IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M 176 of 2010

BETWEEN:

MAURICE BLACKBURN CASHMAN

Appellant

- and –

FIONA HELEN BROWN

Respondent

APPELLANT'S SUBMISSIONS

Part I – Internet certification:

1. These submissions are in a form suitable for publication on the internet.

Part II – Concise statement of issues:

2. The issue which arises from the grounds of appeal is –

   - Does s 134AB(15) of the *Accident Compensation Act 1985* (Vic), either alone, or in combination with s 68(4), operate so that a worker, whose degree of impairment has been assessed under s 104B of the Act at 30% or more, is deemed to have suffered a "serious injury" for the purpose of the adjudication of the issues arising in a damages proceeding brought pursuant to s 134AB, with the consequence that defendants are prohibited from conducting their case in the manner specified by the orders of the Court of Appeal?

Part III – Judiciary Act, s 78B:

3. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903 (Cth)*, and considers that no such notice should be given.

Filed on behalf of: The appellant

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Part IV – Citation of the reasons for judgment of the Court of Appeal:

4. The reasons for judgment of the Court of Appeal are not reported. They are available on Austlii, where the reasons may be downloaded in RTF format: Brumar (Vic) Pty Ltd v Norris; Brown v Maurice Blackburn Cashman [2010] VSCA 206 (25 August 2010).

Part V – Narrative statement of relevant facts:

5. The appellant is a firm of legal practitioners. In 2003 the respondent was employed by the appellant as a salaried partner and as the head of its family law practice in Melbourne.

6. The respondent claims that from 8 January 2003 to 17 November 2003 she was "*systematically undermined, harassed and humiliated*" by a fellow employee, and that complaints and requests to the managing partner for intervention went unanswered and that, as a consequence, she suffered psychological injury and associated loss and damage.

7. On about 12 December 2005, and pursuant to s 98C of the *Accident Compensation Act*, the respondent made a claim for statutory compensation for non-economic loss. The amount of compensation payable to the respondent was determined, in part, by the assessment of the respondent's degree of impairment in accordance with s 91 of the Act, which required that the assessment be made in accordance with the AMA Guides (4th edition) as modified by s 91, and in particular as modified by s 91(6) which substituted for Chapter 14 of the AMA Guides, the Clinical Guidelines to the Rating of Psychiatric Impairment[1].

8. On or about 23 February 2006, the Victorian WorkCover Authority **("the Authority")**, by its authorised agent, accepted that the respondent had a psychological injury arising out of her employment with the appellant.

9. On about 22 March 2006, and pursuant to s 104B(9) of the *Accident Compensation Act*, the Authority referred the following medical questions to a Medical Panel for its opinion under s 67 of the Act –

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[1] Section 91(6) was subsequently substituted by s 9(2) of the *Accident Compensation and Other Legislation (Amendment) Act 2006* which commenced on 26 July 2006, so that there is now substituted for Chapter 14 of the AMA Guides the guidelines entitled "The Guide to the Evaluation of Psychiatric Impairment for Clinicians". The transitional provision is in s 290 of the *Accident Compensation Act*.

(1) What is the degree of impairment resulting from the accepted injury/s assessed in accordance with Section 91, and is the impairment permanent?

(2) Does the worker have an accepted injury which has resulted in a total injury mentioned in the table in Section 98E(1)?

10. The Medical Panel was constituted by Dr Diane Neill and Dr Nathan Serry. On 28 June 2006 the Panel certified as follows[2] –

(1) The Panel is of the opinion that there is a 30% psychiatric impairment resulting from the accepted psychological injury, when assessed in accordance with Section 91(2) for the purposes of Sections 98(c) and 134AB(3) & (15) of the Act. The degree of psychiatric impairment is permanent within the meaning of the Act.

(2) No.

11. On about 15 August 2006, the Authority advised the respondent of the Panel opinion and of her entitlements under s 98C of the Act.

12. On about 25 October 2006 the respondent made application pursuant to s 134AB(4) of the *Accident Compensation Act*, by which she sought access to the statutory "*serious injury*" gateway beyond which she could then commence a common law proceeding against the appellant for damages[3].

13. By s 134AB(15) of the *Accident Compensation Act*, the respondent was deemed to have suffered a "*serious injury*", because the assessment undertaken under s 104B of the Act was 30 per centum or more.

14. On 18 July 2007 the respondent commenced a proceeding in the County Court of Victoria by which she claimed common law damages for negligence[4]. The mode of trial nominated by the respondent on the writ was trial by jury[5].

15. By its amended defence dated 29 September 2009, the appellant denied (inter alia) the respondent's allegations of causation and injury[6].

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[2] See certificate of opinion dated 28 June 2006.

[3] *Barwon Spinners Pty Ltd v. Podolak* (2005) 14 VR 622; *Duyer v. Calco Timbers Pty Ltd* (2008) 234 CLR 124.

[4] See writ & statement of claim dated 18 July 2007.

[5] *County Court Rules of Procedure in Civil Proceedings 1999*, Rule 47.02(1) and (1.1). See now, *County Court Civil Procedure Rules 2008*, Rule 47.02(1)(a) and (1.1).

[6] See amended defence dated 29 September 2009, para 7.

16. By her amended reply dated 15 October 2009, the respondent alleged that the Medical Panel opinion must be accepted as final and conclusive in the common law damages proceeding. The respondent alleged that the appellant is estopped from making any assertion inconsistent with (inter alia) the opinion of the Medical Panel[7].

17. The proceeding came on for trial before His Honour Judge Lacava who, on 22 October 2009, pursuant to s76(1) of the *County Court Act* 1958 (Vic), stated the following questions for determination of the Court of Appeal[8] –

(1) Do any, and if so which of the estoppels pleaded in paragraph 1A(i) of the plaintiff's amended reply to the amended defence arise?

(2) Is this Honourable Court obliged to accept as final and conclusive in any trial of this action any, and if so which, of the matters pleaded by the plaintiff at paragraph 1B(a) and (b) of her amended reply to amended defence?

(3) Is the defendant precluded from acting in any, and if so which, of the ways claimed by the plaintiff in para.1B(c) of her amended reply to amended defence?

18. The stated case was argued together with the appeal in *Brumar (Vic) Pty Ltd v. Norris* before the Court of Appeal constituted by Ashley JA, Mandie JA and Ross AJA[9].

19. On 25 August 2010, for the reasons given by Ashley JA, with which Mandie JA and Ross AJA agreed, the Court answered the stated case as follows[10] –

(1) Unnecessary to answer.

(2)&(3) The defendant (appellant) is prohibited in this proceeding from –

(a) making any assertion, whether by pleading, submission or otherwise; and

(b) leading or eliciting evidence, whether in evidence in chief, cross examination or re-cross examination,

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[7] See amended reply dated 15 October 2009, paras 1A & 1B.

[8] See Ruling dated 22 October 2009.

[9] *Brumar (Vic) Pty Ltd v. Patricia Norris* raised a cognate issue which issue is now affected by statutory amendment, namely the insertion of s 134AB(19A) and the repeal of s 134AB(19)(c).

[10] *Brumar (Vic) Pty Ltd v. Patricia Norris; Fiona Helen Brown v. Maurice Blackburn Cashman* [2010] VSCA 206.

which is inconsistent with the opinion of the Medical Panel provided on or about 28 June 2006; and in particular from making any assertion, or leading or eliciting evidence, to the contrary of the following –

(i) that the plaintiff, as at 28 June 2006, suffered a permanent (in the sense of it being likely to last into the foreseeable future) mental or behavioural disturbance or disorder which was severe by reference to its consequences with respect to pain and suffering and loss of earning capacity, when judged by comparison with other cases in the range of possible mental or behavioural disturbances or disorders;

(ii) that it was the pain and suffering and loss of earning capacity consequences of the accepted psychological injury which constituted the permanent mental or behavioural disturbance or disorder which was severe.

Part VI – Argument:

The errors in the Court of Appeal's reasons

20. The Court of Appeal erred in its construction of s 134AB(15) and s 68(4) of the *Accident Compensation Act* 1985. The errors are found in paragraphs [170] and [176] of the reasons for judgment of Ashley JA, with whom the other members of the Court agreed, where his Honour considered that –

(a) it would be anomalous if an injury which is deemed to be serious injury had no effect in a permitted common law proceeding [170];

(b) the panel opinion which is to be adopted and applied by a court is the opinion with its "mandated serious injury consequences" [170]; and

(c) the effect of s 68(4) is that an impairment assessment of more than 30 per cent given under s 104B(9), having the operation commanded by s 134AB(15), has the effect, in a common law proceeding, that the employer is not entitled to put in issue the fact that, at the time when the opinion was expressed, the worker suffered serious injury, which in the present case, was a permanent severe mental disturbance or disorder [176].

21. For reasons developed below, the Court of Appeal should have construed s 134AB(15) and s 68(4) so that they sit harmoniously with s 134AB(23)(b), which provides that in the trial of a proceeding, the jury must not be informed that the injury in respect of which the proceeding is brought, "has been deemed, found, or required to be found, to be a serious injury". The Court of Appeal should have held that the deemed "serious injury" effected by s 134AB(15) operated so as to permit the respondent to commence a damages proceeding, and for no wider purpose. And the Court should have construed s 68(4) consistently with the Court of Appeal's earlier decision in *Pope v WS Walker & Sons Pty Ltd*[11] with the consequence that the Medical Panel opinion does not bind the court on the trial of the respondent's damages proceeding, as the respondent's level of impairment assessed in accordance with the AMA Guides, as modified by s 91(6) of the Act, and the permanence of that assessed impairment, are not issues which arise at trial.

Statutory Background

22. "Serious injury" gateways to the recovery of common law damages first appeared in Victoria in the *Transport Accident Act* 1986 (Vic), s 93[12]. Broadly speaking, there are three gateways common to the *Transport Accident Act* and the kindred provisions in s 135A and s 134AB of the *Accident Compensation Act* –

(a) a deemed "serious injury" in consequence of an impairment assessment of 30% or more;

(b) consent of the relevant statutory body or self insurer; and

(c) leave of the Court.

23. The Court of Appeal has previously held that s 93 of the *Transport Accident Act* contingently extinguishes rights of action at common law[13]. The Court of

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[11] (2006) 14 VR 435 at 438 to 440, [11] to [21].

[12] The restriction on common law actions for damages in s 93 of the *Transport Accident Act* by reference to the criterion of "serious injury" was noted by the Court in *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 129, [6]. Some background to the enactment of the *Transport Accident Act* is referred to in *Humphreys v Poljak* [1992] 2 VR 129 at 131 per Crockett and Southwell JJ. Compare the "significant injury" gateways now found in the *Wrongs Act 1958* (Vic), s 28LF.

[13] *Wilson v Nattrass* (1995) 21 MVR 41 at 55 per Ashley JA, with whom Hedigan J at 58 was in substantial agreement. See also, *Swannell v Farmer* [1999] 1 VR 299 at 305 to 309 per Batt and Buchanan JJA; *Transport Accident Commission v Murray* (2005) 12 VR 314 at 316-7, [8] per Buchanan JA, with whom Charles JA and Osborn AJA agreed; *Hayes v Transport Accident Commission* [2010] VSCA 104 at [19] and [20] per Neave JA, with whom Nettle JA agreed.

Appeal's characterisation of the effect of s 93 of the *Transport Accident Act* is equally applicable to s 135A(1) and s 134AB(1) of the *Accident Compensation Act*[14].

24. In 1992 "serious injury" gateways to the recovery of common law damages were introduced for injuries arising out of, or in the course of, or due to the nature of employment by a new s 135A of the *Accident Compensation Act*[15]. In concept, the gateways were much like those in s 93 of the *Transport Accident Act.*

25. In 1997 the *Accident Compensation Act* was substantially amended, and the rights of workers to recover common law damages in respect of injuries arising on or after 12 November 1997 were abrogated by s 134A[16].

10 26. In 1999, common law rights were restored by s 134AB of the *Accident Compensation Act*[17]. Section 134AB follows, to a substantial degree, the model of s 135A[18], in that there are the following "serious injury" gateways to the recovery of common law damages[19] –

(a) an impairment assessment of 30 per centum or more which gives rise to a deemed "serious injury" [s 134AB(15)];

(b) consent by the Authority or self insurer [s 134AB(16)(a)] if satisfied that the worker suffered a "serious injury" as defined by the narrative test in s 134AB(37) and (38);

(c) leave by a court to bring a proceeding [s 134AB(16)(b)] if satisfied that
20 the worker suffered a "serious injury" as defined by the narrative test; and

(d) a default gateway under s 134AB(9), which is engaged if the Authority fails to advise the worker in writing within a period of 120 days of receiving the worker's application whether the worker is deemed to have a "serious injury", or whether, otherwise, the Authority will issue a

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[14] As suggested in relation to s 135A by Phillips JA in *Dolling v National Australia Bank* (2002) 5 VR 234 at 239, [12] (last sentence), Buchanan JA and Vincent JA agreeing.

[15] Section 135A was substituted by the *Accident Compensation (WorkCover) Act* 1992 (Vic), s 46(3).

[16] The abrogation of common law rights effected by s 134A was noted by the Court in *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 129, [5].

[17] As noted by the Court in *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 129, [4] and [5].

[18] *Barwon Spinners v Podolak* (2005) 14 VR 622 at [5] per Phillips JA.

[19] The three principal gateways in s 134AB were referred to by the Court in *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 129 to 130, [8].

certificate under (16)(a) consenting to the commencement of a proceeding[20].

27. There are, however, a number of variations on the s 135A model which were effected by s 134AB[21]. Neither s 134AB(19)(c) (now repealed[22]) nor s 134AB(23) has a corresponding provision in s 135A.

Sub-section 134AB(15)

28. Correctly construed, the condition in s 134AB(2) that a worker may recover damages in respect of an injury if the injury is a "serious injury" does not require "serious injury" to be proven at the trial of the damages proceeding so as to entitle the worker to recover damages[23]. The "serious injury" criterion in s 134AB(2) refers to the gateways to the commencement of a proceeding for the recovery of damages in s 134AB[24]. The scheme of s 134AB requires that one of those gateways be engaged *prior* to the commencement of a damages proceeding. Accordingly, "serious injury", as defined, is not an issue which arises at trial[25]. This construction is supported by sub-section (3) which prohibits the commencement of a proceeding unless –

(a) a determination of the degree of impairment is undertaken under s 104B and an application is made under s 134AB(4); or

(b) a worker makes an application under s 134AB(4) on the ground that the worker has a "serious injury" within the meaning of the section.

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[20] The default gateway in s 134AB(9) corresponds to s 135A(2DB).

[21] As noted by Phillips JA in *Barwon Spinners v Podolak* (2005) 14 VR 622 at [3] and [6], significant changes were made to the "narrative test" by which the Parliament constructed a number of very significant hurdles.

[22] Following the hearing of the stated case, but before judgment, s 134AB(19)(c) was repealed by s 57(2) of the *Accident Compensation Amendment Act* 2010, and s 134AB(19A) was inserted by s 57(3), both of which were deemed to come into operation on 10 December 2009. Section 134AB(19A) provides –

> (19A) Any finding made on an application for leave to bring proceedings in respect of the injury does not give rise to an issue estoppel in any proceedings for the recovery of damages brought in accordance with this section which is heard and determined on and from the commencement of section 57(3) of the Accident Compensation Amendment Act 2010.

[23] cf, *Bowles v Coles Myer Ltd* [1995] 1 VR 480 at 483 where Ashley J stated, in relation to s 135A, that s 135A(1) and (2) were not concerned with the bringing of proceedings, but the recovery of damages, and that s 135A(3), which corresponded to s 134AB(15), was a provision of an evidentiary character. Whether or not that construction was correct for the purposes of s 135A as it then stood, it should not be applied to s 134AB, which is in different terms. At [63] of the reasons for judgment below Ashley JA noted the insertion of sub-ss 135A(2A) and (3A) after the decision in *Bowles*.

[24] In a similar way to which s 60F of the *Limitation Act 1969* (NSW) was held to provide a summary of the effect of the substantive provisions that followed in *Dedousis v Water Board* (1994) 181 CLR 171 at 177 per Deane, Dawson, Toohey, Gaudron and McHugh JJ.

[25] *Petkovski v Galletti* [1994] VR 436 at 437 per Brooking J. *Petkovski* concerned "serious injury" for the purposes of s 93 of the *Transport Accident Act* 1986, but the point is equally applicable to s 134AB.

29. The appellant's construction of s 134AB(2) is also supported by s 134AB(16), which prohibits the commencement of a proceeding if the level of impairment assessed under s 104B is less than 30%, unless the Authority or self insurer consents to the commencement of a proceeding under paragraph (16)(a), or a court gives leave to the commencement of a proceeding under paragraph (16)(b).

30. The purpose of s 134AB(15) of the Act is to deem an injury, which is assessed for impairment under s 104B at 30 per centum or more, to be a "serious injury", for the purpose of reviving the worker's common law rights contingently extinguished by s 134AB(1), and thereby to permit the worker to commence a damages proceeding: it has no wider purpose. The purpose of s 134AB(15) is indicated by s 134AB(7)(a), which requires the Authority to advise the worker if the worker is deemed to have a "serious injury", or whether the Authority consents to the worker bringing a damages proceeding if the worker is not deemed to have a "serious injury".

31. In particular, the terms of s 134AB(23)(b), show that Parliament did not intend that a deemed "serious injury" is relevant to any issues at the trial of the worker's common law damages proceeding. Section 134AB(23) provides –

> (23) In the trial of a proceeding brought under this section, a jury must not be informed—
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> (a) of the monetary thresholds and statutory maximums specified by or under subsection (22); or
>
> (b) that any injury in respect of which the proceeding has been brought has been deemed, found, or required to be found, to be a serious injury; or
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> (c) that the Authority or self-insurer has been satisfied that the injury is a serious injury; or
>
> (d) that the Authority or self-insurer has issued a certificate under subsection (16)(a).

32. Section 134AB(23)(b) evinces a legislative intent that the issues at trial be determined by the court, and not by reference to deemed consequences of a statutory impairment assessment. It does this by providing that the irrelevant issues listed therein should not be mentioned to the jury, which reflects the position with other irrelevant issues, such as a plaintiff's entitlement to workers

compensation[26], and the existence of insurance which might cover a defendant's liability[27].

Symmetry

33. At paragraph [170] of the reasons for judgment Ashley JA stated –

> It would be anomalous if an injury which is deemed to be a serious injury had no effect in a permitted common law proceeding. That will not occur if, which in my view is the true situation, the panel opinion which is to be adopted and applied by a court is the opinion with its mandated serious injury consequences.

34. The suggested anomaly arose because the Court was of the opinion that a determination of serious injury in an application brought under s 134AB(16)(b) can give rise to an issue estoppel in a subsequent common law proceeding.

35. There are three answers to the Court of Appeal's reliance on this suggested anomaly. First, it is to be recalled that there is a further gateway, namely consent under paragraph (16)(a). There is no suggestion that the consent of the Authority or self insurer under paragraph (16)(a) has binding consequences for the subsequent common law damages proceeding.

36. The second answer is that, assuming the Court of Appeal's decision in *Brumar (Vic) Pty Ltd v Norris* was correct, and that by operation of (the now repealed) s 134AB(19)(c) a decision of a court in an application under s 134AB16(b) gave rise to an issue estoppel on the question of "serious injury", it is to be observed that a decision of a court in an application under paragraph (16)(b) is the product of a process which is quite different from the assessment of impairment under s 104B. In an application under paragraph (16)(b), evidence is called, there is capacity to cross examine, the judge hearing the application must give detailed reasons, and there is a right of appeal to the Court of Appeal. There is no anomaly in according different treatment to a result arrived at by an informal process where there is no curial hearing, no capacity to cross examine, and no right of appeal[28].

37. Thirdly, the Court of Appeal's construction of s 134AB(19)(c) in *Brumar (Vic) Pty Ltd v Norris* was incorrect. Paragraph (19)(c) provided as follows –

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[26] *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200 at 216 per Dixon J; *Chatzipantelis v Grimwade Castings* [1966] VR 242 at 245 per Winneke, CJ, Barry and Gowans, JJ.

[27] *Grinham v Davies* [1929] 2 KB 249 at 250 per Salter J; *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200 at 210 per Latham CJ

[28] See s 68(4). As mentioned earlier, there is, however, the ability to seek judicial review of medical panel opinions.

> no finding (other than a finding that the injury is a serious injury) made on an application for leave to bring proceedings shall give rise to an issue estoppel

38. The starting point was that no finding gave rise to an issue estoppel. The words in brackets in s 134AB(19)(c) were to make plain that the finding of serious injury, as a statutory gateway, could not be revisited at trial.

39. Under the general law, both fundamental facts and the legal quality of the facts are capable of being the subject of an issue estoppel. But s 134AB(19)(c) defined the scope of the issue estoppel by drawing a distinction between a finding that an injury is a "serious injury", which is the subject of an issue estoppel, and all other findings, which are not. Thus understood, one can see the difference between findings which a court makes upon a serious injury application, and the legal quality of those findings. "Serious injury" is not a finding of fact in itself, but is a legal quality created by statute. In *Hoysted v Commissioner for Taxation*[29] Lord Shaw referred to "a fact fundamental to the decision arrived at", and the "legal quality" of that fact. In *Blair v Curran*[30] Dixon J referred to Lord Shaw's reference to both a fundamental fact, and the legal quality of the fact. The injuries suffered by a worker, and their consequences are fundamental facts. The characterisation of the consequences of an injury as a "serious injury" is a statutory quality attributed to the facts which operates to open the gateway to proceedings for common law damages.

40. It is an unlikely consequence that the legislature intended that, where no other finding gave rise to an issue estoppel, a finding of "serious injury" could be "back-filled" by statutory criteria in the manner suggested by the Court of Appeal. Furthermore, in order to prove the issue estoppel identified in *Brumar*, it would be necessary to tender the record of the orders in the serious injury proceeding. But s 134AB(23)(b) would prevent this from occurring. And s 134AB(23) is generally inconsistent with the suggestion that the trial of a damages proceeding will be affected by the determinations of the gateway processes.

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[29] [1926] AC 155 at 165

[30] (1939) 62 CLR 464 at 532

41. Support for the Court of Appeal's decision in *Brumar* may come from paragraph [11] of the reasons for judgment of this Court in *Dwyer v Calco Timbers Pty Ltd*[31], where the Court stated –

> If leave had been given, the statutory barrier to the bringing of proceedings by the appellant for the recovery of damages would have been removed. In that action for damages the appellant would have had in his favour an issue estoppel arising from the finding that his injury was a "serious injury", but no other estoppel. This would have followed from para (c) of sub-s (19). The provision respecting the issue estoppel both reflects the importance (by reason of its finality) of the determination in any leave application of the issue of "serious injury" and highlights the requirement that the reasons of the County Court be as extensive and complete as those at a trial of the action.

42. There are three things to be said about this passage.

43. First, the Court went no further than to restate the terms of s 134AB(19)(c), namely that an issue estoppel arises from the finding that the injury is a "serious injury", but no other estoppel. Correctly understood, the Court's reasons go no further than observing that the "serious injury" determination is final, and the statutory barrier to the bringing of proceedings cannot be revisited at trial.

44. Secondly, there are other matters which support the requirement that the court hearing an application under paragraph (16)(b) give extensive and complete reasons. The requirement to give detailed reasons has at least three purposes –

(a) the final nature of the decision on a serious injury application requires a correspondingly appropriate level of judicial scrutiny;[32]

(b) to assist the parties in deciding whether to exercise their right of appeal; and

(c) to assist the Court of Appeal in deciding for itself whether the injury is a serious injury.[33]

45. Thirdly, the construction of s 134AB(19)(c) was not argued in *Dwyer*.

46. For the above reasons, the terms of the Act do not support the wide operation given to s 134AB(15) by the Court of Appeal. And there is nothing in any earlier

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[31] (2008) 234 CLR 124

[32] See Second Reading Speech of the Minister for WorkCover, Legislative Assembly, *Parliamentary Debates (Hansard)*, 13 April 2000 at 1010.

[33] *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at [32]; *Church v Echuca Regional Health* [2008] VSCA 153 at [110] to [113] per Ashley JA. Note that s 134AD was repealed by the *Accident Compensation Amendment Act* 2010.

authority, any extrinsic materials, or the history of the legislation, to support the Court of Appeal's construction of s 134AB(15).

Sub-section 68(4)

47. It is difficult to see how the terms of s 68(4) could affect the outcome of this appeal: if the appellant's construction of s 134AB(15) is correct, then (subject to the matters raised by way of contention) the Court of Appeal's decision should be set aside. But at [161] Ashley JA thought that the questions raised by the case stated were resolved by reference to the operation of s 68(4) in the context of the operation of s 134AB.

48. Under the *Accident Compensation Act*, medical questions may be referred to a Medical Panel in a number of circumstances. They include –

(a) a reference by a court exercising statutory compensation jurisdiction [s 45(1) and s 67(2)];

(b) a reference by a court hearing an application under s 134AB(16)(b) for leave to commence a damages proceeding [s 45(1A)];

(c) a reference by a Conciliation Officer in a dispute in connection with a claim for statutory compensation [s 55A, s 56(6) and s 67(2)]; and

(d) a reference by the Authority or self insurer –

(i) in respect of hearing loss claims [s 89(3D)]; and

(ii) in respect of the degree of impairment resulting from an injury assessed in accordance with s 91 [s 104B(9)].

49. The procedures and powers of a Medical Panel are prescribed by s 65 and s 68 of the Act. Under those provisions –

(a) a Panel is not bound by the rules or practices as to evidence [s 65(1)];

(b) the Panel must act informally [s 65(2)];

(c) any attendance by a worker before the Medical Panel must be in private, unless the Panel considers it necessary for another person to be present [s 65(4];

(d) a Panel may ask a worker to meet with the Panel and answer questions, to supply documents, and to submit to a medical examination by the Panel or a member of the Panel [s 65(5)];

(e) the person or body referring a medical question to a Medical Panel must submit certain documents to the Panel [s 65(6A) and (6B)];

(f) the Medical Panel must give a certificate as to its opinion [s 68(2)][34]; and

(g) the opinion of the Medical Panel must be accepted as final and conclusive [s 68(4)][35].

50. The application of s 68(4) of the *Accident Compensation Act* by the Court of Appeal to the present case was erroneous for two reasons.

51. First, s 68(4) should not be construed so that a court is bound by the determination of an issue does not arise. In this case, the Medical Panel assessed that the respondent's level of impairment, as at 28 June 2006, in respect of an accepted injury arising out of or in the course of employment[36], in accordance with the Clinical Guidelines to the Rating of Psychiatric Impairment, was 30%, and that the impairment so assessed was permanent. Those issues will not arise in the respondent's common law damages trial[37]. And for the reasons already stated, the existence of a "serious injury" does not arise on the trial of the damages claim. The issues on the trial of the damages claim are different: they are whether the negligence of the appellant was a cause of any and if so what injuries of the respondent[38]. In respect of any injuries found to have been caused by the negligence of the appellant, damages are to be assessed at the date of trial[39]. The existence, cause, nature and extent of the respondent's injuries are not to be determined by medical practitioners applying criteria in the Clinical Guidelines to the Rating of Psychiatric Impairment as at 28 June 2006 to injuries accepted for statutory compensation purposes.

52. Secondly, s 68(4) should have been construed having regard to its history, as essayed by Eames JA[40] in *Pope v WS Walker & Sons Pty Ltd*[41], and so that it sits

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[34] There is now a requirement that the Panel give reasons, in consequence of amendments to ss 68(2) and (3) effected by ss 90(1) and (2) of the *Accident Compensation Amendment Act 2010*. Prior to the amendments, a person affected by a Medical Panel's opinion could request reasons pursuant to s 8 of the *Administrative Law Act 1978 (Vic)*: *Masters v McCubbery* [1996] 1 VR 635.

[35] However, the opinion is amenable to judicial review: *Masters v McCubbery* [1996] 1 VR 635.

[36] See s 82(1) of the *Accident Compensation Act*, and note the interpretation given to kindred provisions in *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473.

[37] This point appears to have been accepted by Ashley JA at [166].

[38] *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 at 122, [10].

[39] *O'Brien v McKean* (1968) 118 CLR 540 at 545.

[40] with whom Bell A-JA agreed.

[41] (2006) 14 VR 435 at 438 to 440, [11] to [21].

harmoniously with s 134AB(23), under which the jury is not to be informed that an injury has been deemed to be a serious injury. A correct construction of s 68(4) required that s 68(4) be read down, as the Court of Appeal did in *Pope v WS Walker & Sons Pty Ltd.* In particular, the Court of Appeal in the present case should have applied the following observations of Eames JA[42] -

> The breadth of the terms of s 68(4) were remarked upon by Phillips JA in *QBE Workers Compensation (Vic) Ltd v Freisleben*,[43] who described them as "most extraordinary", and the terms of the subsection are, indeed, so broad that, in my opinion, they must be read down, in any event. Otherwise, the subsection would bind, for example, a jury hearing a common law damages claim, and would do so even if the claim was brought against a non-employer, in addition to an employer.[44]

53. The Court of Appeal's construction in the present case of s 68(4), in combination with s 134AB(15), has the very consequence which, implicitly, the Court of Appeal in *Pope v WS Walker & Sons Pty Ltd* regarded as outside the boundaries of the intention of the legislation.

54. In accordance with the approach adopted by the Court of Appeal in its earlier decision in *Pope v WS Walker & Sons Pty Ltd,* s 68(4) must be applied in the context of s 104B(2)(c)(ii), and s 134AB(3)(a), (4), (7), (15) and (23). Applied in this way, s 68(4) operates so that the Medical Panel opinion is binding on the Authority for the purpose of the Authority's consideration of the worker's application under s 134AB(4) to bring a proceeding for the recovery of damages, and, in particular, whether the worker is deemed to have suffered a serious injury by operation of sub-section (15), which must be the subject of the Authority's advice to the worker under sub-section (7). It is to be borne in mind that the jurisdiction of the Medical Panel under s 104B(9) is invoked when a worker disputes the Authority's own determination of the worker's level of impairment. Sub-section 68(4) operates so that the Medical Panel's opinion becomes binding on the Authority, with the consequence that the Authority's earlier determination is of no effect.

55. The appellant's construction of s 68(4) means that s 134AB(15) sits harmoniously with s 134AB(23), and that the rights of all defendants, including

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[42] (2006) 14 VR 435 at 440-1, [23].

[43] [1999] 3 VR 401 at 415, [39].

[44] Footnote 4 of the reasons of Eames JA states, "We did not hear argument as to whether a medical panel opinion would constitute "[e]vidence given before" the court within the terms of s 44(3), and thus would not be capable of being used in any other proceedings."

non-employers, to contest at trial issues of injury, causation, and consequences are preserved[45].

The terms of the Court of Appeal's orders

56. At paragraph [167] of the reasons for judgment Ashley JA concluded that the deemed serious injury, in the case of a psychiatric injury, is one which meets the serious injury test imposed by sub-ss (37) and (38)(b) and (d). And Ashley JA stated that because sub-s (15) is expressed in unrestrained language, it should be read as meaning – except if there is no claim by the worker that the consequences of injury are severe with respect to loss of earning capacity – that the worker is deemed to suffer from serious injury both as to pain and suffering and loss of earning capacity consequences.

57. The Court of Appeal's orders reflected this approach. By the orders, the Court introduced elaborations of "serious injury" derived from authority, and from sub-sections (37) and (38). For example, paragraph (i) of the orders has in brackets after the word, "permanent", the words, "in the sense of being likely to last into the foreseeable future". These words are taken from the reasons of Phillips JA who delivered the judgment for the Court in *Barwon Spinners v Podolak*[46].

58. And the reference in paragraph (i) of the order to, "severe by reference to its consequences with respect to pain and suffering and loss of earning capacity when judged by comparison with other cases in the range of possible mental or behavioural disturbances or disorders", imports into the order some of the assessment criteria in sub-section (38). But sub-section (38) is not a definitional provision: it does not define "serious injury". Rather, it fixes criteria and conditions for the assessment of "serious injury" under sub-sections (16) and (19). The criteria in sub-section (38) are based, in part, upon the reasons of the majority in *Humphries v Poljak*[47], which concerned the establishment of "serious injury" for the purposes of s 93 of the *Transport Accident Act.*

59. The fact that the Court introduced into its orders content for the term "serious injury", and content which was adapted to this case, such as the adoption of "severe" rather than "serious", highlights the fact that the Court was seeking to

[45] See also, *Brambles v Wail* [2002] VSCA 150 at [18]

[46] (2005) 14 VR 622 at 639 [34]

[47] [1992] 2 VR 129 at 140 per Crockett and Southwell JJ

employ a deemed statutory conclusion, devoid of factual content, as a factual premise. The difficulties in crafting content for a deemed statutory conclusion to be employed in a common law trial show that sub-s (15) was not intended to operate in this way. Sub-s 134AB(15) is a statutory gateway, and no more.

Notice of contention

60. Issue estoppel has been raised by the respondent by notice of contention. The appellant shall respond to the respondent's submissions on this point in its reply.

Part VII – Applicable statutes:

61. The following provisions of relevant legislation, and guidelines prescribed by s 91(6) of the Act, are attached as annexures –

(a) **Annexure A** – *Accident Compensation Act*, ss 5 ("medical question"), 45 to 49, 55A, 56, 63 to 68, 82, 83, 91, 98C, 104B, 134AB to 135A and 138A, copied from version 122, which incorporated amendments as at 26 November 2003[48].

(b) **Annexure B** – a table identifying amendments to the abovementioned provisions.

(c) **Annexure C** – copies of amendments to the abovementioned provisions of the Act together with the transitional provisions.

(d) **Annexure D** – a reprint of the abovementioned provisions of the *Accident Compensation Act* as currently in force copied from version 170, which incorporates amendments as at 1 January 2011.

(e) **Annexure E** – *Clinical Guidelines to the Rating of Psychiatric Impairment* dated October 1997, published in the Victorian Government Gazette No S 87, 28 August 1998.

(f) **Annexure F** – *The Guide to the Evaluation of Psychiatric Impairment for Clinicians*, published in the Victorian Government Gazette No G 19, 8 May 2008.

(g) **Annexure G** – *Transport Accident Act 1986* (Vic), s 93, as originally enacted.

[48] The period during which the acts or omissions alleged to give rise to the respondent's claimed injuries are alleged to have occurred is 8 January 2003 to 17 November 2003.

(h) **Annexure H** – *Transport Accident Act 1986* (Vic), s 93, current reprint.

62. The principal changes to provisions of the *Accident Compensation Act 1985* germane to this appeal over the period since the alleged occurrence of the respondent's claimed injuries are summarised as follows –

(a) Sub-ss 68(2) and (3) were amended by the *Accident Compensation Amendment Act 2010*, s 90(1) and (2), so as to require Medical Panels to give a written statement of reasons. By s 2(7) of the amending Act, s 90 came into operation on 10 April 2010. The transitional provision for the amendments to s 68(2) and (3) is in s 345 of the *Accident Compensation Act*, and provides that the amendment applies to opinions given on and after the commencement date.

(b) Sub-s 91(6) was substituted by the *Accident Compensation and Other Legislation (Amendment) Act 2006*, s 9(2), with the consequence that new guidelines, *The Guide to the Evaluation of Psychiatric Impairment for Clinicians*, were substituted for Chapter 14 of the AMA Guides. The opinion of the Medical Panel in the present case was furnished on 28 June 2006, which was before the new sub-s 91(6) commenced on 26 July 2006, being the day after the amending Act received Royal Assent. The transitional provision for the new s 91(6) is in s 290 of the Act.

(c) Sub-s 104B(9) was substituted by the *Accident Compensation Legislation (Amendment) Act 2004*, s 5(10). The transitional provisions inserted as s 104B(19) and (20) of the *Accident Compensation Act* would indicate that the substituted provisions governed the assessment of the respondent's impairment.

(d) Sub-ss 134AB(3) and (4) were substituted by the *Accident Compensation Legislation (Amendment) Act 2004*, s 6(1). The transitional provisions are in s 281 of the *Accident Compensation Act*, and provide that s 134AB as amended applies to applications made under s 134AB(4) on or after the commencement of s 6 and s 7 of the amending Act, which was 21 December 2004.

(e) Sub-s 134AB(15) was amended by the *Accident Compensation Legislation (Amendment) Act 2004*, s 6(2), which inserted the words, "made before an application under sub-section (4) is made". The transitional provision in

s 281 of the *Accident Compensation Act* applied also to the amendment to sub-s (15).

(f) Sub-s 134AB(19)(c) was repealed by the *Accident Compensation Amendment Act* 2010, s 57(2), which by s 2(5) was deemed to have come into operation on 10 December 2009.

(g) Sub-s 134AB(19A) was inserted by the *Accident Compensation Amendment Act* 2010, s 57(3), which by s 2(5) was deemed to have come into operation on 10 December 2009. Sub-s (19A) has a self-contained transitional provision, in that it applies to proceedings heard and determined on and from the commencement of s 57(3) of the amending Act, which was deemed to be 10 December 2009.

Part VIII – Orders sought by the appellant:

63. The orders sought by the appellant are as follows –

A. The appeal be allowed.

B. The orders of the Court of Appeal made 25 August 2010 be set aside and in lieu thereof it is ordered that –

1. The questions reserved by the primary judge be answered as follows –

.1 Do any, and if so which, of the estoppels pleaded in para.1A(i) of the plaintiff's Amended Reply to Amended Defence arise?

Answer: No.

.2 Is this Honourable Court obliged to accept as final and conclusive in any trial of this action, any, and if so which, of the matters pleaded by the plaintiff at para.1B(a) and (b) of her Amended Reply to Amended Defence?

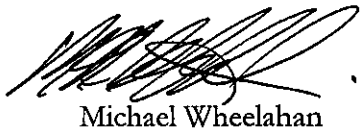
Answer: No.

.3 Is the defendant precluded from acting in any, and if so which, of the ways claimed by the plaintiff in para.1B(c) of her Amended Reply to Amended Defence?.

Answer: No.

2. The plaintiff pay the defendant's costs, including any reserved costs.

C. The appellant pay the respondent's costs of the appeal.



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DATED: 1 February 2011.