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| IN THE COUNTY COURT OF VICTORIA  AT Melbourne  COMMON LAW DIVISION | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES |

General List

Case No. CI-16-57741

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| MARIAM DERHAM[[1]](#footnote-1) | Plaintiff |
|  |  |
| v |  |
|  |  |
| CHAMBER TRUSTEE SERVICES PTY LIMITED[[2]](#footnote-2)  (ACN 000 000 000) | First Defendant |
|  |  |
| and |  |
|  |  |
| BOND INSURANCE LIMITED[[3]](#footnote-3)  (ACN 000 000 000) | Second Defendant |

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| JUDGE: | HIS HONOUR JUDGE MISSO | |
| WHERE HELD: | Melbourne | |
| DATE OF HEARING: | 10, 11, 12, 13 and 17 July 2017 | |
| DATE OF JUDGMENT: | 28 August 2017 | |
| CASE MAY BE CITED AS: | Derham (a pseudonym) v Chamber Trustee Services Pty Limited (a pseudonym) & Anor | |
| MEDIUM NEUTRAL CITATION: | [2017] VCC 1174 |  |

**REASONS FOR** **JUDGMENT**

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Subject: INSURANCE

Catchwords: Total and Permanent Disability policy – construction of ‘unlikely ever to engage in or work for reward’ – epileptic condition – whether it rendered the plaintiff unlikely ever to engage in or work for reward – attack on the plaintiff’s creditworthiness and reliability

Cases Cited: *Tal Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439; *Wiley v Board of Trustees, State Public Sector Superannuation Scheme* [1997] QSC 46; *Ivkovic v Australian Casualty & Life Ltd* (1994) 10 SR (WA) 325; *White v Board of Trustees* [1997] 2 Qd R 659; *Mobilio v Balliotis* [1998] 3 VR 733; *Vella v Cardona* [2015] VSCA 306; *Dordev v Cowan & Ors* [2006] VSCA 254; *McIver v The National Mutual Life Association of Australasia Ltd (t/as Australian Casualty and Life)* [2006] VSC 437; *Jones v Dunkel* (1959) 101 CLR 298

Judgment: The plaintiff has established that she has become incapacitated to such an extent as to render her unlikely to ever engage in or work for reward in any occupation or work for which she is reasonably qualified by reason of education, training or experience and therefore satisfies the criteria of Total and Permanent Disablement prescribed in the policy of insurance and is entitled to the TPD benefit.

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| APPEARANCES: | Counsel | Solicitors |
| For the Plaintiff | Mr A M Donald | Maurice Blackburn |
|  |  |  |
| For the Defendant | Mr K P Fiord | Bellard Law |

HIS HONOUR:

Introduction

# Chamber Financial Services Limited[[4]](#footnote-4) (ACN 000 000 000) is the trustee of a superannuation trust fund known as the “Bond Retirement Fund”.[[5]](#footnote-5) The plaintiff was a member of the fund. The trustee obtained a policy of insurance known as the “Bond Group Life Insurance Policy[[6]](#footnote-6)” which entitled the plaintiff to the payment of $301,224.00 upon her establishing that she fell within the definition of “Total and Permanent Disablement” (“TPD”).[[7]](#footnote-7)

# The definition of TPD is as follows:

“**Total and Permanent Disablement (TPD) means:**

(a) When a Covered Person is under age 65 and is Employed in Permanent Employment for at least the Minimum Hours, if one of the following (i) to (iv) applies:

…

(ii) the Covered Person having been absent from their Occupation with the Employer through Injury or illness for 3 consecutive months and having provided proof to our satisfaction that the Covered Person has become incapacitated to such an extent as to render the Covered Person unlikely ever to engage in or work for reward in any occupation or work for which he or she is reasonably qualified by reason of education, training or experience”.[[8]](#footnote-8)

# There was no issue that the plaintiff has been diagnosed and treated for an epileptic condition. There was also no issue that as at 27 April 2014, the plaintiff had been absent from her occupation with the employer through injury or illness for three consecutive months.

# What that left for my consideration is whether the plaintiff has become incapacitated to such an extent that she is unlikely ever to engage in or work for reward in any occupation or work for which she is reasonably qualified by reason of education, training or experience.

The relevant legal principles

# Counsel referred me to *Tal Life Ltd v Shuetrim;* *MetLife Insurance Ltd v Shuetrim*[[9]](#footnote-9)which they both submitted represented the interpretation I should give to the expression “unlikely ever”. The Court of Appeal was there dealing with the same expression, but in the context of a definition of TPD which was in other ways different to the one I am dealing with here. The differences between the definitions is, in my view, immaterial.

# Leeming JA (with whom Beazley P and Emmett AJA agreed) made the following observations relevant to the meaning of “unlikely ever”:

“88. It seems clear to me that the headnote of *White* has caused some subsequent decisions to depart from what was applied in *Beverley* (as well as by White J herself in *Wiley*). Further, I accept TAL’s submission that in most cases any attempt to express a likelihood in percentage terms will have merely the illusion of mathematical precision. I also agree with TAL’s submission that the bracketed words in the TAL policy tell against the construction in the headnote. Those words confirm what flows from the ordinary meaning of the language of ‘unlikely ever’, namely, that where there is a real chance that a person may return to relevant work, even though it could not be said that a return to relevant work was more probable than not, the insurer would not be satisfied that the definition applies. ‘Unlikely ever’ is, in this context, much stronger than ‘less than 50%’.

89. What follows is this. To make an assessment of TPD, it is not sufficient for the insurer to be satisfied that it is more likely than not that the person will never return to relevant work. On the other hand, if there is merely a remote or speculative possibility that the person will at some time in the future return to relevant work, an insurer will not, acting reasonably and in compliance with its duties, be able to be satisfied that the person is not TPD. The critical distinction is between possibilities which are readily contemplatable even though they may not be more probable than not, and possibilities which are remote or speculative. A real chance that a person will return to relevant work, even if it is less than 50%, will preclude an Insured Person being unlikely ever to return to relevant work.

90. I would reach this conclusion independently of authority, but note that it accords with what was said in *Beverley* by the Western Australian Court of Appeal.

91. To anticipate what follows, for an Insured Person to be unlikely ever to return to relevant work does not mean merely that it is more probable than not that he or she will not ever return to relevant work. The primary judge, understandably following what was stated in the headnote of *White* and in two recent first instance decisions, applied an incorrect test.”[[10]](#footnote-10)

# I was also referred to *Sutton on Insurance Law*[[11]](#footnote-11) in which the learned authors provide a concise summary of the interpretation of that expression in other authorities:

“The expression ‘unlikely ever’ sets a very high standard of probability: ‘permanent state of affairs’, ‘no real chance’ or ‘improbable’.[[12]](#footnote-12) The words ‘look well into the future’ and connote a permanent state of affairs so far as can be seen based on the evidence at the time of assessment. … .”[[13]](#footnote-13)

# Although there appear to be different interpretations of the standard to be applied in the authorities dealing with the same expression and similar expressions, I propose to follow the interpretation of that expression in *Shuetrim.*

The Plaintiff’s case

# The plaintiff is thirty-nine years of age. Her husband is forty years of age. They married in 2003. He is a maintenance fitter by occupation. They have two children, who are ten and twelve years of age. They both attend school full time. The plaintiff and her family live on a 21-acre hobby farm which is about 5 kilometres from the township in Central Victoria.

# I will now turn to the relevant aspects of the plaintiff’s working history.

# The first relevant aspect of her working history commenced in the period 2000 to 2004. The plaintiff was employed by John’s Pies[[14]](#footnote-14) as a store manager.[[15]](#footnote-15) That employment was interrupted in 2002 when the plaintiff was involved in a major transport accident. She was driving along a freeway, heading to Melbourne. She experienced a funny feeling and woke up to find that her car had left the road and ended up stationary in amongst a stand of trees.[[16]](#footnote-16)

# The plaintiff was admitted to the Northern Hospital initially and then, the Austin Hospital, where she underwent surgery to her lower back. She recovered sufficiently from the injury, the surgery and the consequences of the injury to be able to return to work with John’s Pies as a store manager at the end of 2002.[[17]](#footnote-17)

# It would appear that as a result of her admission to the Austin Hospital, that the funny feelings that she had experienced, and continued to experience, were diagnosed as an epileptic condition. She was trialled on medication for the purpose of seeing which was effective in controlling the condition.[[18]](#footnote-18) That was the treatment which she had until about 2008 or 2009 when she came under the care of Professor Cook, neurologist.

# The funny feelings which the plaintiff was experiencing following the transport accident were described by her in the following way:

Q: “Just describe in greater detail the aura feelings you were getting, just the physical - just tell His Honour what the physical response was?

A: At the time when they started I’d just get, like, tingling, in either my face or in my tongue, or the side of my face, and then just these, like déjà vu feelings. Like, I’d be out of it for seconds at a time, just felt like I’d been here before, and just sort of away from the world, a blank, but I was still there. It’s the best I can explain it.

Q: After you had these auras, what were the consequences of them? Did they just pass and were you good, or did you---?

A: Yeah, they just passed. Some would last ten seconds, some would last a minute, and then they would just pass. They’d just stop.

Q: Yes, and then, for you physically and emotionally, how - what, was there any consequence?

A: It was hard, because I didn’t know when they were coming, I didn’t know what - what I was doing at the time. I’d have to stop and go, oh, I’m working, what am I going to do? Am I going to endanger myself, am I not? What’s going to happen? I didn’t know how long they were going to last for, so I didn’t know what I was supposed to do at the time of having them, or - - -

Q: I know it’s quite a few years ago, but are you able to recall the frequency that you were having these auras?

A: Monthly, one a month.”[[19]](#footnote-19)

# The tasks which the plaintiff was required to perform in her work as a store manager with John’s Pies involved the following:

Q: “Can you just describe your duties whilst working at John’s Pies in that particular job?

A: I was a store manager at the time, which was running the store, employing staff, serving, ordering, inventory, pay, make sure the hours are in for the staff so they got paid, chasing up if there was money loss, and then, at the time of the accident, I was opening up the Shepparton store with my area manager.

Q: Did you work at a particular John’s Pies outlet during that period, or a number of different outlets?

A: A number of different. They move you around a lot as a manager, to different stores, trying to help fix up the stores, get them better, get them running better, get the staff better.”[[20]](#footnote-20)

# The plaintiff ceased working with John Pie’s in 2004 and took up employment with the Jie Chen[[21]](#footnote-21) Pharmacy in Central Victoria (“the Chen pharmacy”). She worked there until 2011. The plaintiff was a dispensary technician. She worked with the pharmacist dispensing medication, packing “medico packs” and otherwise serving customers.[[22]](#footnote-22)

# It was during that employment that the plaintiff first suffered an epileptic seizure. It was as a result of the onset of the seizures that she was referred to Professor Cook. She described the seizures in the following way:

Q: “Describe the medications that you were prescribed by Professor Cook?

A: They were stronger anti-epileptic medications they affected me severally (*scil* severely), and still didn’t control me having them. Some of them caused me to have seizures worse. It wasn’t just a deja vu feeling I was getting, they were seizures I was having and they got worse, and more intense.

Q: Now you’ve told His Honour that you were having seizures. Firstly, when do you recall having a seizure as such?

A: I can’t remember how long when they first started. I remember they started at night, I’d get them in my sleep. I’d wake up with blood in my mouth from biting my tongue, or my cheek. Connor[[23]](#footnote-23) would wake me up and relax me and tell me I’ve had one, it’s okay. And then I - I felt really bad the next day, I’d have bad headaches and - I can’t recall when they started.

Q: If I can take you to a period before 2010 are you able to recall for how many years you’ve been suffering from seizures that you’ve just told His Honour about?

A: Be two years.”[[24]](#footnote-24)

# The plaintiff’s employment at the Chen Pharmacy was interrupted by the birth of her two children. Her first child was born in 2005 and her second child in 2007. She took twelve months maternity leave on each occasion before returning to that work.

# Although she suffered seizures from 2008 and during the balance of the time that she worked at the Chen Pharmacy, she was able to cope with that work. She described the seizures as being “consistent”, that is, they occurred once or twice a month. They were “full convulsion seizures” which she described in the following way:

Q: Did the seizures vary in degree?

A: Sometimes they were a lot harsher, I’d have full convulsion seizures, other times they’d just - - -

Q: Just stop you there. Just describe what a full convulsion seizure is, please?

A: My mouth would go automatically, my body - my whole body would shake. I have no control over my body until it passes.

Q: After the seizure passed, that full convulsion seizure what sort of state were you in?

A: I was a mess. I - my brain hurt, my head hurt, I had headaches, I felt sick. I couldn’t barely get up. I just - it takes a bit to bounce back from them.

Q: When you say ‘it takes a bit’ would you just tell - in terms of period of time how long would it take to bounce back?

A: Some can be a week, some can be three or four days. Minimum it takes three days.

Q: You were going to say that you had other forms of seizure which were less I think?

A: Some were - were less as harsh, some just happened but I could deal with it and go, ‘Okay that’s fine, I feel sick, I’ve got a bit of a headache, but that’s okay’.

Q: Are you able to tell His Honour the frequency of those less harsh seizures?

A: The same, could be once a month.”[[25]](#footnote-25)

# Professor Cook advised the plaintiff to undergo a surgical procedure known as a left temporal lobectomy. The plaintiff agreed to undergo the surgery. She was referred to a neurosurgeon, who performed that surgery in 2010. I understand the surgery involved interfering with the temporal lobe on the left side of her brain for the purpose of remedying or limiting the occurrence of the seizures.[[26]](#footnote-26)

# The plaintiff suffered a stroke after the surgery. She lost her peripheral vision on the left side. She lost control over the left side of her body, including her left arm and leg. She underwent rehabilitation for a few months in order to regain that loss of function affecting her left side.[[27]](#footnote-27) The plaintiff gave very little other evidence about the effects of the stroke, which has left me with an understanding that whatever residual physical consequences she has suffered are not significant, except for some cognitive problems which may be related to the stroke, but more likely related to the surgery.

# The plaintiff continued working at the Chen Pharmacy until 2011-2012. Her reasons for ceasing work there were as follows:

Q: Why did you stop work at the pharmacy?

A: Because I couldn’t handle doing it. My multi-tasking skills weren’t there, I couldn’t assist the pharmacist, I couldn’t do the job I was - always done.

Q: And when you say you couldn’t is it something to do with your health?

A: Yes it was.

Q: What aspects of your health prevented you from doing that job?

A: The seizures and from the brain operation I just - my brain couldn’t function to do what I had to always do.”[[28]](#footnote-28)

# The plaintiff principally worked under the supervision a pharmacist named Irene Bartalotti[[29]](#footnote-29) when she worked at the Chen Pharmacy. Ms Bartalotti told the plaintiff that she was not working the same way she did before the surgery. She referred to the plaintiff’s inability to multi-task and her lack of reliability working in the dispensary of the pharmacy. The plaintiff said this was the reason why she resigned from that job.[[30]](#footnote-30)

# During examination-in-chief and cross-examination, the plaintiff gave a chronology of the work that she undertook after she ceased working at the Chen Pharmacy. She was certain who she worked with subsequently, but was uncertain of the chronology of employment. The following is probably the correct order of her subsequent employment.

# The plaintiff subsequently obtained work with another pharmacy in Central Victoria in 2012 for about three months. She worked a 38 or 40-hour week serving at the cash register, serving customers and handing medication to customers after it had been dispensed by the pharmacist. She was made redundant after three months.[[31]](#footnote-31)

# The plaintiff subsequently obtained work at a bakery in Central Victoria in 2012 serving customers and keeping the bakery clean. She was made redundant after three months.[[32]](#footnote-32)

# The plaintiff subsequently obtained work in traffic control with an employer in Metropolitan Melbourne, probably in 2012 or 2013. Her work involved using a handheld sign to control traffic movement. She was made redundant after a couple of months.[[33]](#footnote-33)

# The plaintiff subsequently obtained work at a McDonald’s fast food outlet in Central Victoria serving at the cash register for a few months. She left because she could not handle doing that job.[[34]](#footnote-34)

# The last job obtained by the plaintiff was a return to John’s Pies in 2013 as an assistant manager in a store in Metropolitan Melbourne performing shift work. She assisted the manager in overseeing the work performed by staff, taking orders and serving customers.[[35]](#footnote-35)

# It was in 2013, going into 2014, that the plaintiff was more seriously troubled by seizures. She described what was happening to her in the following way:

Q: “If I can take you to mid-2013, can you describe your health?

A: I was still having the seizures. They weren’t controlled. I was still suffering with the headaches and the aftereffects of the seizures.

…

Q: When you have a seizure, is there any warning or anything like that? Just describe the process in the lead-up to having a seizure, what happens?

A: I will start to feel a tingling in my hand. It will go up my left side to my face. My face will drop, my mouth with (*scil* start) start to go, and same thing, it can last a couple of minutes, it can last 20 seconds, and then it will pass, and then I’ll wait for these headache things to sort of pass, and - - -

Q: Can I just stop you there. You’ve described two levels of seizure. One you’ve described as a full convulsion and the other one is not as bad, and I’ve made a note of what you said about that earlier.

Q: Are you talking now, in mid-2013, about the same sorts of seizures?

A: They changed after my brain operation with the stroke.

Q: Yes?

A: They became more the left side, and the weakness would come back when I’d have a seizure, where I didn’t have that before. I’d get the tingling and the funny feelings in the hand, but not so much the muscle that drops now like I did before.”[[36]](#footnote-36)

# The plaintiff described a severe deterioration in her health in the second part of 2013. The seizures were more frequent. Sometimes they were as often as daily and sometimes weekly. They were more intense. Her ability to obtain a recovery from these episodes was “getting harder”. She then described the nature and extent of that worsening in the following way:

Q: When you say the recovery was getting harder, can you tell His Honour what you did - had to do to recover?

A: That had be (*sic*) bedridden for three days, ’cause I couldn’t get out of bed to - my brain wouldn’t comprehend with everything that’s going on around me. Daily jobs, getting up and having breakfast and things like that were hard to do. I just couldn’t work out what I was doing, or concentrate on what I was doing or how to do it.

Q: Can I take you to December 2013? Can you describe your health please?

A: Yeah, like I just explained. They were just intense. They were - I was suffering severely for days at an end just trying to cope, and just trying to get up out of bed.

Q: Can you just describe to His Honour your - during that period, your ability to remember things?

A: I struggled, like I do now. I still struggle. It was hard.

Q: And your ability to understand things?

A: I couldn’t. I - same as now. Sometimes I can’t - I can’t comprehend what I need to do and - make that happen. Like, it’s like my brain’s just not telling the rest of my body how to do things.

Q: Can you just describe your health in January 2014?

A: It was the same. It was just - it was terrible. I would drive to work, I would work. I won’t remember the day, I won’t remember driving to work, I won’t remember driving home. I’d just - days at an end are just - are blackouts. I just don’t remember them.

Q: At some point did you cease work?

A: Yes I did.

Q: When was that?

A: The end of January 2014.

Q: What was the reason for you ceasing work?

A: I just couldn’t handle it anymore. If I’d kept going I was going to kill myself. I just - I couldn’t remember getting to work, doing work, what I did. I couldn’t remember getting home. My seizures were more frequent, they were intense, they were really making me suffer.”[[37]](#footnote-37)

# After the plaintiff ceased working altogether in January 2014, she continued having seizures weekly, which were not as intense. The seizures were easing and her rate of recovery was better.[[38]](#footnote-38)

# The plaintiff estimated that depending on the gravity of a seizure, it could take three or four days to “bounce back” from the seizure.[[39]](#footnote-39) On some occasions she would be bedridden for three days.[[40]](#footnote-40)

# The plaintiff’s husband, Connor Derham[[41]](#footnote-41), gave evidence.

# Between 2002 and 2004, he observed the plaintiff to have what he described as “staring issues”. She had her eyes open, but she looked spaced out.[[42]](#footnote-42)

# Between 2004 and 2008, he observed “lip-smacking episodes” and “a few convulsive seizures”. The lip-smacking was something he observed to occur monthly. On one occasion, he called an ambulance, presumably because of his concern about the gravity of that episode. He estimated that about 95 per cent of the time these episodes occurred at night.[[43]](#footnote-43)

# In 2009, Mr Derham observed that the lip-smacking and seizures worsened. He said that there were “more fits … lip-smacking, convulsive …”. He estimated that these events occurred twice a month and were random. The impression I was left with from his evidence was that the seizures occurred mostly at night.[[44]](#footnote-44)

# In 2010 and 2011, Mr Derham observed that the plaintiff was free of these episodes for about twelve months, after which the lip-smacking returned. He added that “her memory still was no good …”.[[45]](#footnote-45)

# In 2012, Mr Derham observed that the plaintiff was still having episodes of lip-smacking, her memory was hazy and foggy, and she was forgetful.[[46]](#footnote-46)

# In the latter part of 2013, he observed that the plaintiff appeared as if she was “drugged”. He added that there were days when she was good, and some when she was very good and other days when she was “a train wreck”. He described what he meant by the latter description, that she would stare as if she was star gazing as if “looking straight at something but nobody’s home”[[47]](#footnote-47). He observed her to have seizures. He gave an example that on a fishing trip, she was sitting in their car. She did not know where she was, and did not know how they had arrived at their destination. He took her to the Shepparton Hospital. They subsequently made arrangements to see Professor Cook.[[48]](#footnote-48)

# The letters of Professor Cook, which I have summarised below, do not specifically refer to him seeing the plaintiff in the latter part of 2013, but the letter of Dr Ian Wilson, neurology fellow at St Vincent’s Hospital, which I have also summarised below, demonstrates that the plaintiff saw him about these episodes. He was aware that Professor Cook was treating the plaintiff.

# In 2014, Mr Derham observed the same episodes of lip-smacking and seizures as he had observed in 2012 and thereafter.[[49]](#footnote-49) He estimated that the seizures might last 20 seconds to 2 minutes.[[50]](#footnote-50) He estimated that the plaintiff’s recovery time from a seizure could be from a few hours to up to three days.[[51]](#footnote-51)

# The plaintiff’s principal treater has been Professor Cook. He has treated her since about 2008. A bundle of his letters were tendered into evidence.[[52]](#footnote-52) The letters are very brief.

# Before summarising the bundle of letters, I should firstly turn to a letter of Dr Wilson dated 10 December 2013 to Dr Venkatram,[[53]](#footnote-53) who is one of the general practitioners at the a Medical Clinic in Central Victoria who has treated the plaintiff.

# The plaintiff attended at the Neurology Clinic at St Vincent’s Hospital and was seen by Dr Wilson. She told him that on a visit to friends in Northern Victoria, she experienced confusion and was “amnestic”. She had no memory of what had occurred earlier in the day. She told Dr Wilson that she felt washed out and had experienced difficulty concentrating since the episode at Northern Victoria. She, and her husband, told him of episodes of “small lip-smacking”. On the basis of this, Dr Wilson expressed the following view:

“The small lip smacking events that Mariam is having are clearly small seizures that have recurred. The amnestic episode that she had is also almost certainly an epileptic event. We have observed this on a couple of occasions now that patients who have had a unilateral temporal lobectomy are then very prone to having amnestic episodes, which we believe are related to seizures occurring in the remaining temporal lobe and ‘wiping’ the temporal short-term memories that are stored there.”[[54]](#footnote-54)

# The plaintiff also told Dr Wilson that she had ceased using Topamax, which I assume is medication used in the treatment of epilepsy. He recommended that she recommence using anticonvulsant medication and Topamax. He considered that she might need lifelong anticonvulsant therapy. In relation to her driving, he reiterated some advice apparently given by Professor Cook that she should cease driving and if seizure free for four weeks, she could then resume driving.

# Professor Cook’s first letter to Dr Venkatram is dated 14 October 2014. The letter informed Dr Venkatram of two types of medication prescribed by Professor Cook and the frustrations vented by the plaintiff about her intolerance to medication. He added that a trial of different kinds of medication were the only options available in the treatment of the plaintiff.

# The next letter is a letter to a claims assessor of the second defendant dated 27 April 2014. Professor Cook informed the claims assessor that by use of a video-EEG, the plaintiff’s seizures were recorded. He was subsequently in no doubt that the plaintiff was experiencing seizures. He noted that after the surgery in 2010, that the plaintiff was seizure free until 2013, when the seizures recurred.

# In another letter dated 26 September 2015 to a different claims assessor, Professor Cook described the video-EEG recordings in more detail:

“Mariam Derham has had seizures confirmed by video-EEG recordings in April 2014. Event frequency estimation is based on reports of the patient and her husband, noting she is often unaware of events. We captured 4 events during 5 days of video-EEG, so I don’t doubt their estimated frequency.”[[55]](#footnote-55)

# Returning to the letter of 27 April 2014, it would appear that the claims assessor posed a number of questions for Professor Cook’s consideration. Some relevant answers to those questions are as follows:

“1. …

2. Her symptoms currently are complex partial seizures, with loss of awareness and memory, lasting 1-2 minutes occurring several times weekly. They are unpredictable in timing.

3. Mariam had tried all availab[l]e anticonvulsant medications up to the time of her surgery in 2010. She was on Topamax after the surgery, and to this recently Trileptal was added.

4. She will require ongoing anticonvulsants therapy. Further surgery is not feasible. I expect reasonable control in the long term, though this is not guaranteed, and 30-40% of individuals are not controlled under these circumstances.

5. In my opinion she is close to maximal improvement. As available therapies have been exhausted there are few additional therapeutic options.

…

7. Given that sufficiently good control is unlikely to allow her to be able to drive again, she will be significantly restricted in her daily activities and employability. As well she will not be able to operate potentially dangerous equipment, or work in isolation. These restrictions are through the roads authority, and various employee safety and employer liability regulations.

8. Given the nature of the problem, with unpredictable periods of blackout and confusion, as well as the restrictions on driving and content of work, I don’t think it is realistic to think that she would be able to work in her previous occupations. She is not trained for suitable alternative employment.”[[56]](#footnote-56)

# The next letter is dated 14 November 2015 to someone from an organisation known as Medical Record Exchange. At the time Professor Cook wrote that letter, he had received a letter from the plaintiff’s solicitors informing him that she held a valid driver’s license and was in fact driving. He informed the recipient of his letter that he had not seen the plaintiff since October 2014, but he then made specific reference to the fact that the plaintiff was driving:

“… so I’m not aware what her current situation is regarding the frequency of seizures. If they are all well controlled, she may well be currently eligible to drive, but I’m not able to comment on that more specifically.”[[57]](#footnote-57)

# In the last letter dated 4 October 2016 to Dr Venkatram, Professor Cook noted that the plaintiff saw him that day wanting answers as to why she was having seizures and what was causing them. He added that he had explained to the plaintiff that she was experiencing partial seizures, and he repeated that the video monitoring had recorded the same so he was in no doubt that she was having seizures. He then added the following observation:

“… but minor seizures occur 4-6 times monthly, and are witnessed by her husband. She will get a warning that consist of a disturbance of hearing, followed by a tingling sensation in her hand, leg, then face on the left, accompanied by left facial weakness and oral automatisms. This is much as we recorded during the video monitoring in 2014, and the seizure activity was as expected originating on the right.” [[58]](#footnote-58)

# The plaintiff led Professor Cook to understand that she was not driving and his comment on learning that was - “obviously that’s appropriate”[[59]](#footnote-59).

# The only other reports of treaters are the reports of Dr Lukic dated 9 February 2016 [[60]](#footnote-60) and Dr Venkatram dated 17 December 2015. [[61]](#footnote-61) Their reports are brief in the extreme. Dr Lukic simply stated that he has treated the plaintiff since 2002. He agrees with “the specialist” and Dr Venkatram that the plaintiff is unable to seek gainful employment. Dr Venkatram simply stated that he has treated the plaintiff since 2013, but rather than refer to her epileptic condition and its consequences he referred to her treatment by a cardiologist and endocrinologist and subsequently that “because of ill health” it is unlikely that she will ever again be able to engage in gainful employment. Their failure to describe the plaintiff’s epileptic condition and whether it is the medical condition which is the cause of her inability to engage in employment limits the usefulness of the opinions they have expressed.

The medico-legal assessments

# Dr Seneviratne is a consultant neurologist and clinical neurophysiologist. He examined the plaintiff on 1 September 2015 at the request of the second defendant.

# Dr Seneviratne recorded the following history of the plaintiff’s occupation and work duties:

“Ms Derham is a 37-year-old left-handed female who has been working as dispatch pharmacy technician for a period of eight years. Her work duties predominantly involved making medical packs, help the pharmacist, serving customers and dispatching medications. She has been working in this capacity for a period of about eight years working 40 hours per week at the time of injury.”[[62]](#footnote-62)

# Dr Seneviratne took a reasonably lengthy history of the onset of her symptoms, relevant sequence of events, initial and early treatment, and subsequent progress and specialist management none of which appears to me to be controversial. He was assisted no doubt by the fact that he had Professor Cook’s letter of 14 October 2014 and a report of Dr Wyatt, occupational physician dated 8 June 2014 which I have summarised below.

# In relation to Dr Seneviratne’s reference to the plaintiff’s activities of daily living he recorded the following history:

“Ms Derham lives on a farm and stated that she is still capable of performing domestic duties which can take a longer time. She has frequent memory lapses which interfere with her daily activities. She can drive occasionally short distances. She has stopped going out and mixing with friends due to ongoing symptoms.”[[63]](#footnote-63)

# In relation to her current symptoms relevant to the epileptic condition Dr Seneviratne recorded the following history:

“Ms Derham still experiences continuing “seizures” which causes hearing loss, and funny sensations and numbness of the left arm and face and sometimes mouth. These can last for about 20 seconds. She feels “out of it” during these episodes. She has had episodes of collapses, however, these have resolved since the insertion of the pacemaker.

The episodes of “seizures” can come on unpredictable which can happen once a week or once a month. She can lose memory and attention span for a period of about half a day following a seizure. She also described decreased memory since the surgery and has to write down notes and keep reminders on a daily basis. She has also felt anxious and depressed due to her ongoing seizures. She has not been treated with antidepressant and has not seen a psychologist for this problem.”[[64]](#footnote-64)

# After no doubt giving due consideration to the history he was provided, and Professor Cook’s letter dated 27 April 2014, he expressed the following opinion in relation to the plaintiff’s capacity to return to work:

“Ms Derham is a 37-year-old right-handed female who has epilepsy. Unfortunately, treatment with medication as well as surgical treatment has failed so far and she continues to experience intermittent partial complex seizures on a random, unpredictable basis. Due to her ongoing seizures, she can experience significant neurological deficits which would make her unsafe to work in her usual occupation on a part-time or full-time basis. It is likely her incapacity a neurological deficits related to her medical condition has stabilised and become permanent. However, I would recommend review with treating neurologists (Professor Mark Cook) again to discuss new are antiepileptic medications that are available in the market currently to see whether this would improve her condition. She also appears to have significant amount of depression as well as emotional issues (which are partly related to her left temporal lobectomy) which would need to be addressed by a psychologist.”[[65]](#footnote-65)

# In relation to whether the “new” medications would ameliorate the consequences of the plaintiff’s epileptic condition he was of the following opinion:

“Although she has tried multiple antiepileptic medication so far, there are few new are antiepileptics in market that she has not tried. It is worthwhile trying these to see whether there would be a significant improvement. However, it would be quite unlikely that her condition would significantly improve even with the new antiepileptic medications. Further surgery may not be an option (or which has not been recommended by Professor Mark Cook either).”[[66]](#footnote-66)

# And in relation to whether she had reached maximum medical improvement he expressed the following opinion:

“In my opinion, Ms Derham has reached maximum medical improvement for the claimed condition of epilepsy. This opinion has been reached due to her refractory status of seizures that are ongoing despite trying most of the anti-epileptic medications as well surgery.”[[67]](#footnote-67)

# Dr Wyatt is an occupational physician. She examined the plaintiff on 29 May 2014 at the request of the second defendant.[[68]](#footnote-68) Dr Wyatt acknowledged her own limitations in offering a medical opinion when she said that treatment for an epileptic condition like the plaintiff’s was in the realms of a highly specialised area requiring specialist epilepsy management.

# Dr Wyatt obtained an incomplete work history from the plaintiff. The plaintiff told her that she was an assistant manager at John’s Pies at the time when she ceased work altogether in January 2014, had worked as a dispensary technician at a pharmacy and on a casual basis at a bakery. The plaintiff told her the following in relation to her capacity to undertake routine domestic tasks and to drive:

“Domestically, she is managing what she needs to do, finding things easier to do some days than others. She does the cooking, laundry, vacuuming and mopping. A friend takes her to the shops every few days. Ms Derham is not able to drive. Her children catch a bus to school.”[[69]](#footnote-69)

# Dr Wyatt then expressed the following opinion in relation to the plaintiff’s capacity to return to work:

“Ms Derham’s normal job required her to work full-time, although she did work part-time in January 2014. Her duties included supervising other staff, serving customers, cash handling, receiving and making orders, and working varying shifts.

Ms Derham is not medically fit to do this work part-time or full-time. It is not appropriate that she be working when she has epilepsy that is not controlled. It would not be safe for her to work in that environment with her current level of seizures. Further, she is not able to drive to and from work.”[[70]](#footnote-70)

# Dr Wyatt made another qualification to her opinion, that being that she considered it was premature to assess whether the plaintiff was totally and permanently disabled until more is known about the plaintiff’s condition through treatment by Professor Cook. It occurs to me that Dr Wyatt accepted that the plaintiff was totally and permanently disabled at the time when she examined her. The fact is, nothing has changed through the treatment by Professor Cook, so it must logically follow that Dr Wyatt would stand by the opinion she stated in that respect in May 2014 on the proviso that it would no longer be relevant.

The cardiac arrhythmia

# The plaintiff’s cardiac problem has been referred to in her evidence and in the reports of two medico legal consultants. It is appropriate at this point to make some reference to the cardiac condition, to distinguish its consequences from those caused by the plaintiff’s epileptic condition.

# The plaintiff suffered blackouts which were discovered to be a separate condition unrelated to the plaintiff’s epilepsy. In 2015 she underwent surgery to implant a pacemaker. Her heart rate was dropping below 60 bpm and her heart beat paused for up to 13 seconds which resulted in her having blackouts. Since the implantation of the pacemaker the cause of the blackouts has been resolved. Its implantation did not have any effect upon the plaintiff’s epileptic condition. [[71]](#footnote-71)

The Defendants’ case

# The principal submission made by counsel for the defendants was that the plaintiff’s creditworthiness and reliability were very much in issue.[[72]](#footnote-72) He essentially submitted that some or all of the attack made upon the plaintiff’s credit are sufficient for me to conclude that she is neither creditworthy or reliable. So much so that I should have no confidence in accepting any of her evidence, and hence she must fail.

# I think counsel for the defendant’s submission overstates the effect of the evidence on which the defendants rely. I propose to analyse each aspect of his attack upon the plaintiff’s creditworthiness and reliability for purposes which will become abundantly clear as I undertake that course.

*The Plaintiff’s driving*

# The plaintiff submitted a “Statement of Claim” dated 18 February 2014[[73]](#footnote-73) which she signed, declaring that the answers and statements made on the Claim Form were true and complete. The plaintiff was referred to Question 5 under “Section 2. Occupation details (continued)” which asked her whether she stopped work because of her medical condition. She wrote:

“Can no longer drive or work.

While passing out as memory loss & seizures.”[[74]](#footnote-74)

# Under cross-examination, the plaintiff’s explanation for saying that she could no longer drive was “I worded that wrong”.[[75]](#footnote-75)

# The plaintiff was referred to the reports of Professor Cook, Dr Seneviratne and Dr Wyatt and what they recorded concerning whether the plaintiff was driving or not at around the time when they examined her.

# What Professor Cook wrote in his letters dated 27 April 2014 and 4 October 2016 regarding whether the plaintiff was driving is consistent with him being under the impression that the plaintiff was not driving.

# Dr Seneviratne recorded that the plaintiff could occasionally drive short distances. During cross-examination, the plaintiff said that she did not remember seeing Dr Seneviratne and, as a consequence, could not say whether she gave him that history.

# Dr Wyatt recorded that the plaintiff told her that she was not able to drive. She denied that she told Dr Wyatt that she could not drive. She said that what she told Dr Wyatt was that “when I have seizures, I don’t drive”.[[76]](#footnote-76)

# The plaintiff admitted to driving at times when she is alleged to have said she was not driving, and driving far more extensively than occasionally and only short distances.

# During examination-in-chief, she said that in March 2015, she was only driving locally when she needed to.[[77]](#footnote-77) She admitted that she takes her children to school each day, and that her husband picks the children up 95 per cent of the time. On occasions when her husband cannot pick the children up, she will do that. The distance from her home to the school is about 5 kilometres.[[78]](#footnote-78)

# The plaintiff admitted that it was possible that she picked the children up from their school on two consecutive days, being Friday, 26 May 2017 and then again on Monday, 29 May. If she had done so, then it was because her husband was not able to pick the children up. She added that the occasions when he is unable to pick them up might be as many as three times per week, but whether it is that often depends on the demands of her husband’s work.[[79]](#footnote-79) She was unable to remember whether, on 29 May 2017, she was driving and her husband was a passenger, and they drove to a post office. She said it was possible.[[80]](#footnote-80)

# The plaintiff admitted that she has driven to a business known as Central Victorian Fencing, and that she has gone there often. She said it was possible that she did so on 3 July 2017 and then went to an IGA supermarket.[[81]](#footnote-81)

# During cross-examination, Mr Derham agreed that the plaintiff does drive. He did not disagree that she picked the children up from school on Friday, 26 May 2017 and Monday, 29 May 2017, and then, on 3 July 2017, she drove him to a post office.[[82]](#footnote-82) He agreed that he picks the children up from school 95 per cent of the time.[[83]](#footnote-83) During cross-examination, he gave a curious answer which was not responsive to the question he was being asked:

“… Yes she picks the kids up every day, unless I’m with her, or with her a fair bit. I’m normally with her a lot.”[[84]](#footnote-84)

# It is a confusing answer. I am not sure what Mr Derham meant by the answer when it is compared with the balance of his evidence about the plaintiff’s driving. I am not prepared to give the answer much weight.

# It must be remembered that Professor Cook, Dr Seneviratne and Dr Wyatt have expressed opinions about the plaintiff’s epileptic condition in the context of her capacity to ever engage in or work for reward in strong terms.

# Where counsel for the defendants submitted their opinions are undermined is principally the extent to which the plaintiff has driven and continues to drive and her failure to inform Dr Seneviratne and Dr Wyatt of the whole of her working history between 2002 and 2014. There are some additional less important matters as well which I will deal with later.

# I am in no doubt that the plaintiff has driven and continues to drive to a significant extent following the left temporal lobectomy. She has driven to work, to fitness classes and to undertake shopping, seemingly without her epileptic condition being a restraint on her capacity to drive.

# The evidence of the extent of her driving is contrary to the account she gave during her evidence-in-chief. It is contrary to what she said in the “Statement of Claim”. It is contrary to what she said to Dr Seneviratne and Dr Wyatt. I accept that what Dr Seneviratne and Dr White recorded is what the plaintiff told them. She has obviously downplayed the extent of her driving.

# The strong impression I have in my analysis of the opinions of Professor Cook, Dr Seneviratne and Dr Wyatt is that they would probably not approve of the plaintiff driving. I think it resonates in the opinion of Professor Cook that the plaintiff is unlikely to obtain sufficiently good control over her epileptic condition to allow her to be able to drive again.

# The fact that the plaintiff is driving when it is probable that she should not be, and is driving as extensively as she finally admitted to does not mean that she is not suffering from an epileptic condition as diagnosed by Dr Wilson, Professor Cook and Dr Seneviratne. The extent of her driving may go to her having a functional capacity in excess of what they believed she had, but, in my view, this is the extent of its importance.

# Before leaving the subject of the plaintiff’s driving I should address the references made by counsel for the defendants to the plaintiff’s knowledge of the conditions under which VicRoads will deny the sufferer of epilepsy from driving.

# No evidence was adduced from VicRoads which informs me of the basis upon which VicRoads would take the serious step of denying any person the opportunity to drive because of an active medical condition. Apart from what I consider I should make of the evidence of Professor Cook, Dr Seneviratne and Dr Wyatt relevant to the plaintiff’s driving, there is no evidence upon which I can conclude that VicRoads would have stopped her driving at some stage in the past, and might do so now.

*Personal training*

# The plaintiff admitted that she attended personal training classes in Metropolitan Melbourne and later, in different suburb of Metropolitan Melbourne two days per week with an organisation known as Fantastic Fitness. She agreed that she completed a nutrition consultation disclaimer document dated 9 February 2015,[[85]](#footnote-85) and a personal training package document dated 1 April 2015.[[86]](#footnote-86) The sessions she attended were a mix of personal training and coaching in wellness. The documents appear to establish that the plaintiff was engaged in personal fitness training between April and December 2015.[[87]](#footnote-87) The plaintiff admitted that the driving involved in attending the personal training was 40 minutes to and from the place where it was undertaken.[[88]](#footnote-88)

# Counsel for the defendants relied upon the plaintiff’s attendance at personal training rather more because of the driving that was involved rather than a demonstration of the plaintiff’s functional capacity, although, what capacity she has is obviously relevant to the ultimate question whether she is unlikely ever to engage in or work for reward.

# During cross-examination, reference was made to what the personal training involved, but there is very little evidence which suggests that it means that the plaintiff’s epileptic condition is less of a problem for her.

# I am not persuaded that attending personal training undermines the medical opinions of Professor Cook, Dr Seneviratne and Dr Wyatt, nor the plaintiff’s evidence and that of her husband about the nature and extent of the epileptic condition as it affected her in the early part of 2014 and to the present time.

*VicRoads license applications*

# The plaintiff was cross-examined extensively about permits and licenses which she applied for between 2003 and 2015.

# The first of those applications was for a boat license. The plaintiff made an application for a license or learner permit dated 30 October 2003.[[89]](#footnote-89) The following question was asked about the plaintiff’s health:

“Do you suffer or have you ever suffered from an eyesight or hearing defect, dizziness, blackouts, epilepsy, diabetes, psychiatric or mental illness, any medical condition or other disability which may affect your driving?”

# The plaintiff answered “yes”. When asked to give details, she referred to suffering “epilepsy” and taking “Lami[c]tal, 5[0] [milli]g[rams] per day” to treat it.

# The next application was for a boat license. The plaintiff made an application for a license or learner permit dated 8 October 2009.[[90]](#footnote-90) The same question was asked of the plaintiff. She answered “yes” to that question, and when asked to give details, she referred to suffering epilepsy, which she described as “medicated and controlled”.

# The next application was for a license or learner permit for a motorcycle dated 27 December 2013.[[91]](#footnote-91) Question 1 on the application asked whether the plaintiff was suffering from, or had suffered from, any serious or chronic medical condition or disability which could affect her fitness to drive. The conditions which were specifically referred to included “epilepsy/seizures”. The plaintiff answered “yes” to that question, but gave no details of the condition as the application form appears to require.

# The next application was for a license or learner permit for a motorcycle dated 29 March 2015.[[92]](#footnote-92) Question 1 is in the same form as the previous application for a learner’s permit for a motorcycle. The plaintiff answered “no” to that question. She answered “yes” to Question 3, which asked about medication she was taking at that time. Where she was asked for details, she referred to heart medication only.

# The purpose of the cross-examination is to demonstrate that between the date of the first application and the last, the plaintiff was suffering from the epileptic condition which meant that she should not have been driving, yet drove throughout that period. Additionally, that apart from the first application, she was subsequently less prepared to inform VicRoads of the nature and extent of the epileptic condition in order to enhance the prospects of her applications being successful.

# It was during some parts of the cross-examination based on the applications that the plaintiff said a number of things which do not appear to me to be consistent with the epileptic condition which was first diagnosed after 2002. In relation to the application dated 30 October 2003, she admitted that the seizures she was experiencing had never been under control.[[93]](#footnote-93) In relation to the application dated 8 October 2009, when she was on the verge of undergoing the left temporal lobectomy, she said the seizures might have been under control, but she was unable to remember whether that was so or not. In relation to the application dated 27 December 2013, she was unable to recall why she did not refer to the epileptic condition, and in relation to the application dated 29 March 2015, she answered “no” on the basis that the epileptic condition was not affecting her capacity to drive locally.[[94]](#footnote-94)

# It was during cross-examination about these applications that the plaintiff was asked that, if she was able to drive safely, then why is it that she is not able to work. She said that her seizures became more intense when she was working due to the stress of work. She said that medical practitioners had informed her that stress is a factor in bringing on seizures.[[95]](#footnote-95)

# The plaintiff did not identify which of the jobs she has undertaken over the years which produced stress and occasions when the production of that stress at least were temporally connected with the onset of a seizure. There is no medical evidence from any of the medical practitioners whose reports have been tendered in this proceeding that stress can have that effect in the background of a pre-existing epileptic condition.

# The purpose in cross-examining the plaintiff about these applications was to demonstrate that her approach to licensing “was irresponsible at best and downright deceptive at worst”.[[96]](#footnote-96)

# I am not persuaded that, apart from perhaps an attack upon her creditworthiness and reliability, that what applications the plaintiff made and whether she was deceptive or not does not undermine the opinions of Professor Cook, Dr Seneviratne and Dr Wyatt.

# I do not want to unnecessarily repeat what I said when I dealt with the issue of the plaintiff’s driving, but I think the same reasoning applies here. The plaintiff wanted boat licenses and motorcycle licenses when, at least by early 2014, there was a reasonably strongly worded opinion from Professor Cook that the epileptic condition would probably not allow her to drive again. Logically, that opinion would also apply to driving a boat and certainly riding a motorcycle.

*The Plaintiff’s Facebook page*

# The plaintiff was taken to her Facebook page and to particular parts of it which counsel for the defendants submitted were inconsistent with what she told Dr Seneviratne, that she has stopped going out and mixing with friends due to the symptoms produced by the epileptic condition.[[97]](#footnote-97) It is not something counsel for the defendants relied on in his final address; however, for the sake of completeness, and should that have been an oversight, I will briefly summarise that part of his cross-examination of the plaintiff.

# The plaintiff’s Facebook page demonstrates, among other things, that she attended a wedding, social nights, a birthday, went on holiday to Fraser Island, attended a Christmas party at Fantastic Fitness, and attended a music concert. The entries cover 2015 to 2017.

# The plaintiff’s Facebook page does not reveal anything so momentous that it undermines the opinions of Professor Cook, Dr Seneviratne and Dr Wyatt. The purpose in cross-examining the plaintiff about it was because of the history recorded by Dr Seneviratne that the plaintiff “has stopped going out and mixing with friends due to ongoing symptoms”.[[98]](#footnote-98) I accept that the plaintiff probably told Dr Seneviratne that her social activities had been interfered with to that extent.

# The social occasions demonstrated through the plaintiff’s Facebook page are limited, but certainly are contrary to the plaintiff having “stopped” engaging in social activities.

Errant histories

# Counsel for the defendants submitted that there are a number of matters which the plaintiff should have informed Professor Cook, Dr Seneviratne and Dr Wyatt about. He referred me to a number of authorities which stand for a proposition which is based in logic and commonsense, and that is, that the opinions of medical experts are dependent upon the accuracy of the history on which they are based on issues of importance to the expression of opinion.[[99]](#footnote-99)

# However, it does not follow that a failure to give an accurate history must always lead to a single conclusion that any opinion then expressed by the medical practitioner must, therefore, be flawed. In determining whether to accept the medical practitioner’s opinion, it is critically important to analyse whether what the medical practitioner has not been told is of importance to the expression of that medical practitioner’s opinion.

# Counsel for the defendants cross-examined the plaintiff about a number matters which he submitted affected the reliability of the medical opinions. He took up a number of them in his final submissions. I will address others as well, should his failure to have addressed them been an oversight:

# the plaintiff’s full work history

# the extent of her driving

# the stress the plaintiff suffered when she worked which she associates with the onset of seizures

# the extent that she engages in an apparently ordinary domestic life; and

# the recovery time from a seizure of hours and up to days and occasions when she has been bedridden up to three days.

# I am not persuaded that the plaintiff’s failure to inform of these matters undermines their opinions.

# I will start with Professor Cook. Whilst his letters do not contain an account of the plaintiff’s work history, he did say, in his letter dated 27 April 2014: “I don’t think it is realistic to think that she would be able to work in her previous occupations.” It is not clear what he understood her previous occupations to have been, but he must have been in receipt of some understanding of her work history.

# Dr Seneviratne was informed by the plaintiff that she had been employed as a despatch pharmacy technician for a period of eight years, and nothing more. Dr Wyatt was informed that she worked at John’s Pies as an area manager, as a dispensary technician in a pharmacy and in casual work in a bakery.

# I think, as a matter of logic and commonsense, that if a person has engaged in a number of jobs which have the same or similar physical demands, then a medical opinion that a person cannot do one job is probably sufficient to then determine whether the person is capable of doing any of the other jobs. I see no reason why I should not approach the determination of whether the plaintiff’s failure to give those medical practitioners a full work history in that way.

# During cross-examination, the plaintiff described the tasks she was required to perform in each of the jobs that she has undertaken since 2002, and in many respects they were very similar. Most of those jobs involved serving customers in a retail environment, except for the work she undertook in traffic control. They were relatively straightforward jobs, unlikely to have required any degree of sophisticated training, with the exception of working in the dispensary of the pharmacy. Perhaps the work at the bakery was more physical, because it involved cleaning.

# Taking a global view of the jobs the plaintiff undertook leads me to conclude that Dr Seneviratne and Dr Wyatt had a sufficient history to measure whether the plaintiff was fit for those jobs they were told about, and I think, again as a matter of logic and commonsense, that had they been informed of the other jobs, that their opinions are very unlikely to have been any different.

*Capacity to engage in or work for reward*

# The plaintiff was challenged about her reasons why she is presently unable to work in any of the jobs which she has undertaken over the years.

# The plaintiff denied that she could work in a pharmacy, bakery or as a shop assistant if she was having one or two seizures a month. She said whether she could work and accommodate her seizures would depend upon the work she was doing and on the nature of the seizure. She admitted that she is no longer having the full convulsive seizures that she once did, and the seizures are now minor in gravity. She admitted that if she had a seizure, she could take an afternoon off from work and return to work the next day; however, she added that when she was working, the seizures became more frequent and worsened.[[100]](#footnote-100)

*Failure to call evidence*

# Counsel for the defendants submitted that the plaintiff could have called Belinda Molloy[[101]](#footnote-101) to give evidence that she informed the plaintiff that she had become unreliable in her work in the dispensary of the Chen Pharmacy. The submission also extended to other employers who could have given evidence of the plaintiff’s difficulties which they observed, such as from her last employer, John’s Pies.

# The submission was that this amounts to an unexplained failure to call that evidence which should lead me to infer that the uncalled evidence would not have assisted her case, and therefore, I should not accept the plaintiff’s evidence that she was having the difficulty with her work which she described.[[102]](#footnote-102)

# I am not persuaded that the submission amounts to very much in the face of the compelling evidence of Dr Wilson and Professor Cook that by December 2013, and going into the early part of 2014, that the plaintiff’s epileptic condition had deteriorated at the times when they saw her.

# In any event, Professor Cook, Dr Seneviratne and Dr Wyatt did not base their opinions on the reasons why the plaintiff stopped working at the Yu Pharmacy or with John’s Pies. Dr Seneviratne based his opinion on his understanding of the plaintiff’s epileptic condition, its clinical course and the effect it was having upon her, and that appears to me to be the way Dr Wyatt approached her assessment of the plaintiff.

Conclusions

# Counsel for the defendants essentially submitted that some or all of the attack made upon the plaintiff’s credit are sufficient for me to conclude that she is neither creditworthy or reliable. So much so that I should have no confidence in accepting any of her evidence, and hence she must fail.

# I think counsel for the defendant’s submission overstates the effect of the evidence on which the defendants rely.

# There are a number of matters which are not controversial. I will deal with them first.

# I am in no doubt that by the time the plaintiff came under the care of Professor Cook, that she was suffering from an epileptic condition.

# Following the left temporal lobectomy, the seizures improved for some time. Although, the plaintiff has given differing accounts of the period when she was effectively seizure free, I prefer the evidence of Professor Cook that she was seizure free until late 2013. It is reasonable to infer from his letter dated 27 April 2014 that he continued treating the plaintiff after the surgery and was, therefore, in a position to be able to assess whether she was seizure free or not and for how long.

# Dr Wilson saw the plaintiff on 10 December 2013 when he obtained a history of lip-smacking and an amnestic episode. He was in no doubt that that they were “clearly” symptoms consistent with small seizures. Furthermore, he considered that there was an association between the onset of an amnestic episode and the surgery.

# It was not long after Professor Cook and Dr Wilson became aware that the plaintiff was suffering from seizures at the end of 2013 that Professor Cook organised for the plaintiff to undergo video-EEG recordings in April 2014 to confirm that she was in fact having seizures. The recording captured four events during five days of video-EEG recordings. That led Professor Cook to have no doubt that she was having seizures and of the frequency described by the plaintiff.

# Following the video-EEG recordings, Professor Cook appears to have been in no doubt that the plaintiff was suffering from complex partial seizures with loss of awareness of memory lasting one to two minutes, that they were occurring several times weekly, and that when they occurred was unpredictable.

# Professor Cook considered that it was unlikely that the plaintiff would obtain sufficient “good control” over the seizures which would to allow her to drive again. He considered that her epileptic condition was recalcitrant to control by the use of anticonvulsant medication. Indeed, it was his opinion that the medication he had prescribed had not provided her with any benefit in terms of control of the seizures.

# Although, counsel for the defendants submitted I should be cautious in accepting the conclusions reached by Dr Seneviratne, that submission went rather more to whether I accept his opinion regarding the plaintiff’s capacity to engage in work for reward. There are inevitably aspects of the history he obtained which are different from the brief histories contained in the reports of Dr Wilson and Professor Cook, but after close analysis and comparison of their opinions, I am not persuaded that the differences are all that material.

# I consider that there is sound medical evidence to support the conclusion that the plaintiff is still troubled by the epileptic condition. I accept her evidence that she has epileptic seizures once or twice a month, but whether they affect her to the same extent as she and her husband contend for is a matter I will deal with a little later in these reasons.

# Despite the attack upon the plaintiff’s creditworthiness and reliability, I am not satisfied that it is the overwhelming factor which counsel for the defendants contended it is.

# It must be remembered that Dr Wilson was of the opinion that the surgery is likely to result in the plaintiff being “very prone to having amnestic episodes” and “wiping” the temporary short-term memories that are stored in the temporal lobe.[[103]](#footnote-103) Dr Seneviratne and Dr Wyatt referred to what I will compendia refer to as a cognitive impairment, and in particular, Dr Seneviratne spent some time referring to it as being of significance.

# The plaintiff said that there were many things that she could not remember, for example seeing Dr Seneviratne. Mr Derham gave evidence of the difficulties the plaintiff has with her memory. I am not prepared to go as far as Counsel for the defendants invited me to go to conclude that whenever and wherever the plaintiff gave evidence which was contradicted by other evidence, that it necessarily must be that she was being untruthful. Rather, I think the evidence of the plaintiff that she could not remember details on which she was cross-examined is explained by the evidence of her husband, and I think very well explained in the medical evidence to which I have just referred.

# Dr Wilson, Professor Cook, Dr Seneviratne and Dr Wyatt convincingly describe the consequences of the epileptic condition and left temporal lobectomy. There is little about the clinical assessment made by Professor Cook, Dr Seneviratne and Dr Wyatt which can be assailed, and, in particular, regarding the nature and extent to which it renders the plaintiff unlikely ever to engage in or work for reward.

# I accept the plaintiff’s evidence that by January 2014, she was no longer able to perform the tasks involved in her work at John’s Pies. Although, I have expressed some concerns about the plaintiff’s evidence, I am not persuaded that where I have doubts, that those doubts are sufficient to displace the whole of her evidence or the critical parts of her evidence. I am fortified in reaching that conclusion because of the emphatic way Professor Cook, Dr Seneviratne and Dr Wyatt have expressed their opinions about the plaintiff being unlikely ever to engage in or work for reward. Their opinions leave little or no room for doubt that the plaintiff is unlikely ever to engage in or work for reward.

# That brings me to the interpretation of TPD in *Shuetrim*[[104]](#footnote-104) and whether the plaintiff’s evidence is sufficient to satisfy the definition. I am satisfied to the standard referred to in *Shuetrim* that the plaintiff is unlikely ever to engage in or work for reward, and, in reaching that conclusion, I have considered the occupations or work for which the plaintiff is reasonably qualified by reason of her education, training or experience.

# Neither the plaintiff nor the defendants referred to any other occupations or work other than those the plaintiff has pursued since 2002. Those jobs constituted the occupations or work for which the plaintiff was qualified by reason of education, training or experience. In reaching the conclusion that I have that the plaintiff satisfies the definition of TPD, I have paid regard to each of those occupations or work only. I was not invited to consider any other occupations or work.

# The plaintiff has established that she has become incapacitated to such an extent as to render her unlikely to ever engage in or work for reward in any occupation or work for which she is reasonably qualified by reason of education, training or experience and therefore satisfies the criteria of TPD prescribed in the policy of insurance and is entitled to the TPD benefit.

# I will now have Counsel submit what orders follow these conclusions.

# - - -

1. a pseudonym. [↑](#footnote-ref-1)
2. a pseudonym. [↑](#footnote-ref-2)
3. a pseudonym. [↑](#footnote-ref-3)
4. a pseudonym. [↑](#footnote-ref-4)
5. Exhibit A [↑](#footnote-ref-5)
6. a pseudonym. [↑](#footnote-ref-6)
7. Exhibit B [↑](#footnote-ref-7)
8. Exhibit B, page 7 [↑](#footnote-ref-8)
9. [2016] NSWCA 68 (“*Shuetrim*”*)* [↑](#footnote-ref-9)
10. At paragraphs [88]-[91] [↑](#footnote-ref-10)
11. Fourth Edition, Volume 2, at paragraph [21.380) pages 589-590 [↑](#footnote-ref-11)
12. The authors referred *to Wiley v Board of Trustees, State Public Sector Superannuation Scheme* [1997] QSC 46 and *Ivkovic v Australian Casualty & Life Ltd* (1994) 10 SR (WA) 325 [↑](#footnote-ref-12)
13. The authors referred to *White v Board of Trustees* [1997] 2 Qd R 659 [↑](#footnote-ref-13)
14. a pseudonym [↑](#footnote-ref-14)
15. Transcript 78 [↑](#footnote-ref-15)
16. Transcript 77 [↑](#footnote-ref-16)
17. Transcript 79 [↑](#footnote-ref-17)
18. Transcript 77, 79-80 [↑](#footnote-ref-18)
19. Transcript 80 [↑](#footnote-ref-19)
20. Transcript 78 [↑](#footnote-ref-20)
21. a pseudonym. [↑](#footnote-ref-21)
22. Transcript 82 [↑](#footnote-ref-22)
23. a pseudonym [↑](#footnote-ref-23)
24. Transcript 81. The plaintiff's reference to “severally” should read “severely” [↑](#footnote-ref-24)
25. Transcript 82-83 [↑](#footnote-ref-25)
26. Transcript 83 [↑](#footnote-ref-26)
27. Transcript 83-84 [↑](#footnote-ref-27)
28. Transcript 85 [↑](#footnote-ref-28)
29. a pseudonym. [↑](#footnote-ref-29)
30. Transcript 133-134 [↑](#footnote-ref-30)
31. Transcript 86 [↑](#footnote-ref-31)
32. Transcript 87 and 204-205 [↑](#footnote-ref-32)
33. Transcript 86-87 and 209 [↑](#footnote-ref-33)
34. Transcript 210 [↑](#footnote-ref-34)
35. Transcript 87 [↑](#footnote-ref-35)
36. Transcript 88-89 [↑](#footnote-ref-36)
37. Transcript 89-90 [↑](#footnote-ref-37)
38. Transcript 91-92 [↑](#footnote-ref-38)
39. Transcript 83 [↑](#footnote-ref-39)
40. Transcript 89 [↑](#footnote-ref-40)
41. a pseudonym. [↑](#footnote-ref-41)
42. Transcript 262 [↑](#footnote-ref-42)
43. Transcript 262 [↑](#footnote-ref-43)
44. Transcript 263-264 [↑](#footnote-ref-44)
45. Transcript 264 [↑](#footnote-ref-45)
46. Transcript 265 [↑](#footnote-ref-46)
47. Transcript 266 [↑](#footnote-ref-47)
48. Transcript 267 [↑](#footnote-ref-48)
49. Transcript 268-269 [↑](#footnote-ref-49)
50. Transcript 277 [↑](#footnote-ref-50)
51. Transcript 268 [↑](#footnote-ref-51)
52. Exhibit G [↑](#footnote-ref-52)
53. Exhibit 8 [↑](#footnote-ref-53)
54. Exhibit 8 [↑](#footnote-ref-54)
55. Exhibit G [↑](#footnote-ref-55)
56. Exhibit G [↑](#footnote-ref-56)
57. Exhibit G [↑](#footnote-ref-57)
58. Exhibit G [↑](#footnote-ref-58)
59. Exhibit G [↑](#footnote-ref-59)
60. Exhibit H. Also a general practitioner at the same clinic as Dr Venkatram [↑](#footnote-ref-60)
61. Exhibit J [↑](#footnote-ref-61)
62. Exhibit F, page 2 [↑](#footnote-ref-62)
63. Exhibit F, page 3 [↑](#footnote-ref-63)
64. Exhibit F, page 3 [↑](#footnote-ref-64)
65. Exhibit F, page 3 [↑](#footnote-ref-65)
66. Exhibit F, page 6 [↑](#footnote-ref-66)
67. Exhibit F, page 6 [↑](#footnote-ref-67)
68. Exhibit 9 [↑](#footnote-ref-68)
69. Exhibit 9, page 3 [↑](#footnote-ref-69)
70. Exhibit 9, page 6 [↑](#footnote-ref-70)
71. Transcript 95-96 [↑](#footnote-ref-71)
72. Transcript 290 [↑](#footnote-ref-72)
73. Exhibit D [↑](#footnote-ref-73)
74. Exhibit D [↑](#footnote-ref-74)
75. Transcript 212 [↑](#footnote-ref-75)
76. Transcript 212-213 [↑](#footnote-ref-76)
77. Transcript 98 [↑](#footnote-ref-77)
78. Transcript 95 and 102 [↑](#footnote-ref-78)
79. Transcript 188-190 [↑](#footnote-ref-79)
80. Transcript 191-192 [↑](#footnote-ref-80)
81. Transcript 193 [↑](#footnote-ref-81)
82. Transcript 280-282 [↑](#footnote-ref-82)
83. Transcript 277 [↑](#footnote-ref-83)
84. Transcript 280 [↑](#footnote-ref-84)
85. Exhibit 10 [↑](#footnote-ref-85)
86. Exhibit 11 [↑](#footnote-ref-86)
87. Transcript 220-231 [↑](#footnote-ref-87)
88. Transcript 221 [↑](#footnote-ref-88)
89. Exhibit 6 [↑](#footnote-ref-89)
90. Exhibit 7 [↑](#footnote-ref-90)
91. Exhibit 2 [↑](#footnote-ref-91)
92. Exhibit 1 [↑](#footnote-ref-92)
93. Transcript 174-175 [↑](#footnote-ref-93)
94. Transcript 60 [↑](#footnote-ref-94)
95. Transcript 102-103 [↑](#footnote-ref-95)
96. Taken from counsel for the defendant’s written outline of final submissions [↑](#footnote-ref-96)
97. Exhibit F [↑](#footnote-ref-97)
98. Exhibit F [↑](#footnote-ref-98)
99. *Mobilio v Balliotis* [1998] 3 VR 833; *Vella v Cardona* [2015] VSCA 306; *Dordev v Cowan & Ors* [2006] VSCA 254 and *McIver v The National Mutual Life Association of Australasia Ltd (t/as Australian Casualty and Life)* [2006] VSC 437 [↑](#footnote-ref-99)
100. Transcript 203-211 [↑](#footnote-ref-100)
101. a pseudonym [↑](#footnote-ref-101)
102. *Jones v Dunkel* (1959) 101 CLR 298 [↑](#footnote-ref-102)
103. Exhibit 8 [↑](#footnote-ref-103)
104. *Supra* [↑](#footnote-ref-104)