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High Court affirms narrative test for *'serious injury'* in Humphries v Poljak

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In brief

This rare referral to the High Court makes clear that the narrative test of serious injury laid down by the Victorian Supreme Court in *Humphries v Poljak*[1] 25 years ago remains good law. There must be a subjective assessment of a claimant's injury and the impact this has had on him/her and thereafter an objective assessment, to determine how that injury sits on the spectrum of comparable cases, considering all factors.

A similar test of serious injury exists in the *Accident Compensation Act 1985* (Vic) and *Workplace Injury and Compensation Act* 2013 (Vic). Accordingly, this decision of the High Court is equally relevant to common law claims that arise in a workplace context, which potentially involve a range of defendants, including host-employers, manufactures and occupiers.

The incident and the plaintiff's injuries

On 10 July 2010, Ms Katanas was involved in a traffic accident. She suffered fractured ribs, seatbelt bruising, severe chest pain, lacerations to her left knee and damage to some of her teeth. She also developed psychological symptoms and was treated by a psychologist until mid 2014, and then again from about mid 2015.

The '*serious injury*' test

In order for a plaintiff to have a potential entitlement to recover damages at common law, the injury resulting from the transport accident must be '*serious*' within the meaning of s 93 of the *Transport Accident Act 1986* (Vic) (**Act**).[2] In order for an injury to be serious:

a. The degree of impairment must be assessed at 30 percent or more; or

b. The injury must otherwise be serious, defined in the Act to include severe long-term mental or behavioral disorders.

The second limb of the serious injury test is referred to as the *'narrative test'* and the 1992 Victorian Supreme Court decision of *Humphries v Poljak* set out the parameters of that test. They involve:

a. Firstly, a subjective assessment of whether the nature, symptoms and consequences of the injury are '*serious*', or for mental or behavioral disorders '*severe*'; and

b. Secondly, an objective assessment whereby the seriousness or severity of the injury is compared to other similar cases.

The County Court decision

Ms Katanas' injury was assessed below 30% so she sought a declaration from the County Court of Victoria that she had suffered a '*serious injury*' in accordance with the narrative test. She relied on her continuing need for treatment, daily anti-depressants, her inability to drive long distances, nightmares and flashbacks.

The Court had some reservations about Ms Katanas' credibility but ultimately accepted she suffered post-traumatic stress and a major depressive or adjustment disorder.

The County Court held that in order for a mental disorder to be '*severe*' it must be one at the upper echelon of the spectrum or possible range. The Court gave examples of psychosis, delusional beliefs and thoughts, suicidal ideation and suicide attempts, all requiring continuing treatment and care. It was held that, although Ms Katanas did have some of the symptoms mentioned above, she did not suffer the more extreme symptoms of trauma, sufficient to be a '*severe*' mental disorder for the purposes of the Act.

Victorian Court of Appeal decision

Ms Katanas appealed to the Victorian Court of Appeal, contending the County Court had erred in setting up a range of severity based purely in terms of the treatment and medication which may be required for the disorder. She submitted that applying that reasoning would result in a false and incomplete assessment of the injury itself.

The Court of Appeal accepted Ms Katanas' contention, stating that although the treatment required may cast light on the severity of a disorder, it was only one consideration to be taken into account. The correct approach was to consider all relevant circumstances particular to the claimant, and apply the test in *Humphries v Poljak* giving relevant circumstances the weight the court considered to be appropriate, taking into consideration '*personal experiences of cases which have fallen on one side of the line or the other*'.

The court held that taking into account all of the evidence, Ms Katanas had met the threshold set down in *Humphries v Poljak*.

The High Court decision

The Transport Accident Commission (**TAC**) appealed to the High Court but was unsuccessful.[3]

The High Court held that the '*possible range*' set out by the County Court was incomplete, as it only considered one criterion of comparative severity, being the extent of treatment made necessary by the mental disorder. This meant that other criteria were left out, such as the severity of the symptoms, the severity of the consequences, and the extent to which the symptoms or consequences inhibited daily life and educational pursuits.

The High Court decided that as the assessment left these other considerations out, the assessment had ultimately miscarried.

The High Court held that, contrary to the submissions of the TAC, the Court of Appeal had not '*trampled*' on the test in *Humphries v Poljak* but had in fact embraced it. It required judges to consider all the factors which emerge on the evidence, including previous decisions and drawing upon their own experience.

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[1] [1992] 2 VR 129, 140.
[2] *Transport Accident Act 1986* (Vic), s 93(2)(b).
[3] *TAC v Katanas* [2017] HCA 32

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