

PARTIES: JAMES BAYRAM

v

TERRITORY INSURANCE OFFICE
BOARD

TITLE OF COURT: MOTOR ACCIDENTS
(COMPENSATION) APPEAL
TRIBUNAL

JURISDICTION: DARWIN REGISTRY

FILE NO: M3 of 1997
(9706832)

DELIVERED: 10 November 1998

HEARING DATES: 20–23 July 1998; 1–4 September 1998

JUDGMENT OF: Bailey J

REPRESENTATION:

Counsel:

Appellant: Mr Young
Respondent: Mr Nosworthy

Solicitors:

Appellant: T. Crane
Respondent: Cridlands

Judgment category classification: C
Judgment ID Number: BAI98019
Number of pages: 55

BAI98019

IN THE MOTOR ACCIDENTS (COMPENSATION)
APPEAL TRIBUNAL
DARWIN REGISTRY

No. M3 of 1997
(9706832)

BETWEEN:

JAMES BAYRAM
Applicant

AND:

**TERRITORY INSURANCE OFFICE
BOARD**
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 10 November 1998)

This is a reference pursuant to Section 29(1) (a) of the Motor Accidents (Compensation) Act ("the Act") by the applicant, James Bayram, being a person aggrieved by a determination of the respondent, the Board of the Territory Insurance Office. The determination dated 26 February 1997 of the Board upheld the decision of 12 December 1996 by a designated person (within the meaning of Section 4(1) of the Act) to reject the applicant's claim for benefits under the Act arising from a motor vehicle accident which occurred on 18 April 1993.

The determination of the designated person that was upheld by the respondent is in the following terms:

“On the basis of the medical evidence the applicant has not received a permanent impairment in or as a result of an accident that occurred in the Territory and the applicant is not therefore entitled to a benefit under section 17 of the Act.”

The background to the applicant’s claim under the Act may be stated briefly. The applicant, a resident of the Territory, was involved in a motor vehicle accident on a public street (Bagot Road, Darwin) on 18 April 1993. He suffered some physical injuries as a result of the accident. The major injury was a fracture of the sternum and there were other organic injuries. Such injuries were not the subject of the application rejected by the respondent (the “TIO Board”). Aside from organic injuries, the applicant claims to have suffered, and continues to suffer, from post-concussional syndrome (and in the alternative post-traumatic syndrome) resulting in substantial permanent psychiatric impairment. It is this claim of permanent psychiatric impairment which formed the basis of the claim rejected by the TIO Board.

The grounds relied upon by the applicant in support of the reference to the Tribunal are:

- (a) “The Territory Insurance Office Board has relied and/or purported to rely and/or has been perceived to rely upon information not known to the applicant including a medical report obtained by the respondent and not disclosed to the applicant, which report to the best of the knowledge of the applicant was prepared by or on behalf of a Dr Kutlaca after a visit by the applicant for a medical examination at Darwin Private Hospital on or about 18 October 1996 at 10:00 am.

- (b) The respondent has taken no or no proper account of the opinions of Dr Marinovich of 10 July 1996 and 20 September 1995 and Dr Barrie Kenny dated 12 June 1996.
- (c) The applicant has had no and (sic) no proper opportunity to consider and deal with matters considered by the respondent in coming to the decision the subject of this application.
- (d) The applicant suffers permanent impairment of the whole person equal to not less than 5% and the applicant is entitled to a benefit pursuant to section 17 of the Motor Accidents (Compensation) Act”

Section 29 (4) of the Act provides that a hearing conducted by the Tribunal shall be a hearing *de novo*

In support of the reference, the applicant gave evidence and called as witnesses his wife, their two sons, the accountant to the family trust of the applicant and his wife (“the family business”), his general medical practitioner and two psychiatrists. The TIO Board relied upon the evidence of two psychiatrists, an ambulance officer (who attended the scene of the motor vehicle accident) and an insurance assessor (who had interviewed the applicant in connection with a fire in 1997 which had destroyed a shop owned by the applicant and his wife through their family business).

Members of the applicant’s family, the accountant and his general practitioner gave evidence as to alleged changes in the applicant’s behaviour following the motor vehicle accident. The applicant’s own evidence and cross-

examination by Mr Nosworthy on behalf of the respondent was extensive – occupying the most part of three sitting days.

Evidence as to changes in the applicant's behaviour

The applicant gave evidence that he is now 64 years old (58 years old at the time of the motor vehicle accident). He was born in Greece (of Turkish ethnicity). He came to Australia in 1967 and worked as a qualified electrician. Between 1967 and 1976 he worked as an electrical contractor, principally for the Northern Territory Housing Commission. He also built houses for the Commission between 1976 and 1984. In 1984, the applicant (with the aid of sub-contractors) built a 5,200 square metre commercial building in Palmerston. He and his wife also acquired two electrical goods shops in Palmerston and Darwin. The applicant's wife worked at the Palmerston shop which operated as a retail business, while the applicant operated out of the Darwin shop ("the Cavenagh Street shop"), which was principally concerned with wholesale or trade business. In addition to his work at the Cavenagh Street shop, the applicant continued to work as an electrical contractor for the Northern Territory Housing Commission. A fire destroyed the Cavenagh Street shop in January 1997. The Palmerston shop was closed in 1996.

The applicant gave evidence that before the motor vehicle accident in April 1993 he dealt with tenants at the Palmerston commercial building and generally managed the family business jointly with his wife.

In relation to the motor vehicle accident the applicant testified that as he was proceeding north on Bagot Road, a car pulled out of McMillans Road in front of his vehicle and he collided with it. According to his evidence, his first memory after the accident was of waking up in hospital. He said that his left side – his hand, neck, leg, and knee – was “completely paralysed”, his left little finger was broken and his chest was painful.

In evidence-in-chief, the applicant said that following the accident, the Cavenagh Street shop was closed from 19 April 1993 (the day after the accident) until around October or November 1993. He then started working there for two to two-and-a-half hours per day, five days a week, on the advice of his general practitioner, Dr Linco. The applicant said that he tended to the stock at the shop, but there were few retail customers, who would easily upset him. The applicant also testified that after leaving hospital he had asked a person named “Wally” to carry out his obligations under the electrical maintenance contract with the Northern Territory Housing Commission. “Wally” had performed the work poorly, resulting in complaints from the Commission. The applicant had tried unsuccessfully to carry out work under this contract himself – but was unable to do so because of “shaking” and poor concentration. He also became very easily upset with tenants of Commission houses where he was required to work. The applicant stated that he decided to give up the Housing Commission maintenance contract and “gave it back” to the Commission.

The applicant gave evidence that prior to the accident he had a very good relationship with his wife with whom he managed the family business. He said that his wife now manages the business alone and he now becomes easily upset with his wife and two sons. The applicant said that he now sleeps apart from his wife. The applicant's sons (Barbaros, now 20 and Bahadir, now 19) were sent away to a boarding school at the beginning of 1994 – according to the applicant, to provide relief from arguments and to give his wife less work around the family home. The applicant described his present relationship with his two sons as poor. He described them as lazy around the house and he wanted them to leave the family home and live elsewhere. His elder son has now moved out, while his younger son continues to live in the family home together with his girlfriend. The applicant states that prior to the accident he used to have a very good relationship with his sons.

The applicant gave evidence that he now spends his days watching television, sleeping and occasionally having coffee with friends at Darwin restaurants. He no longer works as an electrician because of restricted movement in his arm. He does not want the problems associated with employing sub-contractors, who in his view “want too much money”.

The applicant claimed that prior to the motor vehicle accident his health had always been good. In his words: “Nothing more than the flu – nothing worse, no operations, or no nothing”. He denied undergoing any investigative procedures concerning his health.

The picture drawn by the applicant of his life before and after the motor vehicle accident received substantial modification under cross-examination by Mr Nosworthy.

It emerged that in 1984, following three years of chest pain, the applicant had been the subject of investigation at the Cardio Pulmonary Investigation Unit of Royal Adelaide Hospital. The applicant had made no reference to this when asked about his health history because, in his view, it was not “relevant” to the present reference. Similarly, he had not referred to the fact that since late 1992 he has undergone three monthly blood tests for his heart, diabetes and cholesterol levels.

It also emerged that the applicant does occasionally sleep in the same bed as his wife and has had sexual intercourse with her on occasions since the motor vehicle accident.

In relation to his work at the Cavenagh Street shop after the motor vehicle accident, the applicant said that he initially worked for two hours per day, but this was subsequently increased to four hours per day after around six months of working.

The applicant denied assaulting or threatening his wife. He admitted that on one occasion he had tried to hit his son Bahadir with a shovel and this had resulted in the police attending at the family home.

In relation to the family business, in cross-examination the applicant said that his wife had always run the family business – both before and after the accident – as she was better educated than the applicant.

Initially when cross-examined about the electrical maintenance contract with the Housing Commission, the applicant maintained that the Commission had taken the contract away after “Wally” had performed poorly after the accident. Eventually, when shown a document (Exhibit D14) from the Department of Lands and Housing cancelling the contract, the applicant conceded that the contract was in fact cancelled on 19 August 1992 (i.e. some seven or eight months before the accident). (I note that the Department of Lands and Housing was responsible for administration of the applicant’s contract with the Housing Commission). The applicant also accepted that he had made representations to the Minister for Lands, Housing and Local Government at a meeting on 9 October 1993 (i.e. nearly six months after the accident) in an attempt to have the Department reverse its decision to cancel the contract (see Exhibit D19).

The applicant was referred to a number of documents (Exhibits D6,7,8,9,12,13 and 34) from the Housing Commission and conceded (eventually) that the maintenance contract was cancelled following a series of complaints by tenants of the Commission. The complaints related to the applicant being rude to tenants, working outside of contract hours, poor workmanship and failure to comply with Commission requirements for urgent maintenance work.

Under cross-examination, the applicant accepted that in 1994 he had personally represented the family business in conducting the defence to a claim made in the Small Claims Court.

The applicant was shown surveillance video recordings made of him on various dates in April and June 1996 and May, June and July 1998. The video recordings (Exhibit D5) showed the applicant, sometimes alone and sometimes together with his wife, at various locations, including the Cavenagh Street shop, the Palmerston shop, outside his home, the grounds of Darwin Private Hospital, the Darwin Mall and Casuarina Square. The applicant initially denied the authenticity of these recordings. He claimed that the dates and times indicated on the recordings were incorrect. He persisted in these denials for a number of hours of cross-examination, but eventually through his counsel, Mr Young, conceded that the dates indicated on the tapes were correct. I will return to the significance of what is shown on the surveillance video recordings and my general observations on the applicant's demeanour during the hearing of the reference later in these reasons.

The applicant's wife, Fidel Bayram, gave evidence that she married the applicant in 1976 and that they had spent their entire married life in Darwin. She described their early family life as very good. On her account, the applicant's relationship with his sons while they were young was "perfect". She described how, nowadays, the relationship between the applicant and herself is very stressful; that there is almost a complete lack of communication

between them and the applicant had become violent towards both her and their two sons.

Mrs Bayram's evidence was to the effect that, following the motor vehicle accident, by late 1993 the applicant had become very restless and began being violent towards her. He pushed her around and treated it as a joke. He pushed her down a stairwell and injured her neck. Mrs Bayram could not give the dates of such incidents – she was not able to specify even the year in which they were said to have occurred. Her evidence was that the applicant's relationship with their sons had similarly deteriorated after the accident. In 1995 or 1996 he had cut Bahadir's neck with a shovel and the police were called to the family home. In 1998 the applicant had assaulted Barbaros with a belt before he had left the family home to live elsewhere in May 1998.

Mrs Bayram said that the decision to send their two sons to boarding school in Toowoomba in January 1994 was made because of the applicant's violence towards the two boys. She said that the applicant now has no capacity to concentrate, becomes upset easily and is unpredictable, has no table manners and spends much of his days sleeping or pretending to sleep. Mrs Bayram described the family's social life as "wonderful" before the accident. In contrast, it is now impossible for her and the applicant to go outside the family home with their two sons because of the applicant's condition. She gave evidence that the family had visited a Cullen Bay restaurant in 1998 to celebrate the applicant's birthday, but "(it) was dark and outside nobody could notice anything".

Mrs Bayram said that she had closed the Palmerston shop in February 1996 because of stress, which she attributed to the applicant's condition. She said that the applicant would attend at the Palmerston shop on occasions and argue with customers. Mrs Bayram gave evidence that before the motor vehicle accident the applicant had managed the Palmerston commercial building, but now the management and rent collection had been handed over to solicitors because the applicant was no longer capable of doing this work and she did not have the time due to the demands of looking after the applicant. The applicant, before the accident, used to take an active role in managing the family business, but now was reluctant or incapable of doing so.

Mrs Bayram gave evidence that she had consulted Dr Marinovich, a psychiatrist, at the beginning of 1994 due to sleeplessness and stress.

Under cross-examination, Mrs Bayram conceded that the maintenance contract with the Northern Territory Housing Commission was cancelled by the Commission "but we also wrote a letter to them to cancel the contract". She said that both the applicant and herself were "very happy" to give the contract back. She was unaware that the applicant had approached a government Minister in October 1993 in an attempt to regain the maintenance contract.

Mrs Bayram gave evidence that fighting between her two sons and their lack of academic achievement had caused stress in the family. She attributed

the fighting and her sons' failure to study to the applicant's behaviour. She was cross-examined about other potential sources of stress and accepted that the Palmerston shop was the object of a robbery in February 1995 and that a council worker had assaulted her in September 1994. She denied discussing the assault with the applicant as it was not her practice to "bring work problems home". Similarly, according to her evidence, while she and the applicant had pursued numerous court actions against tenants of the Palmerston commercial building for outstanding rent, they did not "really discuss this at home". Mrs Bayram did not agree that the loss of the Palmerston building's major tenant (a statutory authority occupying 70% of the building) was a source of family stress. She agreed that the applicant and herself had been distressed about the fire at the Cavenagh Street shop.

Barbaros Bayram is the elder of the applicant's two sons. He is now 20 years old (and was 14 at the time of the applicant's accident). His evidence was to the effect that he was sent to boarding school in Toowoomba at the start of 1994 to "get away" from the applicant. He says that after the accident the applicant's attitude to his brother and himself changed; the applicant became aggressive and complained frequently of pain.

Barbaros described his parents' relationship before the accident as "perfect" and the applicant's relationship to his brother and himself as very good. In recent times, the relationship had deteriorated and Barbaros had moved out of the family home in May 1998. He described the applicant as going slowly downhill after the accident, with the applicant becoming

forgetful and aggressive to his brother, himself and his mother, Fidel Bayram. He first noticed the aggression towards his mother after returning from Toowoomba in mid-1994. He had noticed the applicant's increasing anger before leaving for Toowoomba but on his return it was worse and communication in the family was in decline.

In the opinion of Barbaros, the applicant's work performance has declined and he no longer has the organisational ability to plan work.

The applicant had recently swung a belt at Barbaros and attempted to punch him. In 1994 the applicant had chased him over a fence while trying to whip him with a skipping rope and in late 1993 or early 1994, the applicant chased Barbaros and his brother brandishing a street sign. In relation to the belt incident earlier this year, the **applicant** had taken out a restraining order against Barbaros. The restraining order had prevented Barbaros from entering the family home. According to Barbaros, he had agreed to the order because the family home belonged to the applicant.

Barbaros said that he and his brother fought with each other regularly as children, but this had stopped before the applicant's accident. He accepted, however, that the police were called to a fight (about use of a family car) between his brother and himself in 1996.

Barbaros also gave evidence that the applicant had argued with him about the use of marijuana, but had not complained about him being messy or lazy around the house.

The applicant's younger son, Bahadir Bayram (now 19 years old and 13 at the time of the accident) also gave evidence. He claimed that he had been sent to boarding school at Toowoomba to avoid family conflict that made it difficult to concentrate on his schoolwork. His evidence was that the applicant had started to become aggressive towards the end of 1993.

The applicant had whipped him with a skipping rope, swung a shovel at his head and thrown a brick at his head. The incidents involving the skipping rope and brick were after the accident but before he was sent away to boarding school. The incident with the shovel was in 1995 or 1996.

Bahadir described his relationship with the applicant before the accident as good; nowadays there were constant arguments. He described the applicant as a person who loses control, breathes very heavily, dribbles, and is incapable of holding a conversation. The applicant, according to Bahadir's evidence, spends his days sleeping or lying down on a couch. The applicant complains of pain and requires constant attention from his mother, Fidel Bayram. He described the applicant as "like a zombie". The applicant no longer works around the family home as he used to before the accident and in Bahadir's view the applicant is now impossible to work with and lacks the skills to plan

work. Prior to the accident the applicant was an enthusiastic and skilled worker who frequently involved his brother and himself in his work.

Bahadir accepted that both his brother and himself were lazy at times and had been criticised by the applicant in this regard. The applicant had argued with both his brother and himself about the use of drugs. He denied that the applicant ever goes shopping nowadays. He also denied that the applicant became upset when Bahadir was disqualified from driving for an offence of exceeding the prescribed blood alcohol level.

In addition to the applicant and members of his family, the applicant's general practitioner, Dr Stanley Linco, was called to give evidence as to behavioural changes in the applicant following the motor vehicle accident.

Dr Linco gave evidence that he had known the applicant socially and professionally since 1992. He described the applicant as hospitable, pleasant to communicate with and quite light-hearted before the accident. He had also noted that the applicant was "quite firm" towards his two sons who he encouraged to study as he was concerned about their levels of achievement. He had seen the applicant argue with his sons about their education before the accident and the applicant had complained to Dr Linco that they did not study sufficiently. He was of the view that the applicant's attitude towards his sons' education did not change after the accident.

After the accident, the applicant had suffered significant pain, which in Dr Linco's view was still continuing. He had seen the applicant fly into a violent rage on one occasion after the accident while the doctor and his wife had been visiting the Palmerston shop. Dr Linco had calmed the applicant, but had not considered it necessary to see him professionally regarding this incident.

The applicant had consulted Dr Linco in December 1992 regarding high blood pressure, possible diabetes, and a prostate problem, loss of hearing and concerns about his heart. Since that time, the applicant's blood had been tested at three to four monthly intervals – a frequency which in the doctor's opinion was excessive but which he was prepared to agree to because of the applicant's insistence. Dr Linco gave evidence that the applicant is concerned about dying from heart disease. The doctor was not previously aware that the applicant was the subject of cardiac investigations in Adelaide in 1984.

Mrs Norma Cutler gave evidence that she had known the applicant for nearly thirty years and had acted as accountant to the Bayram family business for more than twenty-five years. She had attended dinners and birthday parties with the applicant, his wife and their children on a frequent basis.

Mrs Cutler gave evidence that before the applicant's accident in 1993, the applicant and his wife managed the family business together, but with the applicant playing a more dominant role. She described the applicant as occasionally excitable, which she attributed to his lack of understanding

because of his poor English and ethnicity. She did not find the applicant's excitability threatening. The applicant presented as a man from a culture where males were dominant. He showed the same dominance towards his two sons.

After the applicant's motor vehicle accident, the applicant's behaviour changed according to Mrs Cutler. He had appeared confused and his wife, Fidel Bayram, had adopted a much greater role in relation to business matters. Mrs Cutler first noticed this change in the applicant's behaviour around the beginning of 1994. At this time, or later, Mrs Bayram exhibited signs of stress – often crying and appearing distressed. In recent times, according to Mrs Cutler, the applicant plays little part in business discussions relating to the family business.

A few months ago, Mrs Cutler had attended a birthday celebration at a Cullen Bay restaurant with the applicant, his wife, Bahadir Bayram and Bahadir's girlfriend. Mrs Cutler's evidence was that the evening was pleasant and the applicant did not display any inappropriate social behaviour. There had been good humour between the applicant, his wife, Bahadir and Bahadir's girlfriend.

Mrs Cutler was also extensively cross-examined on behalf of the respondent about the accounts of the family business. The financial results reported for the financial years 1987/88 to 1996/97 appear in Exhibit D40 and cumulative retail sales from the two shops operated by the applicant and his

wife for the years 1992/93 to 1996/97 appear in Exhibit D41. The reported gross profit/(loss) (and as a percentage of retail sales) for the financial years 1991/92 to 1996/97 are as follows:

1991/92	\$36,115	(5%)
1992/93	\$155,705	(23%)
1993/94	\$156,733	(18%)
1994/95	\$91,257	(13%)
1995/96	(\$43,337)	(-12%)
1996/97	(\$126,450)	(-46%)

Evidence as to the applicant’s condition immediately following the accident of 18 April 1993

Mr Rowan Penhale gave evidence, on behalf of the respondent, that in April 1993 he was an ambulance officer with the St Johns Ambulance NT Service. He had attended the scene of a motor vehicle accident at the corner of Bagot Road and Old McMillans Road, Coconut Grove at 2.23p.m. on 18 April 1993.

Mr Penhale gave evidence that he had observed the applicant lying on the side of the road. He had completed a St Johns Ambulance Officer’s report form (Exhibit D17). In the form he had noted the applicant’s provisional diagnosis as possible fractured ribs, possible fractured left wrist and pain in the cervical region. He had also noted that the patient (applicant) “stated that

he remembers everything that happened”. According to Mr Penhale the applicant was conscious and coherent and supplied details such as his name, address and telephone number. Mr Penhale had checked for, and found no sign of, head injuries. The applicant was not resistant; his pupil reaction was average for a person in daylight hours; he was oriented in time and space and followed Mr Penhale’s requests and instructions. Mr Penhale gave evidence that he would have noted in his report any head injury or loss of consciousness – including any short periods of unconsciousness of which the applicant was aware prior to Mr Penhale’s arrival.

The records of the Royal Darwin Hospital (Exhibit D33) indicate that the applicant was admitted to the hospital at 3.10p.m. on 18 April 1993. There is nothing in the records to indicate that the applicant had suffered a head injury or any period of unconsciousness. His condition on arrival is described as “...in moderate distress with central chest pain, neck pain and left wrist...alert and orientated”.

The records indicate that he was discharged from the hospital on 21 April 1993 having spent one night in the cardiac care unit (for cardiac monitoring) and two nights in a general ward.

Medical Evidence

The applicant relied upon the evidence of two psychiatrists: Dr Leonard Marinovich, who the applicant has consulted regularly since November 1994,

and Dr Barrie Kenny, who prepared two reports at the request of the respondent's solicitors.

Dr Kenny produced a report, dated 3 June 1995, that he initially prepared regarding the applicant (Exhibit A1), a letter, dated 3 June 1996, from the respondent's solicitors requesting a further report (Exhibit A2), and that further report, dated 12 June 1996 (Exhibit A3). In evidence, Dr Kenny maintained the opinion expressed in his written reports that the applicant is suffering from "a continuing post-traumatic syndrome with depression, anger, behavioural change, some persisting physical symptoms with a major psychological functional accentuation and some elements of post-traumatic stress disorder" (page 5 of Exhibit A3). Dr Kenny was of the opinion that the applicant's condition is now permanent and stable and that the applicant requires continuing psychiatric care.

Dr Kenny explained "post-traumatic syndrome" as a series of symptoms that are ascribed to a trauma. The problems complained of by the applicant were severe headaches, feelings of misery, frequent crying, becoming easily upset, poor short-term memory, lack of concentration, sleeplessness (in the absence of medication) and over-eating. According to what the applicant had told Dr Kenny, relationships between the applicant and his family had deteriorated greatly as a result of his condition.

Dr Kenny gave evidence that the accuracy of his diagnosis is entirely dependent on the accuracy of the history given to him by the applicant. In

preparing his first report (Exhibit A1), Dr Kenny had been told by the applicant that he had no recollection of the accident and that he “came to three or four hours later in hospital, where he remained for twelve days”, including three days in an intensive care unit. The applicant had also told Dr Kenny that he had not worked since the accident – he had attempted to work in his shop, but had been so irritable with customers that he had decided it was best if he did not work.

The respondent’s solicitors, in their request (Exhibit A2) for the second report (Exhibit A3) drew attention to the observations of Mr Rowan Penhale, the ambulance officer who attended the accident scene (as to which see above), hospital records indicating that the applicant had spent only three nights in hospital and observations of the applicant working in the Cavenagh Street shop.

Dr Kenny in his second report noted that it was possible that the applicant suffered a very transient concussion immediately after the accident and was conscious when Mr Penhale arrived at the scene. He also noted that the applicant now conceded that he was not sure as to the dates of his hospitalization and that while the applicant had closed his shop in April 1995, he claimed to have “semi-re-opened” it some time later with reduced hours. He claimed that he re-opened the shop to give him a place to go and something to do, but was making only small sales and not re-ordering stock. In his second report, Dr Kenny had maintained his opinion that the applicant was severely impaired, but with the observation “one can never vouch for the honesty of the

history provided by a patient under these circumstances” (i.e. in the context of a compensation claim).

In evidence, Dr Kenny said that while he continued to maintain his opinion as to the applicant’s condition, if the applicant was in fact not unconscious at all after the accident that would tend to weaken his opinion. However, in his opinion, a period of unconsciousness following the motor vehicle accident is not decisive in relation to his diagnosis of the applicant’s condition. Dr Kenny agreed in cross-examination that the applicant could “function perfectly OK” in terms of daily living, his mannerisms of a social nature were appropriate to the setting and he seemed able to concentrate and respond to questions in an appropriate manner.

Dr Kenny was referred to the applicant’s evidence of opening and operating the Cavenagh Street shop at regular hours, sharing coffee with friends several times a week in a habitual pattern and permitting a guest from overseas to stay at the family home for three months. Dr Kenny was of the view that none of these activities were consistent with the history and symptoms related to him by the applicant. In that context, Dr Kenny also agreed that his opinion was only as good as the history given by a patient.

Dr Kenny considered that the process of the applicant’s compensation claim was likely to contribute to the maintenance and exacerbation of his symptoms. He expected that once the case was resolved there would be a substantial attenuation of the applicant’s symptoms.

Dr Leonard Marinovich gave evidence that he was consulted by the applicant in November 1994 and has treated him on a regular basis since that time. He has also treated Mrs Bayram, who was referred to him by her general practitioner before he first met the applicant.

Dr Marinovich produced four reports (Exhibits A6, 7, 8 and 9) and a letter dated 4 June 1996 from the applicant's solicitors (Exhibit A10). The reports are dated 14 December 1994, 20 September 1995, 5 June 1996 and 10 July 1996.

Dr Marinovich gave evidence in which he confirmed the opinion expressed in his reports that the applicant is suffering from post-concussional syndrome as a result of the motor vehicle accident in April 1993. He explained that post-concussional syndrome refers to a collection of symptoms, occurring not uncommonly after a head injury, especially a head injury involving concussion. The condition, referred to as post-concussional disorder, rather than syndrome, is described in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association (referred to as "DSM IV"). DSM IV is a digest of psychiatric opinions gathered from practitioners in the United States of America and elsewhere and is widely accepted as an authoritative text for the identification of psychiatric disorders. The doctor also referred to Organic Psychiatry – The Psychological Consequences of Cerebral Disorder (2nd Edition) by William A Lishman (referred to as "Lishman") in support of his view that post-

concussional syndrome is a condition “fairly well established” in current psychiatric opinion.

Extracts from DSM IV and Lishman were admitted as Exhibits A11 and A12 respectively.

In Dr Marinovich’s opinion, while the existence of post-concussional syndrome is generally accepted by practising psychiatrists, there is debate as to whether it is a distinct mental disorder or a clinical variant of an existing disorder. There is also debate about the cause of the syndrome, in particular whether the syndrome is due to purely psychological factors or organic causes, (i.e. some damage to the underlying brain cells), or both. Dr Marinovich favours the latter view, i.e. that the syndrome is caused by a combination of psychological factors and an organic cause. Dr Marinovich does not accept the view expressed by Dr Kutlaca (as to which see later in these reasons) that post-concussional disorder (or syndrome) is not accepted in DSM IV as a diagnostic entity but is only postulated for research purposes. In his opinion, the listing of the syndrome in DSM IV shows that it is an identified and accepted disorder. The doctor rejected the suggestion that the syndrome is of questionable diagnostic validity because, in his words, the symptoms are “to me, clear. I have seen and treated several hundred people with the syndrome over the years and the symptoms are much the same in each person that you see”.

In Dr Marinovich's opinion the symptoms of post-concussional syndrome are:

- (a) headache – common and persistent;
- (b) irritability – short temper, explosive, rage reactions;
- (c) cognitive changes – changes in ability to think, intellectual, memory loss, faulty judgment;
- (d) dizziness – light-headedness rather than vertigo – dizziness occurs with movement of the head, especially sudden movement of the head;
- (e) changes in taste and smell;
- (f) alcohol sensitivity;
- (g) depression, including suicidal thoughts, changes in sleep, appetite, weight, energy, concentration, self-confidence, self-esteem, and social withdrawal.

Dr Marinovich gave evidence that the applicant has all the above symptoms except alcohol sensitivity (the applicant being a teetotaller). According to Dr Marinovich, the applicant has withdrawn socially since the date of the accident – and this withdrawal has become progressively worse.

According to what the applicant has told him, the applicant has hardly socialised at all in the last twelve months.

In the doctor's opinion, post-concussional syndrome may follow quite minor head injury. Where the syndrome is present, Dr Marinovich considers that it can be concluded that the patient experienced concussion. Such concussion need not have been serious or sizeable to produce the syndrome. In this regard, the doctor noted that concussion may occur where a person does not lose consciousness – such a “clouding of consciousness” may be present although a person appears to others to be conscious.

Dr Marinovich said that mood instability was a feature of the syndrome – giving rise to anxiety, weepiness for no apparent reason, and emotional variability. The doctor had observed such symptoms in the applicant and these had become progressively worse in the last twelve months. He had prescribed medication (Modecate) to reduce the applicant's propensity to react with unpredictable rage to trivial or even non-existent causes. The medication, administered by injection, had produced serious side effects in the applicant – the applicant had become very morose; he dribbled at the mouth, lost facial expression and developed a Parkinsonian-type syndrome. The medication had been stopped as a result of the side effects, but in Dr Marinovich's opinion the applicant would have been still suffering such side effects at the time he gave evidence in the present reference (July 1998). In particular, in the doctor's opinion, the applicant would have been very confused and muddled, very flat,

very forgetful and have a very blank facial expression. Dr Marinovich commented that:

“So I’m sure you had a lot of difficulty leading and cross-examining and getting his evidence from him, because he’s forgetful, his mind’s all over the place and it – it seems the untoward side effects seem to aggravate this – that aspect of his disorder even though we thought it was settling his rages.”

I will return to this observation later in these reasons.

Dr Marinovich was of the view that the applicant’s condition is unlikely to improve. He believes the applicant’s family will eventually have to separate because of the applicant’s rage reactions. He does not consider that the applicant will work again and does not consider that resolution of the present litigation will affect his condition. In his report of 10 July 1996 (Exhibit A9) the doctor expressed the view that based on the American Medical Association ‘Guides to the Evaluation of Impairment’ (4th Edition) the applicant is suffering psychiatric impairment of 75% based on an assessment of his activities of daily living, social functioning, concentration and ability to adapt to his current situation.

In cross-examination, Dr Marinovich confirmed that post-concussional syndrome does not occur in the absence of a head injury. The doctor was not concerned about the absence of any evidence that the applicant suffered any concussion or head injury as a result of the motor vehicle accident.

Dr Marinovich’s approach was that because the applicant had all the symptoms of post-concussional syndrome it followed that he must have suffered a head

injury in the accident, regardless of whether the ambulance officer, Mr Penhale, or those who admitted and treated him at the hospital, were aware of it. In his view, it was possible that the applicant may have suffered a clouding of consciousness without any effect on his blood pressure, pupil reaction, pulse and verbal responses.

Dr Marinovich did not consider that viewing the surveillance videotapes (Exhibit D5) of the applicant in social or other settings would assist him in making or confirming his diagnosis of the applicant's condition. He was aware of the videotapes but had not asked to see them. He was quite sure of his diagnosis, having seen the applicant on many occasions over the years since 1994. He also did not consider the applicant's symptoms were consistent simply with advancing age. While elderly people commonly experienced some of the applicant's symptoms, in his opinion the symptoms as a whole were consistent only with his diagnosis of post-concussional syndrome.

Dr Marinovich was not previously aware the applicant was the subject of cardiac investigation in 1984. He agreed that the excessive number of blood tests prescribed by Dr Linco suggested a concern by the applicant about his cardiac health.

Dr Marinovich was cross-examined about his treatment of Mrs Bayram, who had been referred to him by her general practitioner, Dr Jansen, in mid-1994 (i.e. before the applicant first consulted him). He agreed that he had expressed concern about the Bayrams' heavy business load and financial

commitments. He also agreed that there had been no reference by Mrs Bayram to the applicant being violent towards her or suffering periods of rage. Mrs Bayram had told him that her husband was very “middle-Eastern” in attitude and possessive towards her. Dr Marinovich understood that this had been a situation of many years standing. He had also noted in his report to Dr Jensen that Mrs Bayram had told him that the applicant had a similarly possessive attitude towards his children, who were not allowed to indulge in social activities, have friends or take part in ordinary Australian life. Later in his evidence, Dr Marinovich indicated that he later came to form the view that the applicant’s possessive attitude towards his children developed after the accident. When he wrote his report to Dr Jensen in mid-1994, he had understood that the Bayrams’ children had been sent to a boarding school to allow them better social and emotional growth and development. He had since formed the view that the children were sent away because the Bayram family situation was becoming intolerable.

Dr Marinovich was referred to a report dated 16 November 1994 regarding the applicant that he had forwarded to the applicant’s general practitioner, Dr Linco. In the report, he had referred to the applicant having suffered a “major head injury including concussion”. Dr Marinovich explained that this was a conclusion he had drawn on the basis of the applicant's symptoms. However, in his opinion, post-concussional syndrome can follow minor, even trivial, head injuries. He had concluded that the applicant’s head injury was probably major because of the severity of the post-concussional syndrome suffered by the applicant. He had not sought to

examine the notes of the Royal Darwin Hospital as to details of the applicant's condition on admission or the duration of his stay at the hospital (despite accepting that he could have applied for access to such records).

Dr Marinovich was asked about potential sources of stress between the applicant and his wife. He expressed the view that he would be surprised if the applicant could control himself for periods of months where guests came to live at the applicant's family home. He also accepted that the following matters might be productive of stress between the applicant and his wife:

- (a) Barbaros and Bahadir fighting;
- (b) Barbaros and Bahadir being involved in car crashes with their own cars and that of Mrs Bayram;
- (c) The use of drugs by Barbaros and Bahadir;
- (d) Bahadir driving under the influence of alcohol and loss of his driving licence upon conviction for an offence of exceeding the prescribed blood/alcohol level;
- (e) The applicant and his wife working long hours at the two shops;
- (f) Mrs Bayram being assaulted in the vicinity of the Palmerston shop;

- (g) Mrs Bayram having a lump in her breast which she declined to have investigated;
- (h) The family business being under intense financial pressure as the result of the loss of their major government tenant in the Palmerston commercial building;
- (i) The loss of the electrical maintenance contract with the Northern Territory Housing Commission;
- (j) The fire at the Cavenagh Street shop; and
- (k) The break-up of a longstanding friendship between Mrs Bayram and another, resulting in court proceedings for defamation and recovery of a loan from that other

I note that with the exception of (g), all the above matters were supported by evidence from the applicant, his wife and/or their two sons.

Dr William Blakemore, a psychiatrist, was called to give evidence on behalf of the respondent.

Dr Blakemore saw the applicant on 11 June 1998 and prepared a report, dated 12 June 1998 (Exhibit D21). He confirmed that he maintains the views

that he expressed in that report. In that report, Dr Blakemore had described the applicant's presentation as "quite odd" and "deliberately unrevealing". He considered that the applicant had a contrived air of confusion – being willing and able to answer some questions in detail but feigning confusion in relation to others. In evidence, Dr Blakemore elaborated on his perception of the applicant and said it was "almost as though he was play-acting mad – play-acting being mentally incompetent". The doctor did not agree that the applicant's treatment with Medicate could be responsible for his presentation.

Dr Blakemore agreed that the matters (a) to (k) above (which were put to Dr Marinovich) were potential causes of stress between the applicant and his wife. He did not consider that the applicant, as he presented to him, would be capable of going to Turkey on holidays, attending to work at his shop on a regular basis or meeting with friends for coffee on a regular and consistent basis.

It was Dr Blakemore's view that the applicant's symptoms were consciously elaborated and will disappear immediately once the present litigation is concluded. He does not accept that the applicant has any permanent disability of any significance from a psychiatric point of view.

In cross-examination, Dr Blakemore accepted the existence of post-concussional syndrome, but favoured the view that this condition arises from an organic, rather than psychological, cause. He considers that the syndrome relates to severe head injury resulting in organic brain damage. He considers

that the syndrome is in modern times restricted to severe head injuries generally with some demonstrable physical pathology and measurable cognitive defects. He noted that in the past, but not presently, the syndrome was synonymous with compensation neurosis in the view of the main body of psychiatric opinion.

Dr Kutlaca, a psychiatrist, was also called as a witness on behalf of the respondent. He produced a report, dated 21 October 1996 (Exhibit D32) and a further report dated 2 September 1998 (Exhibit D42). The latter report simply confirms the opinions expressed in his earlier report after a viewing of the surveillance videotapes (Exhibit D5).

Dr Kutlaca confirmed that he adheres to the views expressed in his report of 21 October 1996 (Exhibit D32). It is his opinion that the applicant is not suffering from a diagnosable psychiatric disorder in relation to the motor vehicle accident. He considers that the applicant does not require psychiatric intervention and predicts that all his post-accident complaints will disappear upon resolution of the present litigation.

Dr Kutlaca accepted that psychiatric opinion is frequently only as accurate as the history given by the patient. In this regard, the applicant had told him that he was uncertain whether he had struck his head: "I just had a pain here (indicating the base of the skull) and it is still there". He also told Dr Kutlaca that he had been a hospital in-patient for thirteen to fourteen days, including four to five days in intensive care.

Dr Kutlaca was of the view that symptoms of the kind claimed by the applicant such as dizziness, loss of short-term memory, tiredness and poor sleep might be due to a physical cause or a psychiatric problem. At the age of sixty-five, there are many factors which might be relevant to such complaints (for example, dementia, Alzheimer's disease, mini strokes, the consequences of an infection, or the effects of medication). Dr Kutlaca also agreed that the matters (a) to (k) above were possible causes of stress to the applicant and his wife.

Dr Kutlaca was cross-examined as to his views regarding post-concussional syndrome. He is of the opinion that it is "an entity which may be considered controversial, or to be more specific, less than a 100% syndrome of validity". He is sceptical about the existence of the syndrome.

Dr Kutlaca stressed that in his opinion post-concussional syndrome is not included in DSM IV as a recognised disorder. He emphasised that the entry for post-concussional disorder is included in Appendix B to DSM IV entitled "Criteria Sets and Axes Provided for Further Study" and quoted the introductory paragraph of the Appendix (Exhibit A11):

"This appendix contains a number of **proposals** for new categories and axes that were suggested for possible inclusion in DSM IV. The DSM IV Task Force and Work Groups subjected each of the **proposals** to a careful empirical review and invited wide commentary from the field. **The Task Force determined that there was insufficient information to warrant inclusion of these proposals as official categories or axes in DSM IV.**" (emphasis added)

DSM IV, after describing the features of the proposed post-concussional disorder, lists research criteria, which Appendix B describes as “tentative”.

Dr Kutlaca also referred to Lishman (Exhibit A12) in support of his opinion that the syndrome is less than totally accepted by the vast majority of medical and psychiatric professionals. Lishman refers to the “so-called post-traumatic (or post-concussional) syndrome” as controversial. Lishman notes:

“It is not surprising that the concept lacks clarity, and that its aetiology has remained in doubt. Lewis (1942) referred to it as ‘that common dubious psychopathic condition – the bugbear of the clear-minded doctor and lawyer’ ”.

Dr Kutlaca likened post-concussional syndrome to physical disorders such as chronic fatigue syndrome, reflex sympathetic dystrophia and RSI (repetitive strain injury). He accepted, however, that Appendix B in DSM IV sets out the criteria for post-concussional syndrome as presently understood by the preponderance of psychiatric opinion and agrees it would be appropriate to consider such a diagnosis where a patient displayed symptoms of the type described in DSM IV.

Aside from his doubts about the validity of post-concussional syndrome as a diagnosis, Dr Kutlaca expressed concern at the lack of a comprehensive investigation for a possible organic cause of the applicant’s complaints and the failure to consider explanations other than the motor vehicle accident as the sole cause of such complaints. Dr Kutlaca would favour an approach which

sought to exclude organic causes for the complaints first and then proceeded to consider other potential causes (social, political, religious, financial and so on) for the complaints. He considered that there were several potential causes for the applicant's symptoms: psychotic disorder, a neurotic reaction, a factitious disorder, malingering or a mood disorder (chronic depressive disorder).

In addition to the witnesses to which I have referred, the respondent also called Mr Claude Vautin, an insurance adjuster who had interviewed the applicant regarding the fire at the Cavenagh Street shop. I do not consider it necessary to canvass his evidence, which in my view did not assist in resolving the issues in the present reference.

Assessment of the Evidence

The applicant's case is that he was injured in a motor vehicle accident on 18 April 1993 and that as a result of that accident he suffers post-concussional syndrome (or in the alternative, post-traumatic syndrome) which has left him permanently (psychiatrically) impaired for the purpose of section 17 of the Act.

Mr Young, for the Applicant, describes the applicant's case as straight forward – albeit relying on inferential reasoning. Mr Young submits that the evidence of the applicant, members of family, his accountant and his general practitioner shows a gradual development of particular behaviour and traits which his treating psychiatrist, Dr Marinovich, considers are distinctively

symptomatic of post-concussional syndrome (or disorder). Dr Marinovich infers from this that the applicant suffered a head injury in the motor vehicle accident of sufficient severity to produce the syndrome.

The applicant's case rests on the credibility of the witnesses who described changes in the applicant's behaviour after the accident and the validity of the medical opinions (principally that of Dr Marinovich and to a lesser extent Dr Kenny) which support the applicant's case.

The Credibility of the Applicant's Witnesses as to changes in the Applicant's Behaviour

Mr Young submits that the applicant's evidence was often disjointed, unclear and confusing. Mr Young emphasises the evidence of Dr Marinovich that the applicant at the time when he gave evidence would have been suffering from the side effects of Modicate injections prescribed to control his unpredictable rage reactions. I have previously referred to Dr Marinovich's comment in evidence that he was sure that there would be a good deal of difficulty in obtaining the applicant's evidence "because he is forgetful, his mind's all over the place ...".

I agree that the applicant's evidence was at times disjointed, unclear and confusing. I also agree that there were indeed difficulties in obtaining his evidence. However, I reject the suggestion that the often unsatisfactory nature of the applicant's evidence and, at times, extreme difficulties in extracting it

from him was the consequence of either medication administered to the applicant or the state of his mental health generally.

Dr Blakemore gave evidence that the drug (Modicate) prescribed for the applicant (and relied upon by Dr Marinovich as exaggerating the applicants alleged cognitive difficulties) is a tranquilliser. In Dr Blakemore's opinion, which I accept in this regard, such a drug administered with a sufficiently high dosage might induce drowsiness and perhaps a consistent confusion in responding to questions. The applicant's performance in the witness box was in very marked contrast to someone affected by any such tranquillising agent. The applicant presented as alert, combative and focussed.

In my view, where the applicant's evidence was disjointed, unclear or confusing, this was a deliberate and conscious tactic to avoid revealing matters which the applicant considered were inconsistent with his case. I have summarised the applicant's evidence at some length. The contrast between his evidence in-chief with the concessions that he was driven to make in cross-examination was remarkable. Time and time again the applicant was forced to change parts of his evidence. On a number of occasions this occurred only when the applicant was confronted with documentary evidence at odds with his initial version of events. The applicant's approach was to deny the relevance of what was put to him (for example, his incorrect claims to his consistent good health before the accident) or to dispute the authenticity of documents which revealed very significant variations from his version of events (for example, his initial and repeated insistence that the Housing Commission

maintenance contract was cancelled after the accident in the face of documentary evidence that it was cancelled seven or eight months before the accident). Eventually, the applicant would concede, usually through counsel, the accuracy of what was being put to him.

The combative and argumentative nature of the applicant's approach reached its height when he was cross-examined about the surveillance video recordings made on various dates in 1996 and 1998. The applicant's first reaction, which he persisted in for some hours, was to dispute the validity of the dates indicated on the video recordings. He suggested the dates were false by reference to his technical electrical expertise and by reference to a truck appearing in the recordings which he claimed not to have been used for a period of years. Eventually he conceded, through counsel, that the dates indicated on the recordings were in fact correct.

The content of the surveillance tape recordings shows the applicant engaged in a variety of routine tasks – opening and closing the Cavenagh Street shop, driving, walking, waiting at a medical centre, kissing his wife goodbye, talking to persons at his shop and elsewhere, shopping with his wife, pushing a supermarket trolley, collecting photographs with his wife at a shop, playfully pretending to spray an acquaintance with ant poison. Nothing in the video tape recordings suggests that the applicant was suffering from any of the symptoms accepted by Dr Marinovich as part of the applicant's condition. At all times, the video tape recordings show the applicant as a smartly dressed

and purposeful person engaged in his day to day affairs without any sign of discomfort, distress, anger or dizziness.

The applicant presented much the same appearance in court. During nearly three days in the witness box the applicant showed a high level of determination and concentration. At times, he demonstrated irritation – but it is my opinion that this stemmed with his annoyance at Mr Nosworthy pressing him on matters which he did not wish to answer. The applicant’s presentation was completely at odds with the picture portrayed of him in the evidence of his wife, sons and Dr Marinovich. The most extreme description of the applicant came from the evidence of his son, Bahadir. On his account, the applicant was a person subject to uncontrolled rages, incapable of concentrating or holding a conversation; a person who was “like a zombie”, prone to dribbling and heavy breathing. The descriptions offered by Fidel Bayram, Barbaros Bayram and Dr Marinovich were to much the same effect, albeit expressed in kinder terms. My observations of the applicant were in complete contrast to such descriptions. In my view, the applicant is an intellectually strong and determined man who understood what was being asked of him and at pains to avoid saying anything which he believed would not assist his case against the respondent.

After his evidence had been concluded, I had the opportunity to observe the applicant further during his frequent attendances in court to listen to other witnesses give evidence. Nothing in his demeanour suggested anything consistent with the symptoms described by Dr Marinovich. On the final day of

the hearing, the applicant sat through two hours of counsels' closing submissions. He appeared to listen attentively and again displayed nothing to indicate that he was suffering any psychiatric (or physical) disorder. In particular, he showed no signs of distress, irritability, heavy breathing or dribbling. On the contrary, he appeared entirely normal. Much of this time was spent sitting with his wife, Fidel Bayram (who, in contrast to the applicant, did give the appearance of being under stress). There was nothing to suggest that any tension existed between the applicant and his wife – indeed they gave every appearance of being a contented couple, with Mrs Bayram on a number of occasions removing tissues from the applicant's shirt pocket and exchanging a few quiet words with him.

Demeanour is, of course, not a sure guide to credibility of a witness. However, the extensive opportunity that I had to observe the applicant coupled with both the nature and content of his evidence has persuaded me that he is not a witness that I could rely on to give an honest and reliable account of his behaviour before and after the accident.

The unfavourable view that I have formed of the applicant's credibility is re-inforced by my assessment of Fidel Bayram and the two sons Barbaros and Bahadir.

The thrust of Mrs Bayram's evidence was that all difficulties in the Bayrams' family relationships stemmed from the applicant's condition which could be traced back to the motor vehicle accident. In evidence, she appeared

to deny that she was aware her purpose in giving evidence was to support the applicant's claim for compensation. She denied discussing with the applicant an incident when she was assaulted by a council worker in September 1994. She sought to minimise any potential source of stress which did not emanate from the applicant. Her evidence was given in a very defensive manner with Mrs Bayram frequently cutting off Mr Nosworthy in mid-sentence as she rushed to deny or justify something without waiting to hear the entire question. Her complaint that there is now almost a complete lack of communication between the applicant and herself rings somewhat hollow. Both the applicant and Mrs Bayram in giving evidence were prone to leap to conclusions without listening to questions put to them; both were determined to give a pre-determined version of events regardless of evidence to the contrary and both were rapid and consistent in denying the relevance of anything which conflicted with the thesis that any and all problems between themselves and between the applicant and their children stemmed from the applicant's motor vehicle accident. I do not consider that any substantial weight should be given to the evidence of Mrs Bayram concerning alleged changes in the applicant's behaviour after the motor vehicle accident.

I take a similar view in relation to the evidence of Barbaros and Bahadir Bayram. I consider that both exaggerated the "perfect" nature of the family life they enjoyed before the applicant's motor vehicle accident. I do accept that in the years following the motor vehicle accident there may have been arguments and violent incidents between the applicant and his sons and the applicant and his wife. However, in the light of all the evidence, I am not

persuaded that physical coercion from the applicant and family arguments both before and after the date of the accident would be out of character for the applicant. In this regard, I note Dr Linco's evidence that the applicant was "quite firm" towards his sons both before and after the accident and that the applicant's attitude towards ensuring his sons achieved a good academic record remained unchanged after the accident. I also note that evidence of Mrs Cutler that before the accident the applicant was occasionally excitable and presented as a man from a culture where males were dominant.

In addition to these aspects of the evidence of Dr Linco and Mrs Cutler, the available evidence concerning the cancellation of the applicant's electrical maintenance contract with the Housing Commission lends weight to the view that before the accident the applicant was a domineering and difficult person. A letter of 31 July 1992 to the applicant from the Superintendent in the Department of Lands and Housing includes the comment: "...a number of tenants have expressed dissatisfaction with your impolite and blunt behaviour...".

This letter was sent after a meeting held on 11 May 1992 to discuss with the applicant complaints about his poor workmanship, working out of contract hours, failure to comply with requests for urgent work and complaints as to his treatment of Housing Commission tenants. The background papers considered at this meeting (Exhibit D34) included an assessment by the Department's Palmerston Office Manger that:

"...because of Mr Bayram's East European descent he has an approach and manner which may upset some people. He is always in a hurry,

probably because of his other business commitments resulting in untradesman-like work”

There is a further comment in those background papers that the applicant’s “manner with tenants appears to have been uncompromising and the people are very unhappy having to deal with him” and in relation to a complaint of a tenant that the applicant was upset “that he had to come out at tea time and was very angry and rude at the tenant”.

Aside from the evidence of the applicant and members of his family (as to which as I have indicated I place no substantial weight) the ‘independent’ evidence of changes in the applicant’s behaviour after the motor vehicle accident is very weak. Dr Linco referred to a single incident where he calmed the applicant after the applicant flew into a violent rage – an incident which he did not consider necessary to pursue in his professional capacity as the applicant’s general practitioner. Mrs Cutler referred to the applicant’s gradual withdrawal from his involvement in the family business – a matter she first noticed around the beginning of 1994. She states that the applicant appeared confused and she noticed that he appeared overly possessive of his wife. This attribute of the applicant was also referred to by Dr Marinovich when he was cross-examined about a report he had written in 1994 regarding Mrs Bayram to her general practitioner. In that report, he had referred to Mrs Bayram telling him the applicant was very “middle-Eastern” in attitude and possessive towards her. Dr Marinovich understood that this had been a situation of many years standing.

Mrs Bayram had also told Dr Marinovich that the applicant had a similarly possessive attitude towards his children, who were not allowed to indulge in social activities, have friends or take part in ordinary Australian life. At the time of his report to Dr Jenson, he had also understood that the Bayrams' sons were sent to boarding school to allow them better social and emotional growth and development. Subsequently he had revised his views such that he now believed the Bayrams' sons were sent away because of the intolerable family situation and the applicant's possessive nature towards them developed only after the motor vehicle accident.

With all due respect to Dr Marinovich's professional expertise, his revised opinions regarding the Bayrams' sons is difficult to accept given the evidence from Dr Linco and Mrs Cutler as to the nature of the applicant's attitude towards his sons and his own evidence as to what Mrs Bayram had told him about the applicant when she first consulted him. I also note that Dr Marinovich accepted as true the applicant's assertion that he had "hardly socialised at all in the last twelve months". This may be contrasted with the applicant's own evidence that he meets with long-standing friends for coffee several times a week on a regular basis.

The Conflicting Medical Evidence

The starting point for any consideration of the medical evidence must necessarily begin with the extent, if any, to which the applicant suffered a head injury in the motor vehicle accident on 19 April 1993. I have noted

previously that Dr Marinovich is of the opinion that post-concussional syndrome does not occur in the absence of a head injury. In contrast, Dr Kenny does not consider that his diagnosis of post-traumatic syndrome is dependent upon the applicant having lost consciousness as a result of the accident – albeit in the absence of a period of unconsciousness, his opinion would be weakened.

I have referred above to the evidence of Mr Rowan Penhale, the ambulance officer who attended the scene of the applicant's accident. Nothing in his evidence suggests that the applicant suffered a head injury with or without being accompanied by a period of unconsciousness. Similarly, there is nothing in the notes of the Royal Darwin Hospital (Exhibit. D33) to suggest that the applicant suffered a head injury or any period of unconsciousness.

Dr Marinovich's approach is that **because** the applicant has all the symptoms of post-concussional syndrome it follows that he **must** have suffered a head injury in the accident regardless of whether Mr Penhale or the treating hospital staff were aware of it. Dr Marinovich is of the view that the applicant's condition might have resulted from a relatively mild injury involving a "clouding of consciousness" which would not necessarily be identifiable by observable indications such as effects on his blood pressure, pupil reaction or verbal responses.

It is apparent that the basis of Dr Marinovich's opinion has changed considerably from that which he expressed in his first report to the applicant's

then solicitors (Exhibit A6). In that report (dated 14 December 1994), relying on details provided by the applicant (on 15 November 1994), Dr Marinovich referred to the applicant having suffered a “head injury and period of unconsciousness”. He diagnosed that the applicant was suffering from post-concussional syndrome and stated:

“The condition is a direct consequence of the head injury sustained in that accident and the period of concussion at that time”.

In reporting to the applicant’s general practitioner, Dr Linco, on 16 November 1994, Dr Marinovich referred to the applicant having suffered a “major head injury including concussion”. In a later report to the applicant’s solicitors (Exhibit A8), after being informed of the lack of evidence from Mr Penhale or hospital records that the applicant suffered any period of unconsciousness or head injury, Dr Marinovich emphasises that the applicant’s symptoms are consistent only with his having suffered a period of unconsciousness, albeit a relevant head injury need not have been major nor resulted in anything beyond a “clouding of consciousness”.

In view of the crucial importance of the applicant having suffered a head injury to Dr Marinovich’s diagnosis of post-concussional syndrome, it is surprising that at no stage has he sought to examine the records of the Royal Darwin Hospital. Similarly, it is surprising that Dr Marinovich has not sought to exclude organic causes for what he perceives to be the applicant’s condition, i.e. a condition which in his opinion is the consequence of an injury to the head.

The basis of Dr Kenny's opinion has also undergone revision as it relates to the immediate aftermath of the motor vehicle accident. In his first report (Exhibit A1) to the applicant's then solicitors, Dr Kenny refers to the history of the accident provided by the applicant in the following terms:

"He has no recollection of the accident...his last recollection is for the moment before impact. He came to three or four hours later in hospital where he remained for twelve days. He sustained a fractured sternum and was in intensive care for three days".

In a subsequent report (Exhibit A3), after being told that the ambulance officer's report and the hospital records show no record of the applicant having lost consciousness, Dr Kenny suggests that "there was obviously a transient incident of unconsciousness, which one sometimes sees in accidents ... It is not uncommon to experience a mild concussion with a period of memory loss in a person appearing perfectly normal immediately after a return to consciousness". Dr Kenny notes that the applicant also continued to insist that he spent three or four days in an Intensive Care Unit and further six or seven days in a general ward, but eventually admitted that he was not sure how long he spent in hospital. The latter concession was made by the applicant when he was interviewed by Dr Kenny on 4 June 1996. In this regard I note that a little over four months later, the applicant told Dr Kutlaca (Exhibit D32) that "he had been in intensive care for four to five days ... and an inpatient for a total of thirteen to fourteen days".

Dr Kenny in his report of 12 June 1996 (Exhibit A3) also states:

“With regard to the issue of the head injury, I acknowledge that there is considerable doubt relating to this matter. The fact that Mr Bayram has a period of loss of memory without actually sustaining a period of loss of consciousness suggests a very mild concussion, although probably not sufficient to cause any post-concussive syndrome as such”.

I note that the only evidence that the applicant suffered any memory loss as a result of the accident comes from the applicant himself. The claimed loss of memory contradicts what he told Mr Penhale at the scene of the accident. Where they differ I prefer the evidence of Mr Penhale. I do not accept that the applicant suffered any memory loss immediately after and as a result of the accident.

On all the available evidence, I am not satisfied on the balance of probabilities that the applicant suffered any head injury or period of unconsciousness (including any ‘clouding of consciousness’) as a result of the accident. The absence of such a finding removes a key basis of Dr Marinovich’s diagnosis of post-concussional syndrome. Of course, it does not necessarily follow that the applicant is not subject to a psychiatric disorder.

The medical opinion in the present case may be summarised as three separate views:-

- (a) Dr Marinovich’s opinion that the applicant suffers from post-concussional syndrome;

- (b) Dr Kenny's opinion that the applicant suffers from post-traumatic syndrome;
- (c) The opinions of Dr Kutlaca and Dr Blakemore that the applicant has no genuine psychiatric disability.

In relation to (c) above, Dr Blakemore acknowledges that, despite consciously exaggerating his complaints, there may be a genuine 'compensation neurosis' element in the applicant's condition.

Despite the absence of a finding that the applicant suffered any head injury or period of unconsciousness as a result of the accident, I consider that Dr Marinovich's opinion that the applicant suffers from a genuine psychiatric disorder cannot be lightly dismissed. As the applicant's treating psychiatrist, Dr Marinovich has had a far greater opportunity to assess the applicant than any of the other three medical experts. However, set against that advantage is Dr Marnivoch's uncompromising approach to his diagnosis of post-concussional syndrome.

I have noted Dr Marinovich's lack of interest in reviewing the applicant's hospital records concerning his admission and treatment after the accident and his view that it is unnecessary to have the applicant investigated thoroughly to exclude organic causes for what he perceives to be the applicant's condition. Similarly, Dr Marinovich does not consider that it would assist him to view the surveillance videotapes of the applicant in social or other settings, nor does he consider it necessary to review his diagnosis despite his acknowledging that a

substantial number of matters put to him might be productive of stress between the applicant and his wife.

I consider Dr Marinovich's faith in his diagnosis is misplaced. The evidence of Dr Kenny, which I accept in this context, is that a psychiatrist's opinion is only as good as the history given by a patient. Dr Marinovich appears to have been prepared to accept the truth and accuracy of all that the applicant has told him. I have expressed my view as to the applicant's lack of credibility. In my view, any diagnosis of the applicant's condition based largely on what he chose to tell his doctor must inevitably be treated with caution. Quite aside from Dr Marinovich's over-reliance on the honesty and accuracy of the applicant's versions of past events, Dr Marinovich's insistence that "post-concussional syndrome" is an established psychiatric condition also appears overstated. In this context, I agree with the opinion expressed by Dr Kutlaca that "post-concussional disorder" is included in DSM IV not as a diagnostic entity, but is postulated for research purposes. Similarly, Lishman's reference to "so-called post-traumatic (or post-concussional) syndrome" emphasises that it has not yet received general acceptance as a recognised disorder by practising psychiatrists – at least in the absence of a demonstrable organic cause. Dr Marinovich's reference to having "treated several hundred people with the syndrome over the years" appears seriously at odds with the tentative recognition of the disorder by DSM IV and Lishman.

I do not consider that Dr Kenny's diagnosis of the applicant as suffering post-traumatic syndrome has any greater validity than that of Dr Marinovich's

diagnosis. Dr Kenny noted that “one can never vouch for the honesty of the history provided by a patient” in the context of a compensation claim (see Exhibit A3) and emphasised in his evidence that the accuracy of his diagnosis is entirely dependent on the accuracy of the history given to him by the applicant. Dr Kenny’s reports (Exhibits A2 and A3) reveal inaccuracies in the applicant’s history relating to his hospital stay, unconsciousness following the accident and work performed since the accident. Dr Kenny also expressed the view that the applicant’s evidence of opening and operating his shop at regular hours, sharing coffee with friends several times a week in a habitual pattern and permitting a guest to stay at the family home for three months were all inconsistent with the history and symptoms related to him by the applicant. The applicant’s lack of credibility places a very serious doubt over any diagnosis which relies on the honesty and accuracy of the applicant in describing his alleged symptoms and changes in behaviour following the accident.

I have referred earlier in some detail to the evidence of Dr Blakemore and Dr Kutlaca. Dr Blakemore considers that the applicant’s symptoms are consciously elaborated and will disappear immediately once the present litigation is concluded. Neither Dr Blakemore nor Dr Kutlaca is of the view that the applicant is suffering from a diagnosable psychiatric disorder in relation to the motor vehicle accident. Dr Kutlaca also predicts that all the applicant’s post-accident complaints will disappear upon resolution of the present litigation. He also observes that symptoms of the kind claimed by the

applicant are consistent with various physical or psychiatric conditions, some of which are common to persons of advancing years.

Conclusion

In the light of all the evidence and having regard to the conclusions I have reached as to the credibility of the applicant, his wife and their two sons, I find that the applicant and his family have greatly exaggerated any changes in the applicant's behaviour and traits which have occurred since the applicant's accident in April 1993. I am satisfied that the applicant was possessive towards his wife and children both before and after his accident. I am also satisfied that he was a domineering man with a difficult temperament both before and after the accident.

I accept that his behaviour has deteriorated in recent years, as has his interest and ability to involve himself in the family business, but I am not satisfied that the motor vehicle accident has any relevance to such a decline. A number of matters have emerged in the evidence which could have been productive of great stress in the Bayram household (for example, the cancellation of the applicant's maintenance contract with the Housing Commission before the accident, the loss of the major tenant at the Palmerston commercial building, conflict with Barbaros and Bahadir Bayram as they grew into adolescence and the decline of the electrical shops operated by the family business). It is impossible to say in the light of the evidence as to how far such matters, or others, combined with the applicant's advancing age, have

resulted in him suffering any or all of the symptoms which he attributes to the motor vehicle accident.

As I have indicated previously, I am not satisfied that the applicant suffered any head injury or period of unconsciousness as a result of the motor vehicle accident.

In relation to the expert medical evidence, the absence of a finding that the applicant suffered any head injury or period of unconsciousness as a result of the accident, coupled with the applicant's lack of credibility as a historian substantially undermines the foundations upon which Dr Marinovich and Dr Kenny have constructed their diagnosis. I am not satisfied that the applicant suffers from either post-concussional syndrome or post-traumatic syndrome. I do not consider on the available evidence that I am able, nor is it necessary to do so, to make a finding that the applicant is not suffering from any psychiatric disorder. Similarly, I am not able to make a finding (and nor is it necessary to do so) as to genuineness or severity of the symptoms allegedly suffered by the applicant. I am, however, in no doubt that to the extent that the applicant does have any of the symptoms claimed by him and members of his family the severity of such symptoms has been greatly exaggerated in the evidence of the applicant, his wife and their two sons. I am satisfied that any psychiatric disorder of the applicant was not suffered in or as a result of the motor vehicle accident on 18 April 1993.

In accordance with the above reasons, it is the determination of the Tribunal that the applicant has not received a permanent impairment in or as a result of an accident that occurred in the Territory and the applicant is not therefore entitled to a benefit under section 17 of the Act.