



Principal Registrar &  
Chief Executive Officer



## NOTICE OF APPEAL

### COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2023/00102084

### TITLE OF PROCEEDINGS

Appellant	<b>MIROSLAVKA LUKIC</b>
First Respondent	<b>MOYA DE LUCA-LEONARD</b>
Second Respondent	<b>MICHAEL PERRY</b>

### PROCEEDINGS IN THE COURT BELOW

Title below	Miroslavka Lukic v Moya De Luca-Leonard t/as De Luca-Leonard Solicitor & Anor
Court below	District Court of New South Wales
Case number below	2019/00029291
Dates of hearing	27, 28, 29, 30 June 2022, 1 July 2022, 6 March 2023 and 13 March 2023
Material date	6 March 2023
Decision of	Olsson DCJ

### FILING DETAILS

Filed for	<b>MIROSLAVKA LUKIC</b> , the Appellant
Filed in relation to	Whole decision below in relation to liability, quantum of damages and costs
Legal representative	Gabriel Hernandez, Wilson Fox Lawyers Pty Limited
Legal representative reference	GH:164020
Contact name and telephone	Gabriel Hernandez, [REDACTED]
Contact email	[REDACTED]

### HEARING DETAILS

This notice of appeal is listed for directions at 28Jun2023 09:00 AM - Directions

## TYPE OF APPEAL

Appeal - District Court - Professional Negligence - Legal – Statutory Interpretation – Damages - Inadequate

## DETAILS OF APPEAL

- 1 The appeal is brought pursuant to section 127 of the *District Court Act 1973* (NSW).
- 2 This notice of appeal is not filed pursuant to leave to appeal.
- 3 The Appellant has filed and served a notice of intention to appeal which was served on the First and Second Respondents on 29 March 2023.
- 4 The Appellant appeals from the whole of the decision below in relation to liability, the quantum of damages and costs.
- 5 Judgment was delivered by the District Court on 6 March 2023 and 13 March 2023.

## APPEAL GROUNDS

Decision Date: 6 March 2023

### *Ground 1*

1. In the circumstances where duty of care was never in issue, the Trial Judge erred in not finding a breach of duty by the Respondents in not advising the Appellant to pursue her statutory rights for workers compensation, instead of advising her to bring and settle a work injury damages claim.
2. The Trial Judge erred in finding that the Respondents were in breach of their duty to act professionally, but that such a breach did not cause the Appellant to suffer a loss of statutory benefits or any other damage. Further, the Trial Judge erred in not finding that the breach of care was otherwise causative of the harm suffered by the Appellant.

### *Ground 2*

3. In the circumstances where the Respondents in a professional negligence action did not give any evidence at trial, the Trial Judge erred in not finding that the Defendants had failed to give advice to the Appellant to pursue an alternative course of action, namely pursue her statutory rights for workers compensation, in circumstances where there was evidence that the Appellant wanted such compensation pursued, and where the Respondents did not contradict such evidence.

4. In the alternative, if it were suggested that such advice was provided, the Trial Judge erred in failing to find that such advice was negligent, since the Appellant's evidence was that on April 2013 she received negligent advice from the Respondents counselling against the Appellant pursuing her statutory weekly benefits, because the Respondents led no evidence to contradict the Appellant that she received such advice.

#### *Ground 3*

5. The Trial Judge erred in applying the "but for" test incorrectly in that her Honour held that the harm suffered by the Appellant was not the direct result of the Respondents' negligence pursuant to section 5D of the Civil Liability Act.

#### *Ground 4*

6. Further, the Trial Judge did not consider properly or at all the evidence of the Appellant regarding the weekly benefits to which she was statutorily entitled as set out in the Schedule in the Court Book, to which no reference was made in the judgment. As such, the court did not properly determine the appropriate quantum of loss and damage which the Appellant suffered as a result of the negligence of the Respondents.

#### *Ground 5*

7. The Trial Judge erred in misinterpreting section 59A of the Workers' Compensation Act 1987 by finding that the Appellant would only be entitled to medical benefits for one year after attaining the pension age of 67, as opposed to properly finding that due to her assessment of 24% whole person impairment, the legislation allows the Appellant automatic entitlement to medical benefits for life.
8. The Trial Judge erred in misapplying section 38(8) of the Workers Compensation Act 1987 in that her Honour held that the insurer was entitled to reassess the work capacity of the Appellant when it wished, when in fact the insurer was only entitled to do so if the Appellant were receiving weekly benefits, which she was not. However, had the Respondents properly advised the Appellant of her rights, an application would have been brought by the Respondents on the Appellant's behalf to the insurer which would have entitled the Appellant to receive weekly benefits due to the extent of her capacity, being 24% whole person impaired. This error of law meant that her Honour did not properly assess the loss and damage suffered by the Appellant as a result of the Respondents' negligence.

*Ground 6*

9. The Trial Judge erred in her calculations of the correct value of workers' compensation benefits by misapplying the statutory benefits and miscalculating the same, contrary to the evidence. The value of the Appellant's claim for statutory weekly benefits and medical benefits for life were in fact \$717,261.26 instead of the figure calculated by the court at first instance of \$330,000. The Trial Judge also misapplied the test in Firth v Sutton to calculate the appropriate quantum of damages when the proper basis for doing so is by reference to the Workers Compensation Acts and Regulations which set out the relevant statutory provisions for compensation.
10. Further, the Trial Judge erred in not considering properly or at all the Appellant's expert evidence regarding the calculation of medical benefits claimed by the Plaintiff. The expert evidence on Medicare expenses was an important part of the calculation of the quantum of damages for the Appellant which was not taken into consideration by the Trial Judge when assessing the value of the Appellant's claim.
11. The Trial Judge erred in finding that a successful Work Injury Damages claim was "obviously more favourable" to the Appellant for the reason that "the insurer gave detailed and provable reasons for denying her original claim" where the fact is that such "detailed and provable reasons" were overturned by the Workers Compensation Commission. Further, the Trial Judge erred in finding that the Appellant received \$250,000 in "lump sum damages" when the Appellant in fact only received \$66,250, an error in the assessment of the Appellant's quantum which led the Court to incorrectly find that the Appellant lost nothing.

*Ground 7*

12. Further, the Trial Judge erred in making a deduction for Centrelink benefits in circumstances where a Medicare History Statement needs to be obtained post judgment before a proper calculation of medical benefits can be assessed. The District Court does not have jurisdiction to hear such an application and as such, the Trial Judge erred in not referring the matter to the Supreme Court for determination on that issue. The Appellant's submissions on that issue were not taken into consideration by the Trial Judge, especially considering that this issue has not been recently determined by the Court.

*Ground 8*

13. The Trial Judge erred in drawing a Jones v Dunkel inference against the Appellant regarding the evidence of her son in circumstances where an explanation for why he did not give evidence was provided, and where such explanation was not contradicted by

any other evidence. Further, the Trial Judge erred in not making any Jones v Dunkel inference against the Respondents in circumstances where they did not give evidence in the trial to contradict the evidence given by the Appellant.

14. Further, the Trial Judge erred in rejecting all evidence of the Appellant except where corroborated by contemporaneous documents, in circumstances where the evidence given by the Appellant was the only evidence of certain facts which were important to the questions of breach of duty, and quantum of damages and the Respondents did not give evidence at all.

**ORDERS SOUGHT**

- 1 Appeal allowed.
- 2 Set aside Order 1 of the decision of 6 March 2023.
- 3 Set aside Orders 1 and 2 of the decision of 13 March 2023.
- 4 In lieu of the judgment in the Court below, order judgment in favour of the Appellant in the sum of \$717,261.26.
- 5 Interest on judgment to be applied at the statutory rate from the date of settlement being 3 April 2014.
- 6 In the alternative, judgment for the Plaintiff in the court below and the question of quantum to be remitted to a different judge.
- 7 In the further alternative, order a hearing de novo at first instance before a different judge.
- 8 That the First and Second Respondent pay the Appellant's costs of the proceedings in the District Court of New South Wales.
- 9 That the First and Second Respondent pay the Appellant's costs of these appeal proceedings.

**UCPR 51.22 CERTIFICATE**

I certify under UCPR 51.22(2) that the amount in issue in this appeal exceeds the specified amount under sections 127(2)(c) of the *District Court Act 1973 (NSW)*.

**SIGNATURE OF LEGAL REPRESENTATIVE**

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the appellant that court fees will be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor on Record

Date of signature

6 June 2023

## NOTICE TO RESPONDENT

If your solicitor, barrister, or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the orders sought in the notice of appeal and for the appellant's costs of bringing these proceedings.

Before you can appear before the court, you must file at the court an appearance in the approved form.

## HOW TO RESPOND

**Please read this notice of appeal very carefully. If you have any trouble understanding it or require assistance on how to respond to the notice of appeal you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the notice of appeal from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

Court forms are available on the UCPR website at [www.ucprforms.justice.nsw.gov.au](http://www.ucprforms.justice.nsw.gov.au) or at any NSW court registry.

## REGISTRY ADDRESS

Street address	Supreme Court of New South Wales, Court of Appeal Law Courts Building Queen's Square Level 5, 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

## PARTY DETAILS

A list of parties must be filed and served with this notice of appeal.



[on separate page]

**FURTHER DETAILS ABOUT APPELLANT****Appellant**

Name MIROSLAVKA LUKIC

Address

**Legal representative for Appellant**

Name Gabriel Hernandez

Practising certificate number

Firm

Wilson Fox Lawyers Pty Limited

Contact solicitor

Gabriel Hernandez

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LIVERPOOL NSW 2170

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Not applicable

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**DETAILS ABOUT RESPONDENT****First Respondent**

Name Moya De Luca-Leonard

Address

**Second Respondent**

Name

Michael Perry

Address

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