "one case" in which (by inference exceptionally) "the subtle influence of demeanour" cannot be overlooked[39]. If that proposition is sustained, the important gain of *Fox v Percy* stands in peril of being lost. This Court would then re-endorse a serious impediment to the performance of the jurisdiction and powers of intermediate appellate courts in Australia. This should not be done.

24 Instead, this Court should apply its uncontested authority in *Fox v Percy*. Effectively, that is what the Full Court set out to do. It helps to explain the Full Court's reasoning and to endorse its main conclusions.

The facts and earlier dispositions

25 *The background facts*: Many of the facts necessary to gain an appreciation of the issues argued in this appeal are contained in the reasons of Callinan and Heydon JJ[40]. The respondent claimed damages for negligence on the basis of his exposure to asbestos dust in the course of his employment with the appellants. Leaving aside the contest concerning which of the appellants, if

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ALR 470; *Pledge v Roads and Traffic Authority* (2004) 78 ALJR 572; 205 ALR 56.

37 cf *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179. See reasons of Callinan and Heydon JJ at [180].

38 *State Rail Authority (NSW)* (1999) 73 ALJR 306 at 323 [74]; 160 ALR 588 at 610.

39 *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179. See also *Fox v Percy* (2003) 214 CLR 118 at 139 [66].

40 Reasons of Callinan and Heydon JJ at [116]-[140].

either, was responsible for any damage caused by such exposure, the contest at trial was reduced, essentially, to two points. The first was the suggestion that the respondent had failed to prove *physiological* damage that would support the severe symptoms that he had recounted to the medical witnesses and in his oral evidence. The second, assuming that the claim was to be treated as one relating to a morbid *psychiatric* injury suffered by the respondent in consequence of the exposure, was the suggestion that the respondent's complaint of psychiatric injury should be rejected because of considerations that emerged during evidence. Most especially, those considerations included:

(a) Video surveillance film, tendered in evidence and shown to the medical experts, which, the appellants argued, indicated that the respondent could perform a range of physical activities beyond those stated or conceded in his oral testimony and reports to the medical witnesses;

(b) Evidence from the respondent's lung function tests and records at the Chest Clinic that was said to be inconsistent with, because prior to, the respondent's suggested onset of psychiatric injury and symptoms occurring after the death of his brother from a dust-related disease in 1988 blamed by the respondent as the effective triggering event that had initiated his severe symptoms;

(c) The suggested falsehood of the respondent's statement to a psychologist (Mr Burns) to the effect that he had preceded his deceased brother to Australia and felt remorseful over his responsibility for persuading the brother to follow him to Wittenoom, whereas the fact was that the brother had preceded him, not vice versa; and

(d) The conclusion of the appellants' expert psychiatrist, Dr Febbo, after seeing the video film of surveillance of the respondent's activities that a diagnosis of psychiatric injury should not be accepted and the primary judge's conclusion favourable to that opinion, in preference to the contrary opinions expressed by all of the respondent's medical witnesses.

26 Many other factual issues were raised in argument both at the trial and before the Full Court. However, the foregoing represents the major battle ground between the parties.

27 *The earlier dispositions*: The primary judge did not doubt that an exposure to asbestos could cause a person so exposed to suffer a serious psychiatric illness as a consequence[41]. However, having rejected the establishment of a physiological injury to a degree sufficient to explain the

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41 [2002] WADC 260 at [104].

respondent's symptoms and complaints, the primary judge considered that the diagnostic process for a psychiatric illness was "a complicated one" involving "examination of an extensive range of considerations"[42].

28 Because the primary judge concluded that "the absence of any objective evidence to support the plaintiff's complaints" was a "real cause for concern"[43], he turned to the foregoing four factors, most especially the video surveillance film, in order to resolve the conflict in the medical testimony. Essentially, this involved a conflict between medical witnesses called for the respondent (especially Professors German and Musk and Dr Skerritt) and a psychiatric expert called for the appellants (Dr Febbo)[44]. A consideration of the identified factors in the evidence led the primary judge to his ultimate conclusion[45]:

> "In my opinion the absence of any objective evidence to support the plaintiff's complaints in this case is a real cause for concern. In addition, in my view, the evidence of the video tapes, the results of the lung function tests, the notes from the Chest Clinic and the evidence of inaccuracies in the history given by the plaintiff concerning the death of his brother and the onset of symptoms of breathlessness add weight to that concern. Against this background the conclusion to which I have come is that the opinion of Dr Febbo is to be preferred. In my view the plaintiff has not established that he has suffered any psychiatric injury."

29 In the Full Court, by reference to its own powers and functions in the appeal and to its analysis of the considerations mentioned by the primary judge (including its own inspection of the video film that was so important for the primary judge's decision), a conclusion was reached that the primary judge had erred. This is why the Full Court set aside his judgment in favour of the appellants and remitted the matter for the limited purposes noted[46].

30 It is necessary, in these reasons, to deal with each of the four identified factors. Doing so will explain why no finding on the credibility of the respondent's evidence ultimately stood in the way of the Full Court's proceeding to consider the conclusion that it reached for itself about the preponderance of the

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42 [2002] WADC 260 at [104].

43 [2002] WADC 260 at [106].

44 [2002] WADC 260 at [88]-[96].

45 [2002] WADC 260 at [106].

46 See above, these reasons at [3].

evidence in the trial. However, on each side of this central question lies another issue that must first be considered.

31 It is necessary to deal immediately with the comment of Templeman J, for the Full Court, that each of Professor German and Dr Skerritt was "well known to the Court as an eminent psychiatrist" of many years standing[47]. This comment is given prominence in the reasons of Hayne J and of Callinan and Heydon JJ[48]. It is suggested there that it inflicted a procedural unfairness on the appellants by revealing a predisposition in favour of the evidence of the respondent's witnesses which had not been disclosed during the hearing, so that it could be answered and corrected.

32 As well, there emerged during argument in this Court a consequential question concerning the appropriateness of the orders finally made by the Full Court. Was it appropriate in the present case to remit the assessment of damages to the primary judge, disjoined from the other issues of negligence liability[49]? At least, was it appropriate to do so having regard to the potential importance of hearing and seeing the evidence on the suggested psychiatric injury, which was sharply divided?

The issues

33 The issues for decision in this appeal are therefore the following:

(1) *The procedural fairness issue*: Did the reference in the reasons of the Full Court to the fact that Professor German and Dr Skerritt were well known to that Court, as a fact undisclosed during the hearing, constitute a breach of the rules of procedural fairness ("natural justice"), requiring, without more, relief to the appellants and, at the least, a reconsideration of the entire appeal by the intermediate court differently constituted[50]?

(2) *The credibility issue*: Having regard to the principles governing the conduct of an appeal by rehearing on the basis of the record, did the Full Court err in substituting its preference for the evidence favourable to the

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47 [2004] WASCA 231 at [32], [36].

48 Reasons of Hayne J at [106]-[109]; reasons of Callinan and Heydon JJ at [144]-[147].

49 [2004] WASCA 231 at [171].

50 Since the Full Court's decision in the appeal, the Court of Appeal of the Supreme Court of Western Australia has been established and it was agreed that, if there were a remitter to an intermediate appellate court, it would be to that Court.

respondent over the primary judge's preference for the evidence favourable to the appellants? In particular, did the Full Court err in its:

(a) treatment of the video surveillance evidence;

(b) use of the lung function tests and the records of the Chest Clinic;

(c) treatment of the suggested mis-statement by the respondent as to the bringing of his brother from Italy to Wittenoom and its effect on his psychiatric condition; and

(d) expressed preference, ultimately, for the evidence of Professor German and Dr Skerritt over that of Dr Febbo?

(3) *The orders issue*: If all other issues are determined in the respondent's favour, did the Full Court err in the orders that it made disposing of the appeal and remitting only limited matters to the primary judge for redetermination?

The procedural fairness issue

34 *The issue explained*: The first issue, although mentioned by the appellants in their submissions, did not appear in argument as prominently as it has in the reasons of Hayne J and of Callinan and Heydon JJ[51].

35 The complaint voiced by Callinan and Heydon JJ is not only about the reference to the fact that Professor German was "well known to the Court as an eminent psychiatrist"[52] but is also about various factual mistakes said to have arisen in describing the respective years of experience of the respondent's medical witnesses and the appellants' medical witness, Dr Febbo.

36 Counsel for the respondent conceded before this Court that the Full Court's reference to the respondent's psychiatrists as being "well known" was "unfortunate"[53]. However, he argued that it was not, in the ultimate, significant. I agree. Similarly, I regard the corrections of the precise years of experience of the respective medical experts as immaterial to the point being made by the Full Court in its reasons on this issue. The appellants were correct not to make this a central submission in their arguments. Viewed in context, the Full Court was stating, with minor factual errors, no more than the obvious.

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51 Reasons of Hayne J at [106]-[109]; reasons of Callinan and Heydon JJ at [144]-[147], [161]-[164].

52 [2004] WASCA 231 at [32].

53 [2005] HCATrans 875 at 1374.

37 *An immaterial comment*: Professor German's qualifications were established in evidence. They were stated on the letterhead of his reports. They were not the subject of cross-examination or questioning. Moreover, whilst Dr Febbo was retained by the appellants' legal representatives, and qualified to give evidence on the appellants' behalf, Professor German was the respondent's treating psychiatrist. He had been so for four or five years. He therefore had a much greater "involvement" with the respondent, arising from his added responsibility of treatment[54].

38 Over the course of the consultations and treatment of the respondent, Professor German had spent "probably 20 or 30 hours" talking to him. It is not unusual, in the assessment of conflicting medical opinions, for courts to find the assessments of treating doctors more useful than those of forensic experts. Nor is it unusual for courts to compare the respective levels of experience and eminence of conflicting witnesses.

39 Inescapably, in specialised courts but also in general trial courts obliged to hear repeatedly the evidence of medical and other experts, impressions will be formed as to their respective skills and reliability. In a community such as Perth, it would be unsurprising that Professor German (and Dr Skerritt) would, over time, become "well known to the Court". This observation does not therefore state more than the facts that would have been known at least to local practitioners, appearing in proceedings such as the present. No one questions that Professor German and Dr Skerritt were "eminent" in their field of expertise. The Full Court itself went on to acknowledge that eminence, experience and standing in the profession of psychiatrists did not make a witness "infallible"[55]. The only complaint can therefore be whether the Full Court erred in stating the obvious and doing so without first raising it expressly during argument. In the circumstances of this case, I regard that complaint as without merit.

40 To take a point that Professor German had been a consultant for thirty-six years and not "over 40 years" as the Full Court said[56], is also to miss the proposition that the Full Court was advancing. When he began treating the respondent, Professor German had been practising as a medical practitioner for almost forty years. In rounded terms, his experience was unquestionably much longer in years, and also more intimate with the respondent, than was the case with Dr Febbo. Likewise, to quibble over the precise years of experience as a

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54 [2004] WASCA 231 at [32].

55 [2004] WASCA 231 at [32].

56 Reasons of Callinan and Heydon JJ at [144].

psychiatrist of Dr Skerritt and to suggest that the Full Court should have described his experience as "nearly thirty years"[57] rather than "of some 30 years' standing" is in my opinion clutching at forensic straws.

41 The correction of the years of specialist experience of Dr Febbo is also quite trivial[58]. It is not a proper basis for criticising the fundamental observation which the Full Court was making. Dr Febbo first saw the respondent in September 1996. That was three years after 1993 when he began practice as a consultant psychiatrist. One might have added a couple of years to Dr Febbo's then experience in the light of his period in training as a psychiatric registrar. One might have added a few more years to cover the consultations of Dr Febbo with the respondent to the date of the trial in 2002. However, two facts were indelible and they were the facts that the Full Court saw as critical. Professor German and Dr Skerritt were eminent, highly experienced psychiatrists with longstanding practices and experience accumulated over decades. By comparison, Dr Febbo was less eminent in professional terms. And he certainly had much less clinical experience. Moreover, Professor German, in particular, had responsibility for treating the respondent. Dr Febbo was an expert retained for the litigation. He had neither the long intervals of responsibility nor the frequency of consultations that Professor German did. And he had not, so far, reached the rank in the profession of psychiatrists that Professor German (and Dr Skerritt) had reached.

42 *No procedural unfairness*: The Full Court might have worded its explanation for preferring the respondent's medical evidence to that of Dr Febbo in a different and more prudent way. However, it would seriously overstate the approach that the Full Court took to suggest that its preference for Professor German and Dr Skerritt over Dr Febbo governed the outcome of the appeal. The many other considerations to which I will now turn afford the real explanation for that outcome. There was a conflict of opinion at the trial between the medical experts. Properly, the primary judge did not endeavour to resolve that conflict by expressing a preference for the opinions of Dr Febbo over the respondent's witnesses on the basis of his credibility, demeanour or in-court appearance[59]. Such an approach, sometimes inappropriate in the case of lay witnesses, would even more frequently be an unsuitable and unconvincing way to resolve differences between the testimony of experts. Instead, the trial judge used other *indicia* to lead him to his conclusion. Correctly, the Full Court examined those considerations.

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57 Reasons of Callinan and Heydon JJ at [145].

58 Reasons of Callinan and Heydon JJ at [147].

59 *Ahmedi v Ahmedi* (1991) 23 NSWLR 288 at 291. See also *State Rail Authority (NSW)* (1999) 73 ALJR 306 at 321 [68]; 160 ALR 588 at 608.

43 Ultimately, it is to such other *indicia* that this Court must also turn in judging the acceptability and correctness of the Full Court's conclusions. The appellants' submission that they suffered a breach of procedural fairness by reason of the statement of the obvious as to the qualifications and reputation of the respondent's psychiatrists should be rejected[60].

The credibility issue

44 *Foundations of the primary judge's decision*: The present was not a case where the primary judge expressly or impliedly based his rejection of the respondent's case on the conduct or demeanour of witnesses in court. In order to view the conclusions at trial in this light, it would be necessary to revive the notion of an unexpressed and unstated "subtle influence of demeanour".

45 Such a revival would not only be inconsistent with the new emphasis contained in this Court's reasons in *Fox v Percy*. It would also inflict a procedural unfairness on the respondent greater than that of which the appellants complain by reference to the stated reliance of the Full Court on the reputations of Professor German and Dr Skerritt. That reference was a consideration, right or wrong, that the Full Court disclosed transparently in its reasons. To rely on a "subtle influence" that has not been mentioned or even hinted at by the primary judge is to inflict on the respondent an injustice in this Court of which the primary judge is wholly guiltless. We should not do so.

46 A judge cannot, in his or her reasons, expound all of the considerations that influence the decision in hand. "[T]ime and language do not permit exact expression" of every factor that has contributed to a judicial decision[61]. However, trial judges in Australia know the common disapproval of appellate courts of attempts to render trial conclusions appeal-proof by expressed reliance on the demeanour and appearance of witnesses where that is unnecessary or inappropriate. They also know the scientific unreliability of many such assessments. They are aware of the general desirability of founding judicial conclusions (as far as possible) on rationality and logic.

47 In fairness, I believe that this was the approach that the primary judge took to the evidence in the present trial. In doing so, he may have been affected by the substantial delay (eight months) between the conclusion of the hearing and the delivery of his reasons. Such delay (as the Full Court noted) rendered the impact

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60 cf reasons of Gleeson CJ at [1].

61 *Biogen Inc v Medeva Plc* [1997] RPC 1 at 45 per Lord Hoffmann.

of any judicial recollection of the respondent's demeanour unlikely to be such as would "justify any credibility findings on that basis"[62].

48 In the Full Court, counsel for the appellants, properly, was not willing to overstate the unexpressed significance of demeanour upon the primary judge's conclusions. He accepted that the trial findings "did not depend on demeanour, although that was 'possibly an element'"[63]. Correctly, in my view, this approach led the Full Court to conclude that the primary judge's credibility findings were based (as the primary judge's own reasons suggested) on an "analysis of the recorded evidence"[64]. It was therefore both the entitlement and duty of the Full Court, in the appeal before it, to conduct its own analysis of the evidence and, whilst showing respect for the advantages that the primary judge enjoyed, to give effect to the conclusions derived from such analysis.

49 *The video surveillance tapes*: From his inspection of the video surveillance tapes tendered by the appellants at the trial, the primary judge concluded that the respondent was "capable of a much greater level of activity than that claimed by him"[65]. In describing the "significance of the video tapes", the primary judge contrasted the impression that he had derived from viewing them with the level of activity recounted by the respondent in the histories recorded by the several medical witnesses. It was the disparity between the medical histories and the evidence in the video tapes that the primary judge considered to be most relevant to his conclusion rather than any suggested incongruence between the images shown in the video tapes and the lengthy evidence of the respondent at the trial, including under cross-examination.

50 If it had been the respondent's oral evidence that had given rise to the trial judge's conclusion, appellate disturbance of that conclusion would have been more difficult, according to conventional principles. However, where, as here, it was the perceived disparities between the histories given to the medical witnesses and the appearances of the respondent in the video tapes, a different consideration was brought into play. This was whether the propounded variance led the several medical witnesses to change their opinions or not. In short, the

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62 [2004] WASCA 231 at [157]. See *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273 at 283 [30]; cf *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77 at [85].

63 [2004] WASCA 231 at [157].

64 [2004] WASCA 231 at [158].

65 [2002] WADC 260 at [96].

relevant consideration was whether the disparities indicated that the medical witnesses had been misled by the respondent[66].

51 On that issue, only Dr Febbo concluded – and then not in his written report but in oral testimony – that a significant disparity was shown. The other medical experts were unimpressed by the appellants' trump card. They could not have expressed their opinions in that regard more clearly. Moreover, those opinions were stated by reference, for the most part, to the histories recorded by them at or near the times of the filming recorded in the video tapes.

52 The video surveillance tapes were procured by the respondent by pre-trial procedure. They were provided to, and viewed by, several of the respondent's medical witnesses. Professor German, having recorded key impressions about the chief elements of activity and conduct shown in the video tapes, stated, in his report of 5 July 2001:

> "I do not think there was anything in these video passages that sheds any light on his fundamental mental state and the state of mind which I have described in my previous reports."

53 Dr Skerritt was even more emphatic:

> "This film was as unimpressive as I have ever seen. … None of [the activities shown in the tapes] is inconsistent with a man with moderate respiratory distress, which is what [the respondent] believes himself to be. Nor does it seem to be particularly inconsistent with the descriptions that he gave to my colleagues. None of the behaviour on film has any relevance whatsoever to his psychiatric symptoms as described."

54 Likewise, Professor Musk saw no reason to change his opinion. In a report of 28 March 2002, after viewing the video surveillance material, he noted:

> "The activities that I observed were consistently within what I would expect from a person with mild lung function impairment and during the exercise he would not have approached his maximum predicted oxygen uptake or the maximum oxygen uptake that he reached on his exercise test in November 1999. ... [He] was observed doing light work, mainly installing reticulation including digging shallow trenches. He loaded tools and other items into the back of his car. He tipped some light loads into a rubbish tip and pushed a wheelbarrow lightly laden. He walked and worked steadily but not fast taking rests although he did not appear particularly breathless. These were my impressions."

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66 cf reasons of Hayne J at [112].

55 In light of the foregoing, the Full Court was in as good a position as the primary judge to compare the video surveillance tapes with the recorded histories given to the medical witnesses. The primary judge was in no better position to evaluate such disparities. Both the histories and the video tapes comprised objective evidence available as much to the appellate court as to the primary judge.

56 Because the video film of the respondent's activities was part of the record of the Full Court, it was made available to this Court. I too have viewed it. With all respect to the more impressionable eyes of others, I can only repeat Dr Skerritt's opinion. Considering that the video film in question amounted to a mere eighty-two minutes of footage edited from "about 150 hours of surveillance between February 1997 and July 2001"[67], it is fair to infer that what was provided was the footage most favourable to the appellants' case. Yet it left the respondent's treating physicians and the Full Court singularly unmoved. I share their reaction.

57 This is unsurprising when the basic features of the respondent's claim are remembered. These were not that the respondent was totally incapacitated and bed-ridden. Instead, he complained of breathlessness, pain, lack of energy and depression. Nothing in the tapes gainsays these complaints. Moreover, the morbid character of the respondent's condition meant that his symptoms varied significantly. In his evidence, Professor German explained that the respondent's mental state fluctuated and that he could be distracted from his anxiety when his "morbid and tearful trains of thought" were disrupted[68]. The respondent was recorded as having gained some relief from anti-depressant medication which Professor German had prescribed. In such circumstances, it was unsurprising that the respondent's physicians were unimpressed with the evidence of the surveillance tapes.

58 The primary judge said that he found the unanimous lack of impression on the part of the respondent's medical witnesses "puzzling"[69]. However, he did not explain why this was so, except by an inference that the three physicians, two of whom had treatment responsibilities, were unduly protective of the respondent and of their own earlier expressed opinions. I would reject that inference. In my view, Templeman J for the Full Court reached a conclusion that was open to that Court and which I also would have reached[70]:

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67 [2004] WASCA 231 at [50].

68 [2004] WASCA 231 at [86].

69 [2002] WADC 260 at [96].

70 [2004] WASCA 231 at [124]-[125].

> "From my analysis of the video recordings, it appears that during the entire period of the surveillance, the [respondent's] activities were minimal. He exerted himself very little: and on the only occasions when he exerted himself to a greater extent – the two digging incidents – he did so for only a short time. There was much standing and moving slowly about.
>
> It must, I think, be kept in mind that the [respondent's] activities were not limited by his physical condition, but by his perception of his condition. Given a fluctuating mood, and a capacity to be distracted from his morbid thoughts, it is not surprising that he occasionally undertook tasks which at other times he would not feel able to tackle."

59 Upon this basis, no error is shown in the Full Court's approach to, and use of, the video film tendered at the trial. In so far as any credibility finding of the primary judge rested on the film, the Full Court was in as good a position as the primary judge to reach its own conclusions. It did. Those conclusions were, in my view, correct. However, it is enough to say that they were open to the Full Court on the basis of the evidence before it and in the conduct by it of an appeal by way of rehearing.

60 *The lung function and Chest Clinic evidence*: The second class of evidence by reference to which the primary judge explained his conclusion adverse to the respondent concerned recorded evidence about the respondent's breathlessness and other symptoms.

61 In part, the primary judge relied on what he described as the "objective evidence" of lung function tests that indicated that the respondent's lung functionality was within a normal range[71]. However, whilst this evidence was relevant to so much of the respondent's original case as was based on the claim that his condition had a physiological basis, it was not really relevant (certainly not critical) to the claim so far as it was based on a psychiatric disorder, dependent on what the respondent believed or perceived was his condition because of his morbid state of anxiety and depression. In respect of this second aspect of the respondent's claim, the absence of a measurable physiological basis for his morbid condition was not crucial, still less determinative. The Full Court was therefore entitled to treat the lung function tests as substantially irrelevant to the question to be answered[72].

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71 [2002] WADC 260 at [66], [106].

72 [2004] WASCA 231 at [74].

62 There was another consideration that the primary judge mentioned as bearing on his conclusion adverse to the respondent. Records produced from the Perth Chest Clinic showed that, on various dates between April 1968 and March 1987, the respondent had mentioned symptoms of breathlessness or chest pain when presenting to the clinic for regular check-ups. The primary judge regarded this as important because the respondent had given a history to Professor German and Dr Skerritt that he had first experienced symptoms of breathlessness after his brother had died of mesothelioma in 1988. The primary judge, concluding that the respondent had been "complaining of breathlessness and chest pain for a very long time" yet had continued to work, sometimes in very strenuous physical activities, until 1995, saw an inconsistency between the presence of the recorded symptoms and the suggested onset of a serious psychiatric condition[73].

63 Because those who recorded the entries in the records of the Perth Chest Clinic gave no oral evidence on this point, the Full Court was as well placed as the primary judge to examine the records, to compare them with the complaints of the respondent that were in evidence and to reach conclusions as to the acceptability of those complaints. There are strong reasons to support the Full Court's opinion that the primary judge had misinterpreted the Chest Clinic records and that the correct interpretation of those records did no damage to the respondent's case[74].

64 As the Full Court observed, it was incorrect to view the Chest Clinic records as "complaints" made by the respondent concerning breathlessness and chest pain. They were simply reports of the respondent's then symptoms. They were recorded in the course of regular check-ups, mandated by his employment exposure to asbestos dust. They were not, as such, "complaints" pertinent to requests for medical treatment, such as caused the respondent to seek medical attention after 1988. The Chest Clinic records could not be characterised as indicating persistent or regular complaints of pain and breathlessness requiring medical treatment. On the contrary, there is no suggestion in those records that the respondent was experiencing real difficulties with the performance of his work duties before his brother's death in 1988.

65 If anything, the Chest Clinic records provide support for the respondent's evidence that it was not until 1989 that he began to experience breathlessness and chest pain of such a magnitude that he felt obliged to reduce, and ultimately terminate, his employment. Thus, the Chest Clinic records for 1970, 1972, 1973, 1975, 1976, 1981, 1985 and 1988 all noted that the respondent was "keeping well" or "keeping fit" or had "no complaints".

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73 [2002] WADC 260 at [66], [103].

74 [2004] WASCA 231 at [69]-[74], [160].

66 In these circumstances, the conclusion of the Full Court on this issue was sound. In so far as the primary judge had rested his rejection of the respondent's claim of psychiatric injury following his brother's death on the suggested inconsistency of the earlier chest records, this is not borne out by a fair reading of those records. The sequence of events was, in any case, of a general character. To a vulnerable person who had been exposed to asbestos dust and who showed concern and anxiety warranted by his history and certain physical signs was added the special blow caused by his brother's agonising death, reinforced by the deaths of other friends and colleagues. Mathematical precision in the time sequence, of the kind apparently expected by the primary judge, was an illusion. The Full Court was correct to expose this error of reasoning and to reject that part of the primary judge's explanation for his conclusion.

67 *The sequence of sibling arrivals*: It was also open to the Full Court to conclude that the primary judge had overemphasised the significance of the suggested sequence of events concerning the arrival of the respondent's brother, Walter, in Australia and that of the respondent and the postulated feeling of special guilt on the respondent's part on the ground of introducing his brother to exposure to asbestos dust. The objective fact was that Walter had come to Australia some ten years before the respondent. It was thus Walter who introduced the respondent to work at Wittenoom, not the other way around.

68 In their reasons, Callinan and Heydon JJ suggest that in the evidence it was open to the primary judge to conclude that the respondent had deliberately fabricated the sequence of the arrivals of the respondent and his brother, suggesting that his brother had come to Wittenoom later than the respondent in order to lend credence to a claim based upon a psychiatric injury following the brother's death[75]. Whilst this is a conceivable interpretation of the evidence, it is scarcely persuasive. Indeed it was, as the Full Court found it, "glaringly improbable"[76].

69 The Full Court's opinion in this regard was clearly available to it. This is because the suggested mis-statement of who had introduced whom to Wittenoom was never made by the respondent in oral testimony. Its source can be traced to a history recorded by the respondent's psychologist, Mr George Burns. Mr Burns' report was then copied by other medical witnesses. Thus Dr John Penman conceded that the incorrect statement of the time sequence was not in his own

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75 Reasons of Callinan and Heydon JJ at [170]-[173].

76 [2004] WASCA 231 at [161].

notes of his consultation with the respondent. He accepted that he had probably taken the incorrect history from Mr Burns' earlier report made available to him[77].

70 The extreme unlikelihood of the respondent's mis-stating the sequence of arrivals can be seen when the objective facts are examined in the way that the Full Court undertook. The respondent was much younger than Walter. Walter had arrived in Australia earlier. That fact, and the employment dates at Wittenoom, would, to the respondent's sure knowledge, have been known to, and recorded by, the appellants. The possibility of hoodwinking the appellants on such an issue was incredible. The respondent's fluency in English, as disclosed in the trial transcript[78] and as acknowledged by Dr Febbo, who was himself Italian-speaking, was imperfect. In these circumstances, a misunderstanding on the part of Mr Burns, in recording the respondent's history in this respect, could easily occur. This conclusion is reinforced by the fact that the respondent was recorded by Professor German as expressing guilt as a result of "bringing some of his friends to Australia".

71 It was therefore well open to the Full Court to conclude that Mr Burns had misunderstood a similar statement made to him because of language difficulties. He had transposed Walter for the friends. Had the respondent embarked upon such a foolish and deliberate deception, one would have expected it to have been continued. Everywhere else (save in Mr Burns' report) both in oral testimony and medical histories, the correct sequence appears when attributed to the respondent himself.

72 It follows that no error is shown in the Full Court's treatment of this issue. Another foundation for the primary judge's rejection of the respondent's claim of psychiatric injury was thus knocked away.

73 *Preference between the medical opinions*: The Full Court had therefore rejected the bases nominated by the primary judge for disbelieving the factual foundation of the respondent's claim for damages for psychiatric injury. It found the video tape surveillance evidence unpersuasive. It rejected the results of the lung function tests as relevantly immaterial and the Chest Clinic records as undamaging to the respondent's case. It dismissed, as a mistake, the suggested reliance on an inaccurate statement that the respondent felt guilty because he had brought his brother to Wittenoom. To these conclusions were then added the compelling ingredients of the objective and substantially uncontested facts that supported the respondent's case and the powerful evidence of the treating physicians, Professors German and Musk and Dr Skerritt, who supported the

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77 [2004] WASCA 231 at [145].

78 [2004] WASCA 231 at [151].

respondent's case, having seen the video tapes. To all these considerations was further added the delay of eight months between the trial and the primary judge's decision that made his conclusions about the facts proved at trial potentially unreliable.

74 Yet was it open to the Full Court to dispose of the appeal by preferring the opinions of Professors German and Musk and Dr Skerritt over the opinion of Dr Febbo, which the primary judge accepted? It would have been natural for the Full Court to endeavour to bring the proceedings to a close. Certainly, that Court was empowered to do so, provided there was no relevant disqualifying disadvantage compared to the position enjoyed by the trial judge. The Full Court had before it a considerable quantity of medical material. Many reports and clinical notes had been tendered. The Full Court also had the record of the oral testimony, relevantly of Professors Musk and German and Drs Skerritt and Febbo and Mr Burns. On the basis of that record, the objective of substantial finality that influenced the Full Court is understandable.

75 However, a question remains whether, having found the defects that it did in the reasoning of the primary judge, the Full Court was correct to dispose of the respondent's substantive claim for itself or whether it ought to have ordered a retrial. This is the final issue for our decision.

The appellate orders issue

76 *The appellants' submission*: The appellants argued that, whilst allowing for the undoubted amplitude of appellate review available to the Full Court, that Court had erred in concluding that it was able adequately to judge the oral and documentary evidence and to reach conclusions, as it did, disposing of most issues of liability and requiring the damages to be assessed. The appellants submitted that, in the premises accepted by the Full Court, the proper order was one of retrial.

77 Under the Rules of the Supreme Court the Full Court, on any appeal, had "all the powers and duties … of the Court … appealed from … with full discretionary power to receive further evidence upon questions of fact"[79]. It is implicit in the powers contained in this Rule that they must be carried out with justice to both parties so as to achieve the statutory object of providing the facility of an appeal by way of rehearing, based substantially on the record.

78 In their reasons, Callinan and Heydon JJ have considered, but rejected, the substitution of an order for retrial[80]. However, their rejection of that course

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79 Rules of the Supreme Court 1971 (WA), O 63, r 10(1) (since repealed).

80 Reasons of Callinan and Heydon JJ at [165].

follows their Honours' conclusion that the premises nominated by the primary judge for disbelieving the respondent's claim of psychiatric injury, and preferring the evidence of Dr Febbo to that of the respondent's medical witnesses, should stand. Because I do not share this conclusion, it is necessary to consider the correctness of the Full Court's orders in this case, upon the basis, accepted by that Court, that the primary judge's reasoning was flawed, such that the Full Court was required, for itself, to dispose of the proceedings in the exercise of its own powers.

79 *A retrial should be had*: There are several difficulties in the orders that the Full Court made, limiting the conduct of the retrial.

80 First, it is not clear that the Full Court gave any, or any adequate, attention to the difficulties that can arise in ordering a retrial limited to particular questions. In *Pateman v Higgin*[81], Kitto J, discussing the power of an appellate court to order a retrial[82], said:

> "[I]t remains … a sound general proposition from which to start in the consideration of each particular case according to its own circumstances that if there is to be a new trial it ought to be of the case as a whole unless the Court thinks that 'they shall do more injustice by setting the matter at large again'."

81 This principle was considered by this Court in *Waterways Authority v Fitzgibbon*[83]. In that case, the Court decided an appeal brought from a new trial order made by the Court of Appeal of New South Wales. That Court had substituted a factual finding decisive to the issue of causation in a claim for damages for negligence which had been dismissed at trial. The question before this Court was whether the Court of Appeal had erred in ordering a new trial on a limited basis. By majority[84], this Court concluded that the Court of Appeal had erred. It substituted an order that there be a new trial generally. It is a fair inference from the reasoning of the majority in that case that the principle in *Pateman v Higgin* still represents the approach to be taken by intermediate appellate courts in formulating their orders, once an appeal is allowed. In his

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81 (1957) 97 CLR 521 at 527 quoting *Hutchinson v Piper* (1812) 4 Taunt 555 at 556-557 [128 ER 447 at 448].

82 Under the *Common Law Procedure Act* 1899 (NSW), s 160.

83 (2005) 79 ALJR 1816 at 1834 [119]-[120]; 221 ALR 402 at 426-427.

84 Gleeson CJ, McHugh, Gummow and Hayne JJ; Kirby, Callinan and Heydon JJ dissenting.

reasons, Hayne J[85], citing *Fox v Percy*[86], drew particular attention to the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. He said[87]:

> "The defect in the primary judge's fact finding lay in the failure to evaluate all of the evidence bearing upon the relevant issue of fact. The Court of Appeal could not substitute its finding when that too was based on only part of the material which ought properly to have been considered by the primary judge. Yet that is what the Court of Appeal did."

82 It cannot be gainsaid that a consideration, relevant to the proper disposition of the proceedings between the present respondent and the appellants, was the evidence of the respondent himself and of the several witnesses, including the medical witnesses who disagreed with Dr Febbo. Because of the disagreement between the witnesses and because that disagreement related to the psychiatric injury claimed by the respondent, its existence, duration and degree were not as susceptible to determination on the basis of the record as would be the case where, for example, the injury amounted to a clearly provable, objectively demonstrated physiological one. The respondent was entitled to damages for any psychiatric injury that he had proved. However, proving that injury carried with it added difficulties. The proof was not susceptible to a decision on the record, at least in the circumstances of this case.

83 Secondly, the fact that the Full Court considered it proper to remit the matter to the trial judge for the assessment of damages also presents a difficulty. Untangling the damages attributable to the physical injury suffered by the respondent and those attributable to the psychiatric injury that he claimed was not without problems[88]. Although it is true that the evidence adduced at the trial suggested a conclusion that any physical injury suffered by the respondent had not manifested itself, according to current protocols, in a way justifying the respondent's symptoms and complaints, the fact remained that there were some physical signs. Thus, Dr Peter Bremner, in a report of February 2002, whilst concluding that the respondent's life expectancy "will not be altered by his present lung disease", nevertheless stated:

> "There is an increased risk of him developing malignant mesothelioma as a result of his asbestos exposure and this risk is high in comparison with

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85 (2005) 79 ALJR 1816 at 1836 [133]; 221 ALR 402 at 429.

86 (2003) 214 CLR 118 at 125-126 [23].

87 (2005) 79 ALJR 1816 at 1836 [133]; 221 ALR 402 at 429.

88 cf *Neindorf v Junkovic* [2005] HCA 75 at [50].

> the general population. … Absence of progression of his asbestos-related lung disease between 1994 and 2002 is encouraging. ... [His] asbestos related lung disease is most likely due to his exposure to asbestos at Wittenoom."

84 Disentangling any consequences, however slight, of the pleural plaques and physical injuries suffered by the respondent from the consequences of his psychiatric injury would not be simple. In the end, it might not be necessary. However, it would be desirable that the task should be performed by a judge acquainted with both aspects of the respondent's case, able to differentiate, so far as was necessary, between the causative factors for which the appellants were responsible and those for which liability had not been proved.

85 Thirdly, because damage is an essential element in the cause of action in negligence, it can sometimes be difficult to dissect that element of the action, and the related questions of duty and causation, so as to permit damage to be resolved, disjoined from other issues of liability. Whilst it is not unknown for questions of liability and damages on other issues to be severed and for retrials to be ordered, including in negligence claims, limited to damages where liability is otherwise clear, the present is not a case where that course was appropriate[89]. By the order of the Full Court, the respective liabilities of the two appellants had still to be decided. This could not be done before the precise nature and extent of the damage suffered by the respondent was clear. Consistently with the approach of this Court in *Waterways*, the proper course was for a general order of retrial.

86 Fourthly, that order is also more appropriate to the errors found in the reasoning of the primary judge. Those errors concerned, as the Full Court put it, the unpersuasive reasons advanced for rejecting the respondent's claim in its entirety and the delay that had occurred in delivering the primary judge's reasons. That delay was treated by the Full Court as pertinent to the unsatisfactory determinations of the conflicting evidence in the trial[90]. In this case the proper way to cure that feature of the trial was not to make a further effort, on the basis of the record, and by judges who had not conducted the trial, to sort out the correct or preferable conclusion. It was to require the matter to be retried, allowing fully for the disappointment, expense and further delay that that course necessarily entails[91].

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89 cf *Waterways* (2005) 79 ALJR 1816 at 1820 [19]; 221 ALR 402 at 408.

90 cf *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77 at [85].

91 *Waterways* (2005) 79 ALJR 1816 at 1836 [135] per Hayne J; 221 ALR 402 at 429.

87 *Conclusion: order for retrial*: It follows that I consider that the Full Court erred in the dispositive orders that it made. In some ways this case is similar to *Waterways*. By reference to the entirety of the evidence, the decision at trial was shown to be flawed. The reasoning of the primary judge was defective. The proper course was to order a retrial generally. That is the course that this Court should now adopt.

Orders

88 The appeal should be allowed in part. Paragraphs 2 and 3 of the orders of the Full Court should be set aside. In place of those orders, this Court should order that the proceedings brought by the respondent against the appellants be remitted to the District Court for retrial. As each party has partly succeeded and partly failed in this Court, no order should be made for the costs of this appeal.

89 HAYNE J. The respondent, Mr Arturo Della Maddalena, was born in Italy in January 1943. He came to Australia in August 1961 and, in September that year, began work at the Wittenoom asbestos mine and mill. Mr Della Maddalena worked in the mine and in the mill at Wittenoom, on and off, for a total period of about three and a half years until operations at Wittenoom were closed at the end of 1966. In the course of his employment he was heavily exposed to dust containing asbestos.

90 In 1994, Mr Della Maddalena commenced an action against the appellants in the District Court of Western Australia claiming damages for personal injury. He alleged that the Wittenoom mine and mill had been owned, occupied or managed by one or other of the appellants. The second appellant, Midalco Pty Ltd, admitted that it had owned, occupied or managed the mine and the mill. The first appellant, CSR Ltd, denied that it had owned, occupied or managed the mine or the mill but no issue in this appeal turns on that question. In his amended statement of claim, Mr Della Maddalena alleged that by reason of the exposure to asbestos in the course of his employment, he had suffered, and would continue to suffer, injuries as a result of which he was permanently incapacitated. Five forms of injury were alleged: asbestosis, pleural disease, respiratory degeneration, pain and breathlessness, and psychological reaction.

91 At trial, Mr Della Maddalena's claim was dismissed with costs. The trial judge (O'Sullivan DCJ) found that "the evidence does not warrant the conclusion that as a result of his exposure to asbestos the plaintiff has suffered any physical or psychiatric injury"[92].

92 Mr Della Maddalena appealed to the Full Court of the Supreme Court of Western Australia. That Court (Steytler, Templeman and Wheeler JJ) allowed the appeal[93], holding that the trial judge should have found that Mr Della Maddalena had suffered a psychiatric injury. The Court ordered that there be judgment for the plaintiff against the second respondent, Midalco, for damages to be assessed, and that the issue of the claim against CSR be remitted to the trial judge. By special leave, CSR and Midalco now appeal against those orders. In order to understand the issues that arise in the appeal to this Court, it is necessary to say something more about the facts and about the decisions in the courts below.

93 At trial, Mr Della Maddalena gave evidence that he first became aware that exposure to asbestos may have been dangerous some time before 1980. His brother (or step-brother), Walter, had worked at Wittenoom and in 1988 died of

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92 *Della Maddalena v CSR Ltd* [2002] WADC 260 at [107].

93 *Maddalena v CSR Ltd* [2004] WASCA 231.

mesothelioma. Watching the deterioration in his brother's condition caused Mr Della Maddalena to consult his general medical practitioner. He was referred to Professor A W Musk, a respiratory physician. Thereafter, Mr Della Maddalena consulted Professor Musk on a number of occasions during the succeeding years. He was referred to other respiratory physicians and various diagnostic tests were undertaken.

94 Mr Della Maddalena gave evidence that, after about 1990, he started to experience some shortness of breath, chest pain and tiredness. He said that he became increasingly worried about his condition and the reports of his treating doctors tendered in evidence remarked upon what appeared to them to be symptoms of depression. Mr Della Maddalena's general practitioner referred him to a psychiatrist and he consulted a clinical psychologist. Subsequently, Mr Della Maddalena consulted, and was treated by, Professor G A German, a consultant physician in psychological medicine and he was also examined by three other psychiatrists, Dr J Penman, Dr P W Skerritt and Dr S D Febbo. There was, therefore, a very considerable body of material available to be called at the trial concerning the physical and psychiatric condition of Mr Della Maddalena.

95 A consistent theme running through all the medical evidence was that Mr Della Maddalena had complained to the doctors of breathlessness and chest pain. From at least the late 1990s he described these symptoms as interfering with his ability to carry out many (sometimes any) significant physical activities.

96 Videotapes were tendered in evidence at trial which, it was submitted, showed Mr Della Maddalena undertaking activities inconsistent with his suffering the symptoms of breathlessness and pain he reported to medical practitioners. These videotapes were compiled from much longer videotapes of surveillance that had been undertaken. The trial judge was evidently persuaded that what was shown on the videotapes tendered in evidence was not consistent with Mr Della Maddalena suffering from breathlessness or chest pain. He concluded that "the claim that [Mr Della Maddalena] now suffers from breathlessness and chest pain should not be accepted". Three reasons were given in support of that conclusion. First, there was the videotape evidence. Secondly, the trial judge contrasted the evidence which Mr Della Maddalena gave at trial, to the effect that he had first suffered from breathlessness in or after 1990, with notes kept by the Perth Chest Clinic of consultations with Mr Della Maddalena from 1968 onwards. Those notes recorded that Mr Della Maddalena had complained on a number of occasions of shortness of breath and, at least once, of pain in the left side of the chest. Thirdly, the trial judge referred to evidence given by Professor Musk that the results of lung function tests of Mr Della Maddalena were "within the normal range".

97 All of the psychiatrists who gave evidence at the trial had expressed the opinion that Mr Della Maddalena was suffering from a psychiatric illness. At the risk of undue abbreviation of the opinions, each had concluded that Mr Della

Maddalena was suffering from a major depression associated with significant anxiety. Each had expressed an opinion attributing this condition to his concern about the consequences of his exposure to asbestos. Each founded the diagnosis, in important respects, upon Mr Della Maddalena's description of his incapacities.

98 Dr Febbo, who had been retained by CSR and Midalco to assess Mr Della Maddalena's condition, gave evidence at trial that the diagnosis he had originally made (of "a partially treated Major Depression") was based on the premise that Mr Della Maddalena's history was reliable. He said that he considered that there were inconsistencies between that history and what he, Dr Febbo, had observed when looking at the video surveillance tapes. Dr Febbo concluded, in effect, that because of his concern about the veracity of the history Mr Della Maddalena had provided, he could no longer adhere to the opinions he had earlier expressed about Mr Della Maddalena's psychiatric condition. By contrast, neither Professor German nor Dr Skerritt considered the activities that were shown on the videotapes required any modification of the opinion each had formed, that Mr Della Maddalena was suffering from a psychiatric illness.

99 The trial judge, having concluded that the videotapes demonstrated that Mr Della Maddalena was capable of a much greater level of activity than that claimed by him, said that he found the views expressed by Professor German and Dr Skerritt to be "puzzling". Rather, he concluded, "the opinion of Dr Febbo is to be preferred".

100 Exactly what the trial judge meant by saying that the opinion of Dr Febbo was to be preferred may be open to some doubt. What Dr Febbo had said was that if Mr Della Maddalena's history was accurate, he was suffering a major depression and anxiety. If, however, Mr Della Maddalena's history was not accurate, Dr Febbo could not make that diagnosis. The better view may be that the trial judge is to be understood as holding that Mr Della Maddalena had failed to discharge the onus of proving that he suffered the psychiatric injury of which he complained because Mr Della Maddalena had failed to prove that he had been experiencing the symptoms which he had reported to medical practitioners.

101 The principal reasons of the Full Court were given by Templeman J. His Honour characterised the trial judge's decision as turning upon the view that the trial judge had formed about the credibility of Mr Della Maddalena. Having referred to a number of decisions of this Court including *Fox v Percy*[94], *Devries v Australian National Railways Commission*[95] and *Pledge v Roads and Traffic*

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94 (2003) 214 CLR 118.

95 (1993) 177 CLR 472.

Authority[96], Templeman J identified three matters as underpinning the conclusions reached by the trial judge. Those matters were: first, what was seen as a significant inconsistency between the degree of Mr Della Maddalena's claimed disability and his actual disability; secondly, the apparent disconformity between what Mr Della Maddalena said in evidence about the time at which symptoms of breathlessness first appeared and what was recorded in the notes of the Perth Chest Clinic; and, thirdly, inaccuracies in the history which Mr Della Maddalena had given about the death of his brother and, in particular, whether Mr Della Maddalena had introduced his brother to working at Wittenoom. Because trial of the action finished on 9 April 2002, and judgment was not delivered by the trial judge until 17 December 2002, Templeman J concluded that demeanour could have played no significant part in the trial judge's deciding whether to accept Mr Della Maddalena's evidence.

102 It may readily be accepted that the Full Court was in as good a position as the trial judge to decide what the video surveillance evidence showed. The Court could and did view the tapes for itself. It is not so readily apparent that all of the other criticisms made of the trial judge's reasons were soundly based. In particular, it is not right to say that the trial judge did not give any reasons for reaching his conclusion that the videotapes showed that Mr Della Maddalena was capable of a much greater level of activity than he had claimed. The trial judge had described, in some detail, the scenes which he considered demonstrated a significant ability to engage in physical activities, including lifting and digging.

103 Of determinative significance, however, to the disposition of the appeal to this Court, is the basis upon which the Full Court decided the conflict between the evidence given on the one hand by Professor German and Dr Skerritt and on the other by Dr Febbo.

104 Having concluded that the Full Court was in as good a position as the trial judge to determine Mr Della Maddalena's credibility for itself, Templeman J said that he inferred that, but for the three matters upon which the trial judge founded his adverse view of Mr Della Maddalena's credibility, the trial judge would have accepted Mr Della Maddalena's evidence and "in consequence, Professor German's diagnosis and prognosis". Being of the opinion that the three matters upon which the trial judge founded his view were not soundly based, Templeman J concluded that Mr Della Maddalena's evidence should be accepted.

105 If the Full Court was right to conclude, as it did, that Mr Della Maddalena's account of his symptoms should have been accepted, no process of inference about which expert evidence the trial judge would have preferred was necessary or appropriate. First, the question was one for the Full Court to resolve

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96 (2004) 78 ALJR 572; 205 ALR 56.

for itself. Secondly, and no less importantly, on the hypothesis that Mr Della Maddalena's account of his symptoms should be accepted, the psychiatric evidence was all one way. In particular, Dr Febbo had given evidence that, if Mr Della Maddalena's history was reliable, he was suffering a major depression associated with significant anxiety. There was, on this hypothesis, no dispute to resolve.

106 It is nonetheless important to examine how the Full Court resolved what it saw as the differences between the opinions expressed by the psychiatrists. The Full Court had earlier said of Professor German that he "is well known to the Court as an eminent psychiatrist of over 40 years' standing". The reasons continued:

> "That is not to say he is infallible. However, a diagnosis and prognosis given by Professor German undoubtedly carries considerable weight. That is particularly so in the present case, having regard to the extent of Professor German's involvement with [Mr Della Maddalena]."

(Professor German had seen Mr Della Maddalena about every six weeks for a period of four to five years.) Dr Skerritt was described as "also well known to the Court as an eminent psychiatrist of some 30 years' standing" whereas "[i]n contrast to Professor German and Dr Skerritt, Dr Febbo was a much less experienced psychiatrist".

107 These references to two of the witnesses as "well known to the Court" and the comparison drawn between those two witnesses on the one hand and Dr Febbo on the other cannot be dismissed, as Mr Della Maddalena submitted they should be, as mere asides irrelevant to the reasoning adopted by the Court. Rather, the comparison that was drawn in this way informed the conclusion reached by the Full Court, that the doubts expressed by Dr Febbo in evidence about the veracity of Mr Della Maddalena's history (doubts provoked by viewing the surveillance videotapes) should be set aside in favour of accepting the opinions of Professor German and Dr Skerritt that Mr Della Maddalena was suffering from a psychiatric illness. That process of reasoning was erroneous.

108 The reliance on some witnesses being "well known to the Court" constituted a breach of procedural fairness. The Full Court acted on material that was not in evidence and was not the subject of argument[97].

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97 *Stead v State Government Insurance Commission* (1986) 161 CLR 141; *Australian and Overseas Telecommunications Corporation Ltd v McAuslan* (1993) 47 FCR 492.

109 That is reason enough to conclude that the Full Court's orders must be set aside. (It was not submitted that the making of those orders was otherwise inevitable[98].) But there are other, more fundamental, reasons to conclude that the Full Court's reasoning was erroneous. At trial, and on appeal, one of the important questions was whether Mr Della Maddalena was an accurate historian. Did he, as he had reported to those doctors who had examined him, suffer from debilitating breathlessness and chest pain? If he suffered from those symptoms, what was their cause? If there was shown to be a physical cause for those symptoms, he would have established his claim to have suffered physical injury. But if he suffered those symptoms, and there was, as the trial judge found to be the case, no physical cause for those symptoms, the psychiatric evidence was that exhibiting the symptoms of breathlessness and chest pain, when coupled with other matters revealed on psychiatric examination, would warrant the diagnosis of a psychiatric illness. What, if anything, did the surveillance evidence say about these matters?

110 Mr Della Maddalena's claim to have suffered psychiatric injury did not depend upon his demonstrating a physical cause for the symptoms he said he suffered. Professor German gave evidence that Mr Della Maddalena's mood varied, that his experience of symptoms varied, and that he could be distracted from his morbid thoughts. The Full Court rightly concluded that neither the results of certain lung function tests falling within normal range nor the entries in early chest clinic histories demonstrated that Mr Della Maddalena had not suffered *psychiatric* injury. But likewise it by no means follows from the demonstration, by the surveillance tapes, of some capacity to perform some physical tasks, that Mr Della Maddalena was shown not to have suffered psychiatric injury. Whether he had suffered such an injury was a question that could be decided only upon the whole of the evidence that was given. In particular, it was a question that required an examination and comparison (so far as the evidence allowed) of *why* the psychiatrists who gave evidence differed in their opinions about the significance that was to be given to what was shown on the surveillance tapes. For the difference in opinion was important for what it revealed about whether Mr Della Maddalena had suffered an injury of the kind he alleged. But this analysis and comparison was not undertaken in either the District Court or the Full Court. Rather, the question was answered by expressing a "preference" for the evidence of one or more witnesses over the evidence of another or others.

111 At no stage in these proceedings has CSR or Midalco submitted that the diagnoses made by Professor German and Dr Skerritt and, subject to the qualification about the veracity of Mr Della Maddalena's history, made also by Dr Febbo, would not constitute a psychiatric illness of which the exposure to

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98 cf *Stead* (1986) 161 CLR 141.

asbestos at Wittenoom was a cause. Thus it has never been submitted in these proceedings that feelings and experiences of Mr Della Maddalena not capable of objective verification (like anxiety, fear and panic, coupled with breathlessness and chest pain having no physical cause) could not found a conclusion that he had suffered a compensable psychiatric injury.

112 That approach to the matter by CSR and Midalco may depend upon identifying compensable psychiatric injuries as including (perhaps being limited to) those conditions that a psychiatrist classifies as a psychiatric illness. As I sought to point out in *Tame v New South Wales*[99], abandoning reference to the hypothetical person of reasonable or ordinary fortitude, and focusing upon the psychiatrist's understanding of what has brought about the patient's condition, may stretch the bounds of recovery beyond what is socially useful. Especially is that so where, as here, the psychiatrist's assessment of whether a patient suffers a psychiatric illness depends, in critically important respects, on what the patient reports of his or her symptoms. Whether or not that is so, there is another consequence of immediate importance to the present case. Once the claim of physical injury was rejected, the focus of the inquiry had to shift from objective criteria to the subjective feelings and experiences of Mr Della Maddalena. The question became whether he had experienced those feelings and events. And that is a question which, if it were to be answered "no", would most likely reveal that Mr Della Maddalena had told lies, both to the doctors and in his evidence, for it was never suggested that he could be mistaken about these matters.

113 The focus upon subjective feelings and experiences might also be thought to have raised questions about the admissibility of evidence. What did the doctors' evidence of the history of symptoms (so many of which were subjective and were and could be recounted only by Mr Della Maddalena) establish? Did that evidence prove only that the history described formed the basis for the opinion expressed by the doctor giving evidence[100], or were any of the statements made to the psychiatrists, or other doctors, to be treated as original evidence[101]? And what weight, if any, was to be given to the expression of opinion by Professor German that Mr Della Maddalena "is not … malingering, nor … suffering from … a 'factitious disease' … but is simply … terrified" or the contrary expressions of opinion by Dr Febbo doubting the veracity of Mr Della Maddalena's history? None of these questions was directly explored in the proceedings below or was examined in the argument of the appeal to this Court. Rather, as the reasons in the courts below and the reasons of the other members

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99 (2002) 211 CLR 317 at 415-418 [292]-[296].

100 *Ramsay v Watson* (1961) 108 CLR 642 at 648.

101 cf *Gordon v The Queen* (1982) 41 ALR 64.

of this Court reveal, argument has proceeded on the footing that what the expert witnesses said about the veracity of Mr Della Maddalena's accounts of what he could and could not do was evidence that was important in deciding, even determinative of, whether he was suffering a psychiatric injury.

114 For the reasons stated earlier, the basis upon which the Full Court acted in forming the preference it expressed was not open to it. It follows that the appeal to this Court should be allowed. The appropriate order to make, consequential upon allowing the appeal to this Court, is to order that there be a new trial of the action. The considerations mentioned earlier in these reasons would suffice to compel that conclusion. It is as well to add, however, that I substantially agree with what Kirby J has said on the subject of an order for a new trial. The Court being divided in opinion as it is, I join in the proposal that there be no order as to the costs of the appeal to this Court but that the order for the costs of the appeal to the Full Court made by that Court in favour of Mr Della Maddalena should stand, together with the order allowing the appeal to that Court.

CALLINAN AND HEYDON JJ.

115 The question in this appeal is whether an intermediate court of appeal erred in reversing findings on credibility by the trial judge, and hence in reversing the decision of the trial judge to dismiss the respondent's action framed and litigated as it was, for damages for personal injuries.

Facts and previous proceedings

116 The respondent brought an action in the District Court of Western Australia against the appellants, alleging that, while employed by one or other of them at an asbestos mill in Wittenoom, Western Australia between 1961 and 1966, he had been negligently exposed to asbestos, and, as a result, had suffered asbestosis, pleural disease, respiratory degeneration, pain and breathlessness and psychiatric injury. He claimed that the psychiatric injury was caused by anxiety about his exposure to the asbestos, and his belief that it had caused him to suffer asbestosis.

117 The respondent's older brother (or stepbrother) migrated from Italy to Australia. At Wittenoom he found work at the mill. The respondent followed him some years later when he was 18 years old. His brother introduced him to the work at Wittenoom where he worked intermittently from 1961 to 1966. During that period he was exposed to asbestos dust. The respondent then undertook other employment as a labourer and later as a gas fitter. He retired in 1995 when he was 52.

118 The respondent became deeply concerned about the dangers of exposure after his brother died of mesothelioma in 1988. He began to experience physical symptoms. He said that they included shortness of breath and chest pains.

119 In order to understand the issues at trial, and on appeal, it is necessary to scrutinize the medical evidence, and the complaints that the respondent made to the doctors who examined him from time to time.

120 But before doing so, it is also relevant to know that the respondent was kept under surveillance for long periods before the trial by observers, including a video cameraman, and that he was filmed undertaking various activities by the latter. In all, some 150 hours of film were produced, but only 82 minutes of it tendered in evidence. The complete film was available however to the respondent's lawyers for inspection and tender on his behalf to the extent that he might wish to use it to advance his case.

121 As well as relying upon oral evidence of psychiatrists who had examined the respondent, the parties relied upon written reports which they had made over a long period. Evidence of the respondent's statements generally to the doctors

from time to time, and in particular a statement to one of them that his brother followed him to Australia to work at Wittenoom, assumed some importance at the trial.

122 In a report dated 19 March 1997, Mr George Burns, clinical psychologist, recorded the following as part of the history which the respondent gave him: "His stepbrother, whom he encouraged to come out from Italy and work with him at Wittenoom, died of asbestosis in 1988. Mr Della Maddalena continues to remain guilty about exposing his brother to those conditions." Dr Penman picked that statement up and recorded it in a report he prepared. The brother was eight years older than the respondent.

123 One of the psychiatrists who examined the respondent was Dr Febbo. His qualifications were proved, and are set out below.

124 On 23 December 1996, after two interviews with the respondent, Dr Febbo recorded in a report that the respondent had told him that he felt constantly tired and had said "I was doing two jobs, now I can't even do my gardening." Dr Febbo recorded that the respondent said he was unable to go to the football because "he cannot walk from the car park to the field" and had ceased to enjoy fishing, because "he now gets tired 'casting and walking backwards and forwards'." In that report, Dr Febbo concluded, on his stated assumption of the veracity of the respondent, that it seemed that the respondent had started developing depressive symptoms, followed by an escalating level of incapacity, after he had experienced physical symptoms while working for his last employer, and after the death from asbestosis of various people to whom he had been close.

125 Professor German, another well-qualified and very experienced psychiatrist, reported on the respondent on 16 October 1998. He recorded there the findings of thoracic specialists who had examined the respondent, that there was no clinical or radiological evidence of asbestos-related disease in the lungs although the presence of asbestos fibres indicated exposure to asbestos. Professor German also noted that, on retirement, the respondent had "shut down most of his external activities, including [fishing and other leisure activities] which he had previously enjoyed." It was the Professor's opinion that:

> "[t]echnically [the respondent had] a severe chronic anxiety state; a secondary depressive illness of the adjustment disorder type; and [was] enmeshed in a sick role driven by his total belief in his ongoing and progressive pathology with death not far off. ... [H]e has compelling reality and emotional reasons for his belief. ...
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> These psychiatric disabilities have exacerbated his physical symptoms of breathlessness and pain, and the unfortunate development of

objective evidence of pulmonary disease, albeit mild, has more firmly established, if that were necessary, his convictions of ill health."

126 Brief reference may be made to some evidence by a thoracic physician Dr Lee who examined the respondent. In March 2000, he said that the respondent "impresses as a physically healthy but self-engrossed individual whose decision to retire could not be justified as a result of recognisable physical impairment." By that time Dr Lee had looked at the video film of the respondent, whose activities as shown on it were of a quite vigorous kind, and included digging with a shovel. Dr Lee also commented that the respondent was able to bend and move freely, and smoke a cigarette.

127 By August 2000, Dr Febbo had also seen the video tapes of the respondent. He made this detailed report about them:

"*Tape 1: 25 September 1997*

...

On a segment dated 19 September 1997 [the respondent] is seen in a yard which appears to be an area where some construction is going on. He is talking to another person. He is seen walking and bending. He is then seen pushing a wheelbarrow. He then opens the back of the hatchback and appears to be transferring the contents of the wheelbarrow into the back of the hatchback. Whilst he is doing this he is leaning forward in order to get the object into the vehicle. He is then seen closing the back door of the hatchback and pulling the wheelbarrow back into the construction site. He is seen walking and is then seen behind the truck talking to a man. He is seen pointing.

On a segment dated 20 September 1997 [the respondent] is seen at the back of the hatchback, again with the back door open and he removes a box and carries it. He is seen carrying another object from the car and he is then seen walking near the car. There is then another scene in which [the respondent] is walking next to what appears to be a brick wall.

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Tape 2: 15 December 1997

On a segment dated 11 December 1997 [the respondent] is seen walking out of a store and going to a car. He gets into the driver's side. The vehicle is then seen and revealed to be the hatchback. He is seen opening the back door of the hatchback and removing a large coil. He is seen bending down on the other side of the car. He is then seen bending down and manipulating something on the ground, but the car obscures

him. He is then seen standing, whilst removing a hose from the ground. He is observed putting the hose into the back of the hatchback and he is then seen with a spade, again going to the other side of the car. He is then seen digging, removing large squares of grass. As he is doing this he is observed bending down in order to dig the hole deeper. He continues to dig and then walks over to the car, shutting the back door. He reverses the vehicle and drives off.

Later, he is seen crouching down, doing something inside the hole he has just dug. It appears that he is working on a reticulation system. He continues to crouch down working inside the hole. He is then seen walking over to his vehicle and then to a tap. He returns to the vehicle where he removes something from the back, which appears to be a spanner. He then goes to the hole and manipulates something inside the hole. He is then seen standing and then crouching down again at the hole. He is seen removing some rags and he continues to work in the hole. He is then observed walking to his vehicle, putting objects into the back of the vehicle and then getting into the driver's side, backing out and driving off.

On another segment also dated 11 December 1997 [the respondent] is seen walking in the front yard of the house. He is observed crouching down and then walking again. He is seen standing, looking at the hole. He then picks up the spade and does some more digging. As he does so, he is bending forward. He is seen walking and then continuing to dig again. He stands and then resumes digging. He then crouches down, again doing something in the hole. He is then seen standing and walking around the yard and then moving the hose about. He removes the hose, and then resumes working where the hole is, this time returning the grass and thus covering up the hole. He is seen working with a spade and bending down removing grass. The car is then seen being backed out and he then alights from the vehicle and crouches down doing further work in the garden.

Tape 3: 14 March 1998

On this tape, which was filmed on 12 March 1998, [the respondent] is seen walking in a car park standing near a red vehicle. He is seen opening the door and entering the passenger side. The car is then driven off. He is seen walking across a road carrying an envelope and getting into the hatchback. A man is then seen adjusting a trailer and walking onto the verge. This person appears to be [the respondent], although the picture is not clear. The trailer is seen in the driveway and it is backed out. There is footage of the road, and in the distance someone is seen, possibly emptying out the trailer. Because of the distance, I am unable to recognise the person clearly. The person is seen removing ropes from the

trailer. He is seen bending over and crouching next to the trailer. There is then footage of a man walking.

Tape 4: 29 March 1998

On this tape, which was filmed on 23 March 1998, a man is seen moving a large object and then, with the assistance of another man, putting the object into a large bin. The two are seen walking near the bin. The car is then seen being backed out. The distance makes recognition of either of the men difficult.

[The respondent] is seen walking in a car park. He is seen entering a motor vehicle and then driving off.

Tape 5: 18 November 1999

On a segment of the tape dated 16 November 1999 [the respondent] is seen crouching down doing something in the garden. The sprinklers then go on. He is seen walking around and bending down. He is then seen walking near the house. He is then observed removing a shovel from the back of a 4-wheel drive and digging. He then walks to the other side of the driveway and resumes digging. He is then seen walking on the driveway and digging again. He appears to be digging quite vigorously. He is then seen walking towards the house and returning to inspect his work. He is then seen digging again.

[The respondent] is observed standing near a 4-wheel drive vehicle smoking. He is then seen walking near a building and then he appears to be cleaning outdoor furniture. It appears that this is a café-lunch bar. He is then seen carrying a child into the back of a 4-wheel drive vehicle. He is then seen getting into the driver's side of the vehicle.

On a segment of the tape dated 17 November 1999 [the respondent] is seen putting what appears to be a hose in the back of the 4-wheel drive and then getting into the vehicle."

Dr Febbo then made a summary of his observations and expressed his opinion of the respondent's condition.

"[The respondent] is seen performing a number of activities. In particular I note that on a number of occasions he is observed bending and digging. Whilst in parts of the video evidence it was not possible to identify him clearly, there is considerable footage showing [the respondent] performing a number of activities including digging, gardening, bending and walking. He appears comfortable whilst he is performing these tasks.

> In contrast to the above, on reviewing my report dated 23 December 1996, which was based on my interviews of 3 September 1996 and 26 November 1996, [the respondent] described being in constant pain that was made worse when he leaned forward. It is noteworthy that he told me 'I am not doing anything because of pain' and that, on doing minor tasks, he starts 'puffing, sweating and getting out of breath.' He told me he was unable to go to the football because he could not walk from the car park to the field and he added that, at the time I saw him, it had been 'two years' since he had last gone to the football. He also said that he was unable to fish. I also note that [the respondent] made the comment 'I was doing two jobs, now I can't even do my gardening.'
>
> In short, assuming that there had not been a considerable improvement in [the respondent's] condition between the time of my assessment and the time over which the video surveillance tapes were filmed, I am unable to reconcile what I observed on the tapes with the history with which I was provided during those interviews in 1996.
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> ...
>
> I have considerable concerns about the veracity of the history with which I was provided in relation to [the respondent's] ability to undertake physical activities, and it follows that the history with which I was provided in relation to symptoms, both physical and psychiatric, also raises concern in relation to veracity. As I said in my report, my mental state examination findings did not indicate any impairment and, in arriving at a psychiatric diagnosis, the history is of course critical. I can no longer hold the opinion I expressed in my report dated 23 December 1996 with an acceptable degree of certainty."

Dr Febbo added that it was fair to conclude that the respondent retained the ability to be selective in circumstances in which he adopted "the sick role".

128 Nonetheless, the respondent persisted in complaining to Dr Febbo that he was significantly physically disabled. In January 2001, he told this doctor that he was unable to do "everything just about". The respondent said that sometimes when he bent down to fix a sprinkler, he experienced pain, "can't breathe, start sweating". He added that he may do "half an hour, not even that" of weeding. He claimed that he was able to do less then than he had been able to do in 1996. Dr Febbo was of the view that the respondent was suffering a Major Depression associated with significant anxiety. But he continued to be concerned about the inconsistencies between the respondent's activities as depicted on film, and his asserted level of incapacity. Dr Febbo concluded his assessment by saying that the diagnostic statements that he had made were based on the premise that the respondent's history was reliable.

129 The respondent's solicitors obtained access to the video tapes. They caused them to be shown to Professor German who was dismissive of them. On 5 July 2001, he said that he did not think that there was anything in the video footage that he had seen that shed any light on the respondent's fundamental mental state which he had described in his previous reports. Dr Bremner, a respiratory physician, made a report upon the respondent's condition to his solicitors on 12 February 2002. He recorded in it that the respondent had told him that he had smoked for 20 years but had quit completely in 1989. On the other hand, the respondent told Dr Febbo in January 2002 that he smoked about six cigarettes a day in an attempt to relax. When he reported on this occasion, Dr Febbo adhered to the opinion he had last expressed about the respondent's condition.

130 Dr Skerritt was another of no fewer than four psychiatrist witnesses who examined and reported on the respondent. (Dr Gidley, a fifth psychiatrist, was mentioned in evidence but was not a witness at the trial.) In January 2001, Dr Skerritt wrote that although the respondent had definite asbestosis it was of such a mild degree as to be insufficient to cause physical symptoms. He gave this opinion:

> "I think that there are several factors increasing the impact of relatively mild asbestosis in [the respondent]. Breathlessness, which is ultimately due to hyperventilation, with tightness across the chest and pounding heart, are very typical symptoms of anxiety which are interpreted as features of asbestosis according to [the respondent's] understanding of it. The symptom of worry is very prominent in anxiety disorders and particularly in his case. It is little more than commonsense to say that the more one worries about a symptom the worse it gets. For example, in any normal person the experience of a toothache is worse at night than it is in the day. I think that this phenomenon is projected to a much greater extent in [the respondent] and, coupled with his relatively poor understanding of the situation for cultural and educational reasons, he now finds himself in the position of complaining of massive physical symptoms quite out of proportion to the physical pathology."

131 In April 2001, after seeing the video footage of the respondent that had been shown to Professor German, he was equally dismissive of it. It was, he wrote, "as unimpressive as [any he had] seen." He added this:

> "When I review my own notes I did not interrogate him on precisely what physical activities he could do and not do, concentrating rather on my attempt to elucidate the rather obscure and heavily somatised psychiatric symptoms which occur in depression.

> My overall impression is that the videotape does not reveal any behaviour, which is in serious contradiction to that which he was claiming as recorded by my colleague. [The respondent] believes himself to be handicapped in a physical way and this is consistent with the demonstration of periods which were never more than a couple of minutes of physical activity interposed by periods of smoking, walking around and leaning on his spade."

132 In his evidence in chief at the trial, apart from some rather non-specific complaints of pain and breathlessness, the respondent said little of his physical, as opposed to his mental state.

133 In cross-examination however, the respondent claimed that he experienced difficulty when he actually had to do some work. He said that he tried to avoid physical activity in order to prevent pain, sweating and breathlessness.

134 The respondent was cross-examined about a statement that he made in evidence in chief, that he spent his days "lazing around the house." When pressed, he claimed not to know what "lazing around the house" meant, although it was a direct response to a question that he had been asked. Sometimes he did however concede that he fixed leaking taps but only apparently at the cost of significant problems, as was the case when any physical exertion was involved.

135 Counsel for the appellants continued to explore the extent of the respondent's physical capacity in cross-examination. She elicited that he did some gardening, that is "[a] bit of pruning, a bit of a clean-up" at a relative's house but not at his own. He said that he did nothing "really physical". If he lifted something, he regretted it afterwards. He denied that he could do "hard work", which he identified as "digging trench[es] and things like that". The respondent agreed that on one occasion he had assisted a distant relative to lift a washing machine as shown on video tape.

136 Counsel for the appellants fairly exhaustively put to the respondent for his comment, the various statements that he had made to doctors from time to time, that he was severely physically incapacitated. She asked him to reconcile them with his apparent ability to do the various physical tasks which, on his account, should have been beyond his physical capacity. It is true to say however that when he admitted to doing them, he invariably claimed that he did them infrequently, that they were not really very heavy tasks, and that he suffered in consequence of them.

137 The respondent was shown some 80 or so minutes of the 150 or so hours of video tape which had been taken of him. With respect to his activities as they appeared there, he was forced to concede that he did undertake them without any problems, and apparently painlessly. At one point, the respondent accepted that

on 11 December 1997, he did some digging, bending over repeatedly and crouching, looking into holes in the ground that he had dug, and, furthermore, that he had done this for long periods, indeed that he had spent an entire morning bending and crouching, and shovelling dirt in summer-time.

138 Part of the appellants' case was that the respondent was leading a relatively useful and active life, fairly regularly maintaining and assisting in the repair and construction of houses in which members of his family were interested. Again, it is not unfair to the respondent to say that when confronted with video evidence which suggested this to be so, he was forced to concede that there was some truth in the appellants' contentions, although at all times he persisted in minimizing the extent and demands of such exertions as he undertook them.

139 The trial judge, O'Sullivan DCJ, considered and rejected all of the respondent's claims of injury, and of any afflictions of pain and breathlessness. In doing so he was influenced by the negative results of the tests of lung function made by Professor Musk, and the opinions of other respiratory specialists that no relevant abnormalities were discernible.

140 The trial judge further noted that the respondent had complained of pain and breathlessness for a very long time, citing clinical notes from 1968, 1971, 1977, 1979 and 1983. He was also influenced in deciding the case as he did, by the video tapes of the activities undertaken by the respondent before the trial, and the fact that the respondent had been able to continue to work for many years after he had left the mill, that is, until 1995. He summarized his conclusions in this way:

> "In my opinion the absence of any objective evidence to support the [respondent's] complaints in this case is a real cause for concern. In addition, in my view, the evidence of the video tapes, the results of the lung function tests, the notes from the Chest Clinic and the evidence of inaccuracies in the history given by the [respondent] concerning the death of his brother and the onset of symptoms of breathlessness add weight to that concern. Against this background the conclusion to which I have come is that the opinion of Dr Febbo is to be preferred. In my view the [respondent] has not established that he has suffered any psychiatric injury."

Appeal to the Full Court of the Supreme Court

141 The respondent successfully appealed to the Full Court of the Supreme Court (Steytler, Templeman and Wheeler JJ). The principal judgment was given by Templeman J with whom the other members of the Court agreed.

142 At the beginning of the Full Court's reasons, the Court said that, in essence, the claim was based on the diagnosis of anxiety and depression made by a number of psychiatrists. That diagnosis was founded substantially on the respondent's history as he described it. It is important to notice also that the Full Court observed that the trial was conducted on the basis that the respondent had in fact suffered psychiatric injury, which we take to mean psychiatric injury only. The Full Court saw the central issue in the appeal as being whether the trial judge erred in his assessment of the evidence, so as to permit the Full Court to reverse the trial judge's decision, and to remit the matter to him for an assessment of damages. The Full Court then summarized much of the medical evidence, pointing out that Professor German had seen the respondent at six-weekly intervals over a period of four or five years.

143 The Full Court then said this:

> "The consensus of the relevant expert witnesses (other than Dr Febbo) was that the [respondent] was suffering from a psychiatric injury. Although the witnesses expressed themselves in different ways, the essence of the diagnosis was that as a result of the [respondent's] exposure to asbestos and of the traumatic effect on him of the death of his brother and others close to him, he had become so anxious about his own fate that he had developed physical symptoms to an extent far greater than those caused by the relatively minor degeneration of his respiratory system. In other words, the [respondent] believed himself to be affected by asbestosis to a far greater extent than he actually was. The true diagnosis was anxiety or depression, or both, to such an extent as to constitute what Professor German described as 'a recognisable psychiatric injury – of some substance'."

144 That passage was followed by this one which was the subject of criticism by the appellants in this Court:

> "Professor German is well known to the Court as an eminent psychiatrist of over 40 years' standing. That is not to say he is infallible. However, a diagnosis and prognosis given by Professor German undoubtedly carries considerable weight. That is particularly so in the present case, having regard to the extent of Professor German's involvement with the [respondent]."

Quite apart from the criticisms made by the appellants, this passage goes beyond the evidence. According to Professor German's evidence in chief, he had been "a consultant physician in psychological medicine" for 36 years. In cross-examination he said his training finished in 1965. And there was evidence that at the time of the trial he had recently retired.

145 After quoting a deal of Professor German's evidence, the Full Court turned to the evidence of Dr Skerritt. Again it made an observation that was the subject of complaint in this Court.

> "Dr Skerritt is also well known to the Court as an eminent psychiatrist of some 30 years' standing."

Apart from the appellants' criticisms, this passage also goes beyond the evidence, which said only that he had practised as a psychiatrist for nearly 30 years.

146 Dr Skerritt's evidence too was then quoted and discussed at some length.

147 The Full Court chose to prefer Professor German's and Dr Skerritt's evidence to that of Dr Febbo. It said:

> "In contrast to Professor German and Dr Skerritt, Dr Febbo was a much less experienced psychiatrist. I say that without intending the slightest disrespect to Dr Febbo but simply to record the fact that as at the trial, he had been a specialist in that field for three years, albeit a psychiatric registrar for some years previously."

That was not quite accurate or complete. Dr Febbo graduated in medicine in 1984. He was a resident and senior resident medical officer in 1984-1986. He was a psychiatric registrar from 1987 to 1992 in various Perth hospitals, a senior registrar (forensic) in 1992 at Long Bay Prison, Sydney, and a director of hospital psychiatry and consultant psychiatrist in Cairns Base Hospital from 1993 to 1995. From 1995 to the date of the trial in 2002 he had been a consultant psychiatrist both at Royal Perth Hospital and in private practice, and Head of the Western Australian Transcultural Mental Health Centre. He had also been a Fellow of the Royal Australian and New Zealand College of Psychiatrists from 1993. Hence it was quite incorrect to say that "as at the trial" Dr Febbo had only been a specialist psychiatrist for three years, even though the first time he saw the respondent was three years after he began his Cairns appointment.

148 A further basis for the Full Court's preference for Professor German's and Dr Skerritt's evidence and conclusions over those of Dr Febbo seems to have been that Dr Febbo's adverse view of the respondent and his account of his complaints was only formed following his viewing of the tapes.

149 The Full Court then went to the evidence of Professor German and Dr Skerritt regarding the video film. The Full Court quoted Dr Skerritt's opinion of 2 April 2001 that the film was as unimpressive as he had ever seen, and that the respondent's behaviour on film had no relevance whatsoever to his psychiatric symptoms as described. The Full Court also referred to Professor

German's opinion a few months later, that the film shed no light on the respondent's fundamental mental state.

150 The Full Court discussed the trial judge's conclusions, one of which was that the respondent had misinformed Dr Penman that he felt guilty about the death of his elder brother because he had induced his brother to come to Australia where he contracted asbestosis and died, when the true position was that the respondent had followed his brother to Australia some years after the latter's arrival in this country. The Full Court next referred to a credibility issue which the trial judge regarded as significant, and resolved against the respondent, that although the objective clinical notes from the Perth Chest Clinic established that the respondent had complained of breathlessness many years before the death of his brother, he had continued to work notwithstanding those complaints.

151 After some further references to the reasons of the trial judge, the Full Court embarked upon a criticism of them. First, it said, the trial judge was not justified in finding that the respondent complained about breathlessness and chest pain before 1989:

> "The records of the Perth Chest Clinic do not record complaints: only symptoms, presumably described in response to enquiry. The [respondent] did not attend the Clinic because he wanted to complain: only for an (approximately) annual check."

152 The other two reasons for the Full Court's rejection of the trial judge's finding in this regard were that the respondent continued to work without difficulty until after 1988, and that there were references in the notes from the chest clinic from 1970 until 1988 to the respondent as keeping well or keeping fit: in short that although there were regular references in the notes to the respondent's worries about exposure to asbestos, it seemed that he "made no real complaint about his symptoms until 1989" on his referral to a doctor by an asbestos disease society.

153 The Full Court was very critical of the way in which the trial judge dealt with the video film, saying this of it.

> "Although the trial Judge said he was satisfied that the video recordings showed the [respondent] was capable of a much greater level of activity than he had claimed, his Honour did not give any reasons for reaching that conclusion.
>
> With all respect to his Honour, this was a serious omission."

The seriousness of the omission, in the Full Court's eyes, is highlighted by two facts. The first is that the Full Court backed up its criticism by extensive

quotation from one of its recent decisions describing the vices and consequences of excessive delay, and the need for more comprehensive reasons where there had been excessive delay[102]. The second fact was that the point was made again at the end of the judgment in rejecting the trial judge's credit findings, which were partly based on what the video recordings showed. The validity of the Full Court's criticism is thus a significant matter in the disposition of the present appeal.

154 It is also plain that the Full Court was concerned about the delay between the conclusion of the trial and the giving of the trial judge's judgment, a period of eight months. This was, the Full Court said, an unacceptably long delay[103], particularly in a case of this kind, where much depended on the judge's impression of the plaintiff. In all of the circumstances, the Full Court was of the opinion that this was a case in which the Full Court was in as good a position as the trial judge to assess and analyze the video evidence in the light of the respondent's history as he described it to his doctors, keeping in mind Professor German's opinion that the respondent's mental state fluctuated and that medication provided some relief. Templeman J, speaking for the Full Court, then said this:

> "In these circumstances, I do not think it appropriate to compare the [respondent's] activities as shown on the video recordings with everything he had ever said to the doctors who had examined him. In my view, the better approach is to compare the [respondent's] description of his symptoms at or as close as possible to the relevant periods of surveillance."

155 Templeman J next summarized his impressions of the video recordings, and offered explanations for apparent differences between what they showed, and the activities which the respondent had said he could not undertake. His Honour explained that when the respondent stated that "he was not doing 'anything'", he was merely using a "figure of speech": that "not doing anything" meant that he was not engaging in regular activity. Templeman J even suggested an alternative: that the respondent's statement in evidence that he was unable to do anything may have been a reflection of his low state at the time, an explanation

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102 *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273 at 283 [27]-[30].

103 Whether the responsibility for the delay is to be attributed to the trial judge is unclear. If the administrative arrangements of the District Court permitted a speedier decision, it can be; if not, the responsibility lies with those having control of those administrative arrangements.

he offered in cross-examination, for a similar statement he made to a doctor in 1996.

156 Templeman J made his own analysis of the video recordings:

> "From my analysis of the video recordings, it appears that during the entire period of the surveillance, the [respondent's] activities were minimal. He exerted himself very little: and on the only occasions when he exerted himself to a greater extent – the two digging incidents – he did so for only a short time. There was much standing and moving slowly about."

157 After summarizing some of the respondent's evidence in cross-examination, Templeman J said this:

> "My conclusion ... is that the [respondent's] evidence was internally consistent and was not inconsistent with the video recordings. With all respect to the trial Judge, I do not accept that the video recordings disclose that the [respondent] was capable of greater activity than he claimed, or than he described to the medical practitioners who examined him. The video recordings therefore provide no basis for doubting the [respondent's] credibility."

158 With respect to the fact that the respondent was recorded as having told Dr Penman that he felt guilty for bringing his elder brother out from Italy, Templeman J, who had not seen or heard the respondent, proffered this explanation:

> "Furthermore, the impression I have is that the [respondent] is a relatively unsophisticated man: an observation made also by Professor German. Having regard to the [respondent's] lack of sophistication, I do think it inconceivable that he would have told Dr Penman (apparently alone among the doctors who examined him) that he felt guilty about bringing Walter from Italy.
>
> I note that in Professor German's report dated 16 October 1998, there is a reference to the [respondent] feeling guilty 'in bringing some of his friends to Australia'. In my view, that was, in all probability, what the [respondent] was attempting to tell Dr Penman."

(In fact, as noted above, it was Mr Burns, not Dr Penman, to whom the statement was supposedly made. Dr Penman narrated it in his report, but derived the proposition from a report by Mr Burns. In evidence Dr Penman expressed the hope that he would have talked about the matter with the respondent, but could not remember whether or not he did.)

159 In the result, Templeman J concluded that the trial judge had erred in making the three credibility findings against the respondent that he did, namely that the tapes showed him capable of much more activity than he claimed, that what he had said to Mr Burns about his brother was not credible, and that there was inaccuracy in his claim only to have experienced breathlessness from 1988. Templeman J concluded that, on the authorities, the Full Court could and should therefore intervene:

> "For the reasons set out above, on the basis of my own assessment of the video recordings, and in the absence of reasons given by the trial Judge to explain his view, I consider that his Honour erred in concluding that there was any significant inconsistency between the degree of the [respondent's] claimed and actual disability.
>
> In relation to the onset of symptoms of breathlessness, I consider that the Judge misinterpreted the records of the Perth Chest Clinic and the effect of the [respondent's] evidence directed to that issue.
>
> In relation to inaccuracies in the history given by the [respondent] concerning the death of his brother, I consider that the Judge's conclusion was 'glaringly improbable'.
>
> I am therefore drawn to the conclusion that in this case, where credibility findings have been based on what I consider to be, with respect, a misinterpretation of the evidence, this Court is in as good a position as the trial Judge to determine the [respondent's] credibility for itself.
>
> I emphasise that the trial Judge's adverse credibility finding is based only on the three matters to which his Honour referred. I infer that, but for those matters, the Judge would have accepted the [respondent's] evidence and, in consequence, Professor German's diagnosis and prognosis. This is not, therefore a case in which difficulties arise such as those referred to in *Pledge v Roads and Traffic Authority*[**104**].
>
> Further, it should be noted that although the trial Judge came to the conclusion that 'the opinion of Dr Febbo is to be preferred', it is not clear, with respect, what Dr Febbo's opinion was. It will be recalled that in the end, having viewed the video recordings, Dr Febbo felt unable to make a diagnosis. But even Dr Febbo appears to have subscribed to the view that the [respondent] was suffering from depression. His opinion appears to have been that the [respondent's] symptoms were not as severe as he claimed.

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104 (2004) 78 ALJR 572; 205 ALR 56.

> In all the circumstances, I consider that the appropriate course would be to set aside the Judge's credibility findings and to substitute a conclusion that the [respondent] is suffering from a psychiatric injury involving anxiety and depression.
>
> It is, of course, necessary for the [respondent] to prove that the [appellants] have caused his psychiatric injury. That was put in issue by the [appellants] in ... their amended defence. The question of causation was not argued on the appeal but I do not think it could be said that the [respondent's] injury was caused by anything other than his exposure to asbestos. Furthermore, it was Professor German's evidence that in the 1960s, it was well known that the possible consequences of exposure to asbestos might lead to a psychiatric condition. Professor German maintained his opinion in cross-examination."

160 The decision of the Full Court was that the matter should be remitted to the trial judge to resolve only two issues, the appellants' respective responsibilities for the mill at Wittenoom, and the damages to which the respondent was entitled.

The appeal to this Court: remitter to the Court of Appeal?

161 It is apparent that the Full Court was influenced, in preferring the evidence of Professor German and Dr Skerritt to the evidence of Dr Febbo, by two matters: that the former two doctors were well known to, and respected by, the Court; and that those two doctors had superior experience to that of Dr Febbo. No other conclusion can flow from the way the Full Court expressed itself about those two doctors and about Dr Febbo.

162 In making submissions about these matters, the appellants placed primary emphasis on a submission that there was a denial to them of natural justice – a proper hearing – in the circumstances. Their argument is correct. Nothing in the appeal books indicates that anyone ever suggested, either during the trial or during the hearing of the appeal, that Professor German and Dr Skerritt had to be accepted because of their greater medical experience and because of the Full Court's acquaintance with them. Had the Full Court made any intimation to either effect, then the appellants may well have been entitled to ask the judge or judges who did so to disqualify themselves. This was an issue that seems to have emerged as such for the first time in the reasons of the Full Court. The appellants had no opportunity of dealing with it. Not only might they have sought a disqualification had it been raised, but also they would no doubt have pointed out that it was a matter upon which evidence might bear. Had greater experience been relied on by the respondent at the trial, the appellants' response might well have been to seek to have the respondent examined by another doctor, or to have another doctor comment upon the respective qualifications and experience of all

of the doctors concerned. It might well have been that the appellants would have sought to make more of Dr Febbo's qualifications, for example, their relative freshness, and perhaps completeness, the uniqueness of his experience, and his bilingual capacities. They could have pointed to the fact that Dr Febbo's qualifications had been put into evidence in some detail, unlike those of Professor German and Dr Skerritt. It is one thing to calculate the years since their training ended and observe what their letterheads say; it is another thing to call them "eminent". Counsel for the respondent noted that neither had been cross-examined on their expertise; perhaps they would have been if the cross-examiner had known that the Full Court thought them to be eminent, and that the Full Court thought that any diagnosis or prognosis by Professor German "undoubtedly carries considerable weight".

163 The appellants indeed advanced a subsidiary submission – that the Full Court's remarks were not merely an insignificant verbal slip, but probably record a predisposition in favour of Professor German in particular, and hence affected the Full Court's preference of Professor German and Dr Skerritt over Dr Febbo. That submission is sound. If the remarks were not intended to be significant, it is unlikely that they would have been made.

164 In short, it is most unfortunate, however the appellants' point is taken, that the Full Court left itself open to an inference that it believed that doctors whom the members of the Court knew, or whose evidence they had accepted in the past, were preferable to a well-qualified doctor new to the scene. For these reasons the decision of the Full Court cannot stand.

165 If that matter rested alone, the appropriate order would be to remit the matter to the Court of Appeal of the Supreme Court of Western Australia for determination of the appeal from the trial judge afresh. However, it does not stand alone, and there are good reasons for restoring the trial judge's orders.

The appeal to this Court: restoring the trial judge's orders?

166 To begin with, the Full Court erred in rejecting the trial judge's findings on credibility in several significant respects.

167 *Did the trial judge give reasons relating to the activity revealed in the video recordings?* The first is that it is entirely incorrect to say, as the Full Court did, that the trial judge did not give any reasons for reaching his conclusion that the video recordings showed that the respondent was capable of a much greater level of activity than he had claimed, and that this was a serious omission. The trial judge set out histories given by the respondent to Drs Febbo, Tarala and Lee and Professor Musk suggesting an incapacity to walk far, or garden or cast a fishing line, and suggesting that the respondent was in constant pain, and became breathless on doing any physical activity. In this Court counsel for the

respondent conceded that there were no substantive differences between what the trial judge recorded from the histories and the respondent's evidence in chief. The trial judge then said:

> "Video taped footage was tendered in the course of the trial and it is fair to say that it depicts the plaintiff engaged in many activities which are inconsistent with these complaints. It is true that much of what is seen on video simply shows the plaintiff standing or sitting or walking slowly but there are scenes in which he demonstrates a significant ability to engage in physical activities including lifting and digging. On one occasion, for example, he is seen assisting in the lifting of what appears to be a washing machine onto the back of a utility. On another he digs a reticulation trench. He is frequently depicted at work checking or fixing reticulation in the various houses which are owned by members of his family. The video tape also clearly shows him engaged in maintenance work around the houses, attending hardware stores and then visiting houses with tools and items purchased for the purpose of carrying out work at the properties."

The trial judge later, in the course of analyzing the evidence of Mr Burns (clinical psychologist) and Dr Penman, Professor German, Dr Skerritt and Dr Febbo (psychiatrists), set out the reaction of the last three witnesses to the video recordings: they did not change the opinions of Professor German and Dr Skerritt, but they caused Dr Febbo to have concerns about the respondent's veracity and the reliability of the history he gave, and hence caused him to withdraw a diagnosis of a Major Depression and to be unwilling to make a diagnosis at all. The trial judge then set out what those three witnesses perceived in the video recordings, and referred to Professor German's view that nothing in them shed any light on the respondent's condition and Dr Skerritt's view that the film was "as unimpressive as I have ever seen." He then said:

> "In my view the video tapes do disclose a level of activity by the plaintiff which is significantly greater than that described by him to a number of medical practitioners. As long ago as 1989 Professor Musk reported that the plaintiff claimed to be unable to keep up with others of his own age while walking because of breathlessness. On 10 September 1992 Dr Tarala reported that the plaintiff told him that he found it hard to keep up at work because of chest pain and shortness of breath. On 25 March 1994 Professor Musk wrote that the plaintiff told him that he can only walk about 200 metres slowly and becomes very tired and that he was breathless when washing or showering himself and wanted to lie down all the time. The reports from all the medical practitioners are replete with complaints of this kind.

> Having closely watched the video tapes I am satisfied that they demonstrate that the plaintiff is capable of a much greater level of activity than that claimed by him. Against this background I find the views of Dr Skerritt and Professor German puzzling."

168 This is a polite way of disagreeing with the failure of Professor German and Dr Skerritt to adjust their views in the light of the video recordings. It is also an acceptance of Dr Febbo's opinion that no diagnosis of Major Depression could be made.

169 Now other minds might disagree with these reasons, but it cannot be said that the trial judge gave no reasons. Nor, contrary to submissions advanced on behalf of the respondent to this Court, can it be said that there were not "real" reasons or that they were "cursory". The fact is that the trial judge gave lengthy reasons for reaching his relevant state of satisfaction. The trial judge's analysis of the video recordings, and his comparison of them with the respondent's evidence, and the medical evidence, were careful, close and detailed. Nothing more need be said than that to demonstrate the point that the Full Court erred in the holding that it made in this regard.

170 *The respondent's evidence of guilt about his brother*. The second, and again, patent error on the part of the Full Court, was to conclude that it was glaringly improbable that the respondent would have said that it was he who attracted his brother to Australia rather than the contrary, or that it was inconceivable that he would have said this. That the respondent might make a statement to that effect was neither inconceivable nor glaringly improbable. An obvious reason why he may have said it was that it would have reinforced the basis for his claim of guilt and anxiety about his brother's death. The Full Court's explanation was that the respondent was trying to say he felt guilt at bringing some of his friends to Australia and was misunderstood. The source of this explanation appears, at least in part, to be the representatives of the respondent. His notice of appeal to the Full Court alleged that the trial judge should have accepted the respondent's "evidence that the inversion of the facts as reported by Mr Burns and adopted by Dr Penman was the result of a simple misunderstanding." The Full Court recorded the following submission advanced on the respondent's behalf:

> "It was submitted on behalf of the [respondent] that it is almost inconceivable that he would have told anyone he had encouraged [the brother] to come out to Australia and work at Wittenoom, or that he felt guilty about [the brother's] death. Indeed, in his cross-examination, the [respondent] made it plain that he would not have done. On that basis, it was submitted, the passage in Mr Burns's report must have been the result of a misunderstanding, presumably because of the [respondent's] inability to express himself clearly in English."

171 Contrary to a submission advanced in the Full Court and in this Court for the respondent that the respondent "made it clear in his evidence that he had not made the incorrect statement to Mr Burns", in cross-examination the only evidence of the respondent was:

> "[I]f you told that to a doctor that wouldn't be right, wouldn't be accurate? – No."

172 This is not a denial of having told "that" to a doctor.

173 What is more, the explanation advanced by the Full Court was not supported by the respondent, who was not asked about the matter in examination in chief or re-examination. Nor was it supported by Mr Burns. The statement is recorded with definiteness and clarity by Mr Burns. Mr Burns was not questioned to suggest that he had made any error or that the respondent had told him anything about the respondent's guilt feelings about bringing friends to Australia, or that he had misunderstood the respondent. Counsel for the respondent, who called Mr Burns, took him through that part of the history without any suggestion that it was erroneously recorded. In cross-examination Mr Burns was quite definite that the respondent told him what was recorded. There was no re-examination. Had the respondent or Mr Burns given evidence of the explanation later propounded in the Full Court, it would have been possible for testing to take place. In these circumstances it was not, with respect, for the respondent on appeal, and for the Full Court, to search for untested explanations, to use the appellants' phrase, to support a factual conclusion different from that of the trial judge.

174 *Did Dr Febbo advance an opinion?* A third error on the part of the Full Court related to a criticism made of the trial judge in the following terms:

> "[I]t should be noted that although the trial Judge came to the conclusion that 'the opinion of Dr Febbo is to be preferred', it is not clear, with respect, what Dr Febbo's opinion was. It will be recalled that in the end, having viewed the video recordings, Dr Febbo felt unable to make a diagnosis. But even Dr Febbo appears to have subscribed to the view that the [respondent] was suffering from depression. His opinion appears to have been that the [respondent's] symptoms were not as severe as he claimed."

175 The actual position is that Dr Febbo, having made an assumption that the history given to him by the respondent was correct, formed the view on 23 December 1996 that while the respondent had a number of depressive symptoms reaching the level required for a Major Depression, examination of his mental state was not in keeping with that, and the severity of his disorder fell far

short of what was required to explain the high level of incapacity described by the respondent. He had "adopted the sick role to a much greater degree than can be explained by his [d]epression or ... physical status." Dr Febbo's second report, on 31 August 2000, was made after seeing five video surveillance tapes. He said they were irreconcilable with the history given in 1996 "assuming that there had not been a considerable improvement in [the respondent's] condition" between then and the time of filming. He said that he could no longer hold his earlier view about the "presence of depressive symptoms and a diagnosis of Major Depression … with an acceptable level of certainty."

176 Dr Febbo's third report, dated 16 April 2001, said that assuming the history given was correct, the diagnosis was "Major Depression associated with significant anxiety", but that what Dr Febbo saw on the surveillance tapes was difficult to reconcile with the respondent's history and presentation. Dr Febbo's last report dated 18 March 2002 had nothing to add to the third report.

177 In his evidence in chief Dr Febbo repeated what he had said in his second report: that the video surveillance film raised such concern about the respondent's veracity that he could no longer adhere to the original diagnosis of Major Depression. He was not cross-examined about that proposition.

178 In short, Dr Febbo's opinion was that while on one set of assumptions the respondent appeared to have an illness, in the light of all the circumstances, it could not be said that he did. Whether others agree with Dr Febbo's conclusion, it is an opinion, clearly and repeatedly stated. It was incorrect for the Full Court to suggest that it was not clear what his opinion was. It was not the opinion ascribed to him by the Full Court.

179 *The impact of the video recordings.* A further basis advanced by the Full Court for the reversal of the trial judge's findings on credibility adverse to the respondent, requires separate and somewhat more lengthy consideration. Templeman J did watch the video recordings, and the concurrence of the other judges suggests that they did too. They were in as good a position to make an assessment as the trial judge. They were also in an equally good position to make a comparison between what the recordings showed, and the written reports of the doctors and the transcripts of their evidence, and the transcripts of the evidence of the respondent. That opportunity was a substantial one, but it still fell far short of the real advantage that the trial judge enjoyed in this case, of actually seeing and hearing the evidence of the witnesses, particularly the respondent, and of observing his reaction to each segment of the film as it was shown to him.

180 There are cases in which the advantages enjoyed by trial judges over appellate courts are exaggerated. A complete written record, a degree of detachment from the trial itself, and the sum of the collective knowledge and

experience of three or more judges may themselves on occasions place the appeal court in a superior position to that of the trial judge to decide the case. But this is not such a case. This is one case in which "the subtle influence of demeanour" cannot be overlooked; it is a case in which it "does not follow that, because [the trial judge] made no express reference to … demeanour … , demeanour … played no part in [his] findings"[105]. The position of the appellants' counsel before the Full Court and in this Court was that demeanour was not critical in determining credibility issues at trial, but that it could not be eliminated. In truth it must have been of some significance and, although the advantage which the trial judge had may have been reduced by the time between when he heard the evidence and when he gave judgment, it has not been shown to have been reduced to nothing. The trial judge formed a certain impression of the respondent judged in relation to the video recordings and his reaction to them. The way in which the respondent visibly responded to questions, any delays, evasions or reluctance in answering them, and the extent of his fluency in English, were all matters of especial relevance in a case of this kind, and ones which only the trial judge, and not a court of appeal could perceive and weigh against all of the other relevant evidence in the case. They bore directly upon the weight to be given to the respondent's evidence at the trial, his statements to the medical practitioners, and their opinions of him. The Full Court's opinion that the trial judge had given no reasons for the key conclusion that the video recordings undermined the credibility of the histories given by the respondent, and the Full Court's handling of the issue relating to the respondent's guilt about his brother, were both erroneous, and they appear to have led the Full Court into a further error of not paying any regard to the trial judge's advantages because their Honours appeared to think he had failed to use or palpably misused them. In consequence, this was not a case in which a different opinion from the trial judge's, of what the video film showed, judged in relation to testimony, particularly from the respondent, about it could justify the reversal of a finding of credibility adverse to a party.

181 That conclusion is reinforced by the fact that the Full Court, in analyzing what the video recordings revealed, did not deal with Dr Febbo's view of them. That was a consequence of their Honours' decision to adopt a particular approach to the video recordings. Their Honours did "not think it appropriate to compare the [respondent's] activities as shown on the video recordings with everything he had ever said to the doctors who had examined him." They thought "the better approach is to compare the [respondent's] description of his symptoms at or as close as possible to the relevant periods of surveillance." Dr Febbo first saw the respondent on 3 September 1996 and 26 November 1996, and the date of his report on those interviews was 23 December 1996. The first video recordings

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105 *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179 per McHugh J.

were apparently made on 1, 2, 10, 19 and 20 September 1997. On that basis the Full Court did not discuss his reactions to the video recordings, and began with Dr Penman's report of 16 September 1997 on his consultation with the respondent on 9 September 1997. The Full Court then dealt with a report of Professor Musk on 5 November 1997 and two films made on 9 and 11 December 1997. The next films were made on 13 March 1998; on 1 April 1998 Professor German reported on an attendance by the respondent on or about that day. On 17 March 1999 the respondent saw Dr Tarala, who reported on 23 April 1999. On 23 March 1999 a further film was made. The Full Court next dealt with the film of 16 November 1999, and a report by Dr Lee dated 23 March 2000 on an examination on 23 February 2000.

182 The Full Court then turned to various aspects of the respondent's evidence before concluding that it was internally consistent and not inconsistent with the video recordings. The Full Court pointed out that the video surveillance did not commence until after the respondent had seen Dr Febbo in 1996.

183 Dr Febbo's reaction on 31 August 2000 to the video recordings was that he could not reconcile them with the history given in 1996 "assuming that there had not been a considerable improvement in [the respondent's] condition" between 1996 and the time when the recordings were made. The Full Court noted that between 1996 and 2000 the respondent had been under Professor German's care, and "derived some benefit" from Aropax and from the consultations with Professor German. The finding that he had "derived some benefit" sits badly with what Professor German reported on 16 October 1998:

> "I cannot see any substantial change in his impaired functioning, which is very considerable, even with vigorous anti-depressant and other forms of psychiatric therapy. I note that although he reported to Dr Gidley that he felt better with anti-depressants, he later denied this to Dr Febbo and indicated that these had done nothing for him except to make him feel 'dopey'. Certainly his response to date to anti-depressants, although, I think, present, is not dramatic."

184 The finding that the respondent had "derived some benefit" also sits badly with Professor German's evidence in chief. After being referred to the passage just quoted, he said the prognosis was the same. After referring to the "fairly potent medication" which the respondent had been taking, he said:

> "He has some capacity now to enjoy things he used to enjoy before although not at the same level and that reflects the effect of treatment but his major problem which is his total preoccupation with his gloomy prognosis, as he understands it, continues and with this ritual of going for repeated chest scans and assessments by respiratory physicians every year always bringing the possibility of further bad news and sometimes in

> reality further bad news I can't see how his conviction of a miserable death in the future could be changed."

185 These items of evidence do not support the view that "a considerable improvement" had taken place after Dr Febbo first saw the respondent in 1996.

186 The Full Court had another reason for explaining any difference between what the respondent's capacities as filmed appeared to be and the respondent's capacities as reported to doctors. The reasoning proceeded in this way. First, so far as the respondent said in histories that he was not "able to undertake any form of physical activity", or that for more than a year "all he had done in terms of activities was water the garden", or that he was "not doing anything because of pain" or that he was unable to "do anything" to fix a house his son had purchased, he was speaking in an exaggerated or figurative way, not literally. Secondly, some contrast between what the video recordings showed and what the respondent said in the histories could be explained thus:

> "[The respondent's] activities were not limited by his physical condition, but by his perception of his condition. Given a fluctuating mood, and a capacity to be distracted from his morbid thoughts, it is not surprising that he occasionally undertook tasks which at other times he would not feel able to tackle."

187 The difficulties in this reasoning are as follows. The first ten words of the passage just quoted involve a massive departure from the respondent's case at trial, in which he contended that he had asbestosis, pleural disease, respiratory degeneration, chest pain and breathlessness. The rejection of most of this case by the trial judge, and the failure of the respondent to challenge that rejection in either appeal, itself points strongly against his credibility.

188 Secondly, the respondent couched his histories and his evidence in chief in general and universal terms. Dr Febbo was entitled to feel disquiet about the respondent's reliability in view of those parts of the video recordings which contradicted the generality of the histories. In cross-examination Dr Febbo was never asked to retract or qualify any part of his evidence on the basis that he had failed to take account of any supposed variation in the respondent's conduct caused by fluctuations in mood and distractions from his morbid thoughts, either in general or in relation to what he perceived in the video recordings. The respondent faced a dilemma. Either the picture of general and universal incapacity presented in the histories was right or it was wrong. So far as it was right, it might support the opinions of the doctors, but only so far as the video recordings were not adverse to it. So far as it was wrong, whether because of exaggeration or because of fluctuations in mood, the histories lost validity as a basis for professional opinions favourable to him.

189 It cannot be said that the Full Court's method, considered by itself, was without utility. But in necessarily excluding Dr Febbo's reports from integration into the reasoning, it overlooked the fact that Dr Febbo's perceptions of the video recordings were not challenged in cross-examination. It is one thing to pay attention to the reports of doctors close to the time of the events filmed. It is another wholly to exclude from consideration evidence of Dr Febbo's reactions which, though not close in time to the events filmed, were not challenged, particularly where no convincing reason has been postulated to explain why the respondent's capacities as filmed were more extensive than those reported to doctors.

190 In all the circumstances, just as it was wrong to conclude that Dr Febbo expressed no clear opinion, so it was wrong to ignore, or at least marginalize, Dr Febbo's reaction to the video recordings.

191 The Full Court, concentrating on the video film, the internal consistency of the respondent's evidence as recorded in the transcript, and the consistency of the respondent's evidence as recorded in the transcript with the video film, found no basis for doubting the respondent's credibility. However, in the circumstances of this case, the different impression formed by the Full Court in the light of the factors it examined could not justify the reversal of the trial judge's finding about the respondent's credibility in a manner adverse to the appellants in the light of the rather different factors he bore in mind. Unlike the Full Court, we do not consider an inference favourable to the respondent to be any more compelling than the inference drawn by the trial judge, particularly having regard to the fact that the respondent bore the onus of proving his case.

192 Because Templeman J's appreciation of the video film loomed so large in his Honour's reasons, we also viewed it. For what it is worth, our opinion of it is much closer to that of the trial judge than to his Honour's. It left us with a clear impression of a physically fit man able to move, lift, push a wheelbarrow, bend and dig efficiently and freely, and apparently painlessly.

193 *The trial judge's treatment of Professor German.* Another error in the Full Court's reasoning is to be found in the following passage:

> "It is … to be implied from the trial Judge's reasons that he would have accepted Professor German's diagnosis (and therefore his assessment that the [respondent] was credible and genuine) but for his Honour's perception that there was inconsistency between the [respondent's] activities as shown on the video recordings and as described to his doctors."

194 This is erroneous. The trial judge advanced several reasons apart from the video recordings for rejecting the respondent and therefore rejecting Professor

German's diagnosis: the absence of objective support for the respondent, the results of the lung function tests, the demonstration by the notes from the Chest Clinic that the respondent had asserted breathlessness many years before his brother's death, during which period the respondent worked full time until 1995, and the erroneous statement about the respondent's guilt in relation to his brother's death. Secondly, the passage is circular. In large measure Professor German's diagnosis depended on the respondent's history being credible and genuine. The fact of the diagnosis did not establish that it was.

195 The passage is related to another unsatisfactory element of the Full Court's reasoning – its treatment of the Perth Chest Clinic records. One of the reasons why the trial judge rejected the respondent's claim that he suffered from breathlessness and chest pain (apart from the video tapes and the lung function tests) was that although he worked until 1995, he had complained of breathlessness and chest pain on six occasions in 1968, 1971, 1977, 1979, 1983 and 1987, according to the records of the Chest Clinic. The Full Court said that the records did not show "complaints", but "symptoms, presumably described in response to enquiry." This semantic point is of no substance. The fact is that the records were inconsistent with the respondent's claim in testimony that his first experience of breathlessness was in 1990, and the Full Court did not reconcile the testimony with the records.

196 The other two criticisms by the Full Court of the trial judge's reasoning were that there was no suggestion that the respondent had difficulty in working until after 1988, and the Chest Clinic records also record the respondent as being well. However, these criticisms miss the point which the trial judge was making about the Chest Clinic records: the contradiction between what the respondent told the Chest Clinic before 1988 and what he told other medical professionals and the court after 1995 radically undercuts his reliability as an historian of his own symptoms.

Is an alternative case available to the respondent?

197 It has been a matter of some concern to us whether, despite the fact that the trial judge rejected, and not incorrectly so, the contention that the respondent suffered the psychiatric condition that he claimed, and that the respondent had any physical disabilities as a consequence of it, the respondent may nonetheless have made out a case of some *non-minimal compensable injury*[106]. There is uncontradicted evidence of the presence in his body of some asbestos fibres. There may also have been some basis for a holding that the respondent genuinely believed himself to be suffering disabilities, either or both physical and

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106 See *Cartledge v E Jopling & Sons Ltd* [1963] AC 758.

psychiatric, as a result of exposure to asbestos, even though there was no medical basis for them: that his case was one of functional overlay or psychosomatism, but still disabling for all that.

198 Psychosomatism and functional overlay, whatever may be the correct definition of them, are expressions used interchangeably by lawyers. Of the former, recognizing that it may sound in damages, Windeyer J in *Mount Isa Mines Ltd v Pusey*[107] said this[108]:

> "Sorrow does not sound in damages. A plaintiff in an action of negligence cannot recover damages for a 'shock', however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had."

199 In *Bunyan v Jordan*[109], Dixon J said[110]:

> "On the medical evidence, the jury might find that the defendant's actions threw the plaintiff into a sufficiently emotional condition to lead to a neurasthenic breakdown amounting to an illness.
>
> I have no doubt that such an illness without more is a form of harm or damage sufficient for the purpose of any action on the case in which damage is the gist of the action, that is, supposing that the other ingredients of the cause of action are present."

"Functional overlay" was recently discussed in the Court of Appeal of New South Wales (Hodgson and McColl JJA and Cripps AJA) in *J & K Clothing Pty Ltd v Mahmoud*[111], a case which, by reason of the way in which the plaintiff

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107 (1970) 125 CLR 383.

108 (1970) 125 CLR 383 at 394. See *Tame v New South Wales* (2002) 211 CLR 317 at 374-375 [171] per Gummow and Kirby JJ.

109 (1937) 57 CLR 1.

110 (1937) 57 CLR 1 at 16. See also *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 395.

111 [2004] NSWCA 207.

chose to conduct it, and the consequential ambiguity of his claim, has some similarities with this one. And although the plaintiff there ultimately failed, the Court of Appeal accepted that had he set out to make a claim of, allege and prove functional overlay, he could well have been entitled to be compensated for it.

200 One reason why a reasonably high degree of precision about the true nature of a condition of psychosomatism or functional overlay is important is that, as the primary judge said in *Mahmoud*[112], a functional overlay may not so much be a psychiatric condition as an idiosyncratic reaction to a perceived, perhaps imagined, problem. Precision is also desirable because experience tells that after the successful conclusion of litigation a functionally overlaid plaintiff may sometimes make a speedy recovery.

201 In this case however, as the Court of Appeal did in *Mahmoud*, we have formed the view that the respondent cannot succeed upon any basis that he was suffering at least a compensable psychosomatic condition or functional overlay. The reason why this is so is that, as the Full Court observed in its reasons, in essence, the respondent's claim was based on the diagnosis of *anxiety and depression* made by a number of psychiatrists, and that these were productive of an incapacity to work and to lead an active physical life. That observation is generally consistent with the respondent's notice of appeal to the Full Court. For example, ground three was that the trial judge erred in failing to find that there was a psychiatric basis for the respondent's symptoms of chest pain and breathlessness, and that he also erred in finding that the respondent had not suffered psychiatric injury.

202 Had the respondent presented and argued either a primary or an alternative case of psychosomatism or functional overlay, different factual issues would have had to be explored, including as we have pointed out, because of its relevance to quantum, the likely post-litigation duration of the condition. Questions of the kind raised in *Watts v Rake*[113] and *Purkess v Crittenden*[114] as to the respective causes of or contributions to the respondent's true condition, would also have had to be answered, such as the relevance of non-compensable sorrow or grief to it. Even in this Court, the respondent never argued a case of psychosomatism or functional overlay. Indeed neither party ever mentioned such a possibility. His case throughout was that his psychiatric condition produced actual physical incapacity. Once he was disbelieved about that, he was left with no arguable basis for it. This being so, it is unnecessary to consider whether the

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112 [2004] NSWCA 207 at [14].

113 (1960) 108 CLR 158.

114 (1965) 114 CLR 164.

presence of a functional overlay or psychosomatism might provide any basis for an award of damages in favour of the respondent.

203 The appeal should be allowed with costs. We would order that:

1. The appeal be allowed with costs.

2. The orders made by the Full Court of the Supreme Court of Western Australia on 13 October 2004 be set aside and in lieu thereof order that the appeal to the Full Court be dismissed with costs.