HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, NETTLE, GORDON AND EDELMAN JJ

TRANSPORT ACCIDENT COMMISSION APPELLANT

AND

MARIA KATANAS RESPONDENT

Transport Accident Commission v Katanas
[2017] HCA 32
17 August 2017
M160/2016

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

S A O'Meara QC with S D Martin for the appellant (instructed by Hall & Wilcox Lawyers)

M F Wheelahan QC with M J Hooper for the respondent (instructed by Zaparas Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Transport Accident Commission v Katanas

Accident compensation – Transport accident – Statutory compensation scheme – Where respondent involved in motor vehicle accident and subsequently suffered mental disorder or disturbance – Where mental disorder or disturbance required to be "severe" to allow bringing of common law proceedings – Where respondent did not require inpatient psychiatric treatment – Where respondent found not to have suffered symptoms of psychological trauma at upper echelon of range – Whether severity of mental disorder or disturbance assessed only by reference to extent of treatment – Whether narrative test laid down in *Humphries v Poljak* [1992] 2 VR 129 followed by Court of Appeal.

Words and phrases – "mental disturbance or disorder", "narrative test", "range or spectrum of comparable cases", "serious injury", "severe", "symptoms and consequences".

Transport Accident Act 1986 (Vic), s 93.

1 KIEFEL CJ, KEANE, NETTLE, GORDON AND EDELMAN JJ. This appeal raises for consideration the application of the narrative test of serious injury for the purpose of s 93(17) of the *Transport Accident Act* 1986 (Vic) ("the narrative test") laid down in *Humphries v Poljak*[1]. There is only one ground of appeal: that the majority of the Court of Appeal of the Supreme Court of Victoria (Ashley and Osborn JJA, Kaye JA dissenting) erred in holding that the primary judge misdirected himself as to the application of the narrative test. Special leave to appeal was granted because the appeal was said to raise a question of principle of general importance. As put at the application for special leave, that question was whether the majority of the Court of Appeal erred by casting aside or "trampling upon" the narrative test – particularly that part of it which calls for a comparison of the case in suit with other cases in the range of comparable cases – and substituting a new and unprecedented test of bringing to account the subjective symptoms and consequences of an alleged serious injury and assessing their significance by reference to a new and unexplained concept of a "line"[2]. When the appeal came on for hearing, however, it became apparent that the appellant's oral argument was directed to two contentions: the contention that the majority had trampled upon the narrative test; and an alternative contention – which was nowhere as such identified in the appellant's written submissions – that the majority of the Court of Appeal had misunderstood the primary judge's formulation of the "possible range" and thereby fallen into error.

2 For the reasons which follow, it is clear that the majority of the Court of Appeal did not depart from the narrative test. It is also clear that the appellant's alternative contention, alleging a misunderstanding of the primary judge's formulation of the range, is not a ground for which special leave was granted. It raises no question of general importance. It should not be entertained.

Relevant statutory provisions

3 At relevant times, and as far as is pertinent for present purposes, s 93 of the *Transport Accident Act* provided as follows:

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

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1 [1992] 2 VR 129.

2 [2016] HCATrans 286 at lines 11-14, 96-104, 147-170.

...

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

...

(b) the injury is a serious injury.

...

(4) If—

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

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

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

(c) the Commission—

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

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

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

...

(17) In this section—

...

serious injury means—

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

(b) permanent serious disfigurement; or

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

(d) loss of a foetus."

The narrative test of serious injury

4 The terms "serious" and "severe" are not defined in the *Transport Accident Act* but, for the last 25 years, it has been accepted that the question of whether an injury is "serious" for the purpose of s 93(17) is to be answered according to the narrative test laid down by the Full Court of the Supreme Court of Victoria in *Humphries v Poljak*[3]:

> "To be 'serious' the consequences of the injury must be serious to the particular applicant. Those consequences will relate to pecuniary disadvantage and/or pain and suffering. In forming a judgment as to whether, when regard is had to such consequence, an injury is to be held to be serious the question to be asked is: *can the injury, when judged by comparison with other cases in the range of possible impairments or losses, be fairly described at least as 'very considerable' and certainly more than 'significant' or 'marked'*?" (emphasis added)

5 In *Mobilio v Balliotis*[4] the Court of Appeal of the Supreme Court of Victoria affirmed the application of the narrative test in relation to mental and behavioural disturbance or disorder and held that "severe" in that context is of stronger force than "serious".

6 As appears from *Humphries v Poljak*, the application of the narrative test entails a two-stage process:

(1) an assessment of whether the nature and symptoms of the injury and the consequences of the injury are, subjectively for the applicant, "serious" or, in the case of mental or behavioural disturbance or disorder, "severe"; and

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3 [1992] 2 VR 129 at 140 per Crockett and Southwell JJ.

4 [1998] 3 VR 833 at 846 per Brooking JA (Winneke P, Ormiston JA, Phillips JA and Charles JA agreeing at 834-835, 854, 858, 860-861).

(2) a determination of whether the injury as thus assessed is objectively "serious" or, in the case of mental or behavioural disturbance or disorder, "severe" when compared with the range or "spectrum"[5] of comparable cases.

The facts

7 The respondent was born in Greece in 1945 and migrated to Australia in 1962. She married in 1964 and was employed in various positions until the early to mid-1990s. From 1995, she looked after several of her grandchildren on a regular basis. In the period from 1998, she obtained the Victorian Certificate of Education, a Diploma of Modern Greek Language and a Bachelor of Arts degree, as well as completing a course which entitled her to operate a taxi licence. Her husband died in 2005.

8 At about 7.00 pm on 10 July 2010, the respondent was driving her car on Princes Highway, Mulgrave, on her way home. After stopping at a red light at the intersection of Princes Highway and Springvale Road, and waiting until the light had changed to green, she proceeded into the intersection. At that point another vehicle collided with the driver's side of her car. It is not clear whether she lost consciousness but she suffered multiple fractures of her left rib, seatbelt bruising, severe chest pain, a laceration to her left knee and damage to some of the teeth in her lower jaw. She was conveyed by ambulance to the Alfred Hospital and remained there until discharged on 14 July 2010.

9 Following her discharge from hospital, the respondent attended on her general practitioner, Dr Chan. Dr Chan prescribed pain medication and referred the respondent for physiotherapy. Thereafter, the respondent attended on Dr Chan on several further occasions, complaining of pain, lowered mood, nightmares and daytime thoughts of the accident. On 26 October 2010, the respondent reported to Dr Chan that she had returned to 70 per cent of her pre-accident physical function. In November 2010, Dr Chan referred the respondent to a psychologist, Dr Alvarenga, whom the respondent thereafter continued to see for treatment until about mid-2014 and then again from about

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5 See, for example, *Dwyer v Calco Timbers Pty Ltd (No 2)* [2008] VSCA 260 at [7] per Ashley JA (Nettle JA and Dodds-Streeton JA agreeing at [1], [31]); *Stijepic v One Force Group Aust Pty Ltd* [2009] VSCA 181 at [42] per Ashley JA and Beach AJA; *Sutton v Laminex Group Pty Ltd* (2011) 31 VR 100 at 117 [89] per Tate JA (Ashley JA and Hargrave AJA agreeing at 102 [1], 121 [115]).

the middle of 2015. In the course of that treatment, Dr Alvarenga referred the respondent to a clinical psychologist, Dr Raj, for eye movement desensitisation and reprocessing treatment to assist with the respondent's flashbacks and distressing memories of being trapped in the car. After that treatment, the respondent reported to Dr Alvarenga that she had experienced some relief from intrusive memories. Throughout 2011 and 2012, the respondent continued to attend on Dr Chan for treatment of neck, back, hand and knee pain suffered as a result of the accident. In 2011, Dr Chan offered anti-depressant medication to the respondent, but at that point the respondent declined. Dr Chan also offered to refer the respondent to a psychiatrist, which offer the respondent at that point also declined. In April 2013, however, the respondent felt the need for more psychological treatment to deal with recurrent flashbacks. At that point, Dr Chan prescribed anti-depressant medication and the respondent began to attend on a psychiatrist, Associate Professor Mazumdar, for further treatment.

10 In February 2014, the respondent presented to the emergency department at Monash Medical Centre and consulted a psychiatric nurse in relation to nightmares suffered since taking anti-depressant medication. The nurse taught the respondent breathing techniques. Later in 2014, the respondent commenced treatment with a clinical psychologist, Dr D'Abbs, as part of a pain management programme. Dr D'Abbs subsequently reported that the respondent had found the psychological input helpful. The respondent continued to see Dr D'Abbs for psychological treatment at least until 2015.

The proceedings at first instance

11 On 16 April 2013, the respondent filed an originating motion in the County Court of Victoria seeking leave to commence common law proceedings for a serious injury pursuant to s 93(4) of the *Transport Accident Act*. The motion came on for hearing before Judge O'Neill in August 2015. The respondent's claim was that she had suffered a psychiatric injury which was "severe"[6]. In order to establish the severity of her disorder, she relied on her need for continuing treatment with Dr Chan, Dr Alvarenga, Associate Professor Mazumdar and Dr D'Abbs; her need for daily anti-depressant medications in a setting of intermittent nightmares and flashbacks of the accident; difficulties in relaxing and feeling safe; inability to drive a car for more than short distances; inability to look after her grandchildren in the manner which she had done prior to the accident; difficulties in concentration and organising her thoughts that

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6 *Katanas v Transport Accident Commission* [2015] VCC 1156 at [29]-[44].

affected her ability to read and cook, and inhibited her from further studies; interruption of sleep; and restrictions in her social pursuits. Her claim was supported by the opinions of her treating medical practitioners and also by several other medical practitioners whom she consulted or had been required to consult for medico-legal purposes. Several of them identified symptoms of post-traumatic stress disorder and diagnosed that condition[7]. Others proffered different psychiatric diagnoses[8].

12 The respondent was cross-examined on the "severity" of her condition and its consequences by reference to the degree of her continued involvement in the lives of her children and grandchildren, her ongoing relations with friends, her independence in domestic matters and her involvement in investment properties and the operation of a taxi licence. On the basis of that cross-examination, the primary judge found[9] the respondent to be an "unsatisfactory witness" who: "did not answer questions in the manner [he] would expect of an honest witness"; refused to answer questions directly put to her; denied histories that she was recorded as having given to treating and other medical practitioners; gave explanations that his Honour found to be evasive and unimpressive; and regularly sought to argue and prevaricate when matters were clearly put to her, which, his Honour said, "cause[d] [him] to have reservations about the extent to which her psychological symptoms have impacted upon her life".

13 The primary judge, however, did not reject all of the respondent's testimony. His Honour accepted[10] that the respondent had suffered a range of symptoms arising out of the accident, including flashbacks and nightmares, that had prevented her from undertaking any ongoing studies, affected her sleep and her ability to look after her grandchildren, and necessitated psychological treatment and medication which would need to be continued into the foreseeable future. The primary judge also accepted[11] the opinions of the respondent's treating and other practitioners that the respondent had suffered a post-traumatic stress disorder and either a major depressive disorder or an adjustment disorder

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7 *Katanas* [2015] VCC 1156 at [49], [55], [60], [62], [65], [71].

8 *Katanas* [2015] VCC 1156 at [72], [73].

9 *Katanas* [2015] VCC 1156 at [77], [78].

10 *Katanas* [2015] VCC 1156 at [83]-[84].

11 *Katanas* [2015] VCC 1156 at [79], [81].

which was substantially related to the accident. On that basis, the primary judge identified[12] the "real issue" as being whether, "given the reservations [his Honour had] in respect of [the respondent's] credibility", the psychological symptoms and consequences met "the test for 'severe' injury as prescribed by the Act".

14 The primary judge observed[13] that in order to satisfy the test of whether a mental disorder or disturbance is "severe":

> "the consequences arising from a transport accident must be more substantial than the test posed [in relation to 'serious long-term impairment or loss of a body function']; that is, that they must be more than 'very considerable' when a comparison is made with other cases in the possible range of impairments. Thus, consideration must be given to the vast array of mental disorders which may be encountered following a transport accident. At one end of the spectrum is mild anxiety as a result of trauma, easily overcome without medical intervention. At the other end of the spectrum are those disorders which provoke the most extreme symptoms and consequences, including psychoses, admission to psychiatric hospitals as an inpatient, delusional beliefs and thoughts, suicidal ideation and suicide attempts. Such conditions require extensive treatment and medication. *It follows that for a mental disorder to be described as being 'severe', it is at the upper echelon of those disorders in the possible range.*" (emphasis added)

15 Having so stated the test, the primary judge next recorded[14] that, although he accepted the respondent had suffered the range of symptoms claimed, he had "some reservations about [her] description of her symptoms and the effect upon her of the diagnosed psychological condition", and that he did not accept that her condition was "as extreme as she would have it". Of importance to that conclusion was that, notwithstanding the respondent's symptoms, the respondent had retained a capacity to: live independently and undertake most of her usual domestic tasks; drive a car, albeit only for short distances and with some fear; look after her grandchildren and remain involved in their lives, albeit not to the same extent as before the accident; carry on some degree of social life, albeit reduced compared to what had gone before; and manage a number of investment

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12 *Katanas* [2015] VCC 1156 at [82].

13 *Katanas* [2015] VCC 1156 at [82].

14 *Katanas* [2015] VCC 1156 at [85].

properties and a taxi licence, albeit with the assistance of agents. And although the respondent had received considerable treatment and medication, she had not been an inpatient in any psychiatric institution (save for one visit to the emergency department) "nor suffered the more extreme symptoms of psychological trauma as described above".

16 On that basis, the primary judge concluded[15]:

> "Balancing on the one hand, the extent to which I accept [the respondent] has suffered psychological consequences, and on the other, the extent to which she has been able to maintain her involvement in social, recreational and domestic matters, I am not satisfied that she meets the requisite statutory test. In essence, I am not satisfied the mental disorder from which she suffers may be described [as] 'severe'."

The proceedings in the Court of Appeal

17 The respondent appealed to the Court of Appeal. She contended, inter alia, that the primary judge had misdirected himself as to the objective assessment of the severity of her mental disorder. She submitted that the error was to set up a spectrum ranging from mild anxiety not requiring treatment to the most extreme symptoms and consequences requiring extensive treatment and medication, and so to conceive of the severity of mental disorder or disturbance solely in terms of the extent of treatment and medication which the disorder or disturbance necessitated. Consequently, the respondent contended, for the primary judge to reason that, to qualify as "severe", a mental disorder or disturbance must be "at the upper echelon of those disorders in [that] range"[16] was to engage in a false and incomplete process of reasoning which caused the assessment of the respondent's injury to miscarry.

18 The majority of the Court of Appeal accepted the respondent's contention. Their Honours stated[17] that, although the extent of treatment made necessary by a psychiatric disorder may cast light on whether the disorder should be classed as severe, it was only one among a range of considerations that needed to be taken

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15 *Katanas* [2015] VCC 1156 at [86].

16 *Katanas* [2015] VCC 1156 at [82].

17 *Katanas v Transport Accident Commission* (2016) 76 MVR 161 at 167 [19] per Ashley and Osborn JJA.

into account. The correct approach, they said, was to bring to account all relevant circumstances personal to the claimant and apply the narrative test outlined in *Humphries v Poljak*, giving each identified relevant circumstance the weight which appears to be appropriate. They added that, in that task, a judge "will be assisted, of course, by personal experience of cases which have fallen on one side of the line or the other".

19 Kaye JA, in dissent, concluded[18] that the primary judge had not applied or adopted a test that focussed solely or primarily on the extent of treatment and symptoms to the exclusion of other consequences. In his Honour's view, it was apparent from the primary judge's reasons that he had correctly applied the narrative test by taking into account the nature of the respondent's disorder, its symptomology, its treatment, and the consequences of it for the respondent.

The appellant's contentions

20 Assuming that the majority of the Court of Appeal were correct in their characterisation of the primary judge's formulation of the "possible range", the appellant argued that there was no error in the primary judge's formulation. In the appellant's submission, given that the respondent did not complain of pecuniary or occupational consequences, and that there was no suggestion of unnecessary treatment, the range as formulated by the primary judge was not stated in a "false and incomplete way" but was appropriate and adapted to the respondent's case. Further, in the appellant's submission, by holding that the range as formulated by the primary judge was of only "limited utility"[19], the majority of the Court of Appeal had "relegated what in [*Humphries v Poljak*] is an important part of 'the question' to a matter of 'limited utility'" and "introduced a new and unexplained concept [of] 'the line'". According to the appellant, the majority's reasoning thus had the effect of "displacing or trampling upon that part of the [*Humphries v Poljak*] formulation directed to the evaluation of an instant case against the range of comparable cases". And, it was said, that would place judges in the future in a quandary as to how reasons for judgment could be "framed by reference to [the range or spectrum] if any statement of the range would inevitably be erroneous for incompleteness".

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18 *Katanas* (2016) 76 MVR 161 at 179 [77].

19 *Katanas* (2016) 76 MVR 161 at 167-168 [20].

No error in the majority's reasoning

21 The appellant's contentions should be rejected. Assuming that the majority were correct in their characterisation of the primary judge's formulation of the "possible range", it is clear that the range, as so formulated, was incomplete because it had regard to only one criterion of the comparative severity of a mental disorder or disturbance: the extent of treatment made necessary by the disorder or disturbance. That precluded consideration of other relevant criteria of comparative severity – for example, in this case, the severity of the respondent's symptoms; the severity of their consequences for her; and the extent to which the symptoms or consequences inhibited the respondent's daily activities, family life, social life and educational pursuits. Because the range as formulated was incomplete, it was prone to skew the assessment of severity and cause the assessment to miscarry.

22 The majority of the Court of Appeal did not state that the concept of a range or spectrum of injuries, as such, was of limited utility. To the contrary, they explicitly embraced the concept of the range as part of the narrative test. As they said[20]:

> "With the qualification that regard must be had to the use of the word 'severe' in the case of mental or behavioural disturbance or disorder, the task which the judge had to undertake was that explained by Crockett and Southwell JJ in *Humphries v Poljak* as follows[21]:
>
> > '[W]e think that the task of a judge confronted with the requirement to determine an application made pursuant to sub-s (4)(d) when reliance is placed upon sub-s (17)(a) may be stated in the following terms: He is to be affirmatively satisfied (the burden of proof being borne by the applicant) that the injury complained of is in fact a serious injury. To qualify for such a description there must be an impairment or loss of a body function which as a result of the infliction of the injury complained of is both serious and long-term. We think "long-term" is not an expression likely to give rise to difficulty. To be "serious" the consequences of the injury must be serious to the particular applicant. Those consequences will relate to pecuniary disadvantage and/or pain and suffering. In forming a

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20 *Katanas* (2016) 76 MVR 161 at 165 [9] per Ashley and Osborn JJA.

21 [1992] 2 VR 129 at 140.

> judgment as to whether, when regard is had to such consequence, an injury is to be held to be serious the question to be asked is: *can the injury, when judged by comparison with other cases in the range of possible impairments or losses, be fairly described at least as "very considerable" and certainly more than "significant" or "marked"?* Beyond such guidance it is, we think, not possible to go.'" (emphasis added)

23 As can be seen, the point of their Honours' observation[22] that the range as formulated by the primary judge was of "limited utility" in the assessment of a mental disorder or disturbance was that:

> "a psychiatric disorder may have severe consequences, even though the sufferer has not undergone much treatment [and] the mere fact that a person has attended many doctors and undergone much treatment would not tell in favour of a disorder being severe unless the symptoms and consequences of the disorder properly call for that level of treatment."

24 Still less did the majority displace or "trample upon" the narrative test of seriousness or severity. Very much to the contrary, after observing[23] that "the task which the judge had to undertake was that explained by Crockett and Southwell JJ in *Humphries v Poljak*", their Honours expressly noticed[24] that the only error in the primary judge's application of the narrative test was in formulating the range by reference to only one of the several criteria relevant to the assessment:

> "Understandably, and correctly, [the respondent's] counsel did not submit that there was any error in the judge's approach as disclosed in the passage [at [82] of the primary judge's reasons for judgment], up to and including his Honour's observation that 'consideration must be given to the vast array of mental disorders which may be encountered following a transport accident.'"

25 Contrary also to the appellant's submissions, for the majority to conclude that the range as formulated by the primary judge was of "limited utility" in the

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22 *Katanas* (2016) 76 MVR 161 at 167-168 [20].

23 *Katanas* (2016) 76 MVR 161 at 165 [9].

24 *Katanas* (2016) 76 MVR 161 at 165 [10].

assessment of a mental disorder or disturbance does not mean that any attempt to frame a relevant range or spectrum will invariably be incomplete. Rather, it rightly emphasises in plain and appropriate language that, in making an assessment of the severity of a mental disorder or disturbance by comparison to the range or spectrum of comparable cases, a judge must identify and bring to account all of the factors which emerge on the evidence as relevant to the assessment. There is nothing new in that proposition. It has been the case for the 25 years since *Humphries v Poljak* was decided.

26 Contrary to the appellant's final submission, the majority's observation that a judge would be assisted by his or her personal experience of cases which have fallen "on one side of the line or the other" did not introduce a new and unexplained concept. What their Honours said was[25]:

> "We do not doubt that the extent of treatment made necessary by a psychiatric disorder may cast light on whether the disorder should be accounted as severe. But in our view the spectrum which the judge described was only one amongst a number of ways in which the question of severity might be approached, each of them being incomplete in itself. For instance, one might frame a spectrum, in a particular case, by reference to the accepted frequency and severity of the claimant's symptoms (or consequences) such as flashbacks or nightmares, or by reference to the extent of inhibitions upon the claimant's daily activities, or by reference to the extent of inhibitions upon the claimant's occupation or further education. In each instance, a spectrum could be set up, ranging from zero to very great. But whilst each spectrum would be relevant to determination whether the statutory test was satisfied in the particular case, no one of them, by itself, would answer the critical question. In our opinion, the correct thing to do, in each case, is to first identify and next bring to account all relevant circumstances personal to the claimant; and then to apply the statutory test, making a value judgment as described by Crockett and Southwell JJ in the passage [from *Humphries v Poljak*] cited ... above. In making that value judgment, a judge must give to each identified relevant circumstance the weight which appears to be appropriate. *He or she will be assisted, of course, by personal experience of cases which have fallen on one side of the line or the other*." (emphasis added)

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25 *Katanas* (2016) 76 MVR 161 at 167 [19].

27 The point of the observation was evidently to emphasise, in previously sanctioned language[26], the long-recognised reality that the application of the narrative test is in the end likely to turn "on the opinion of a judge familiar with a range of conditions within which the instant condition occurs"[27] and thus upon the judge's conclusion as to the "side of the line" on which the case may fall.

Notice of contention

28 The respondent filed a notice of contention in this Court seeking that the orders of the Court of Appeal be upheld on the basis that the primary judge failed to give adequate reasons, particularly in relation to the effect of his Honour's findings as to credit. In the circumstances, it is unnecessary to consider that contention.

29 Nonetheless, in that context, it may be observed that the majority made an important point about the difference between symptoms and consequences of psychological injuries compared to physical injuries[28]. In either case, assessment of the severity of an injury will ordinarily be informed by what is accepted as being the extent of both its symptoms and its consequences. But to speak of symptoms and consequences in the case of mental disorder or disturbance suggests a bright line distinction that may not always exist. In the case of physical injuries, the distinction tends to be clear. The majority gave as an example a claimant who suffers a spinal disc protrusion, which is an injury, that causes sciatica, which is a symptom, that causes sleeplessness, which is a consequence. Such examples can be multiplied. By contrast, in the case of mental disorder or disturbance, symptoms and consequences more often elide. No doubt, the respondent's asserted inability to undertake further education would be characterised simply as a consequence of her injury. But, as their Honours observed, her reported experience of flashbacks and nightmares might properly be described as both a symptom of her post-traumatic stress disorder, and a consequence of the disorder. It is important to bear in mind, therefore, that, in assessing the severity of mental disorders or disturbances, what might be characterised as a symptom may also be relevant as a consequence.

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26 *Mobilio* [1998] 3 VR 833 at 836, 837, 841 per Brooking JA, 858 per Phillips JA.

27 *Fleming v Hutchinson* (1991) 66 ALJR 211 at 211.

28 *Katanas* (2016) 76 MVR 161 at 165-166 [11].

Kiefel CJ
Keane J
Nettle J
Gordon J
Edelman J

Conclusion and orders

30 The appeal should be dismissed with costs.