IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No M176 of 2010

BETWEEN

MAURICE BLACKBURN CASHMAN
Appellant

AND

FIONA HELEN BROWN
Respondent

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RESPONDENT'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 first issue which arises from the grounds of appeal and the notice of contention is the legal effect on a common law damages trial of a medical panel opinion under s.68(4) of the *Accident Compensation Act 1985* (Vic) where that opinion is to be adopted and applied by any court, body or person and must be accepted as final and conclusive.

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3. The second issue is whether any and if so what estoppel arises from the opinion of a medical panel upon the hearing and determination of a common law damages trial.

Part III – Judiciary Act, s.78B certification:

4. The respondent considers that no notice should be given in compliance with s.78B of the Judiciary Act 1903.

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Part IV – Contested material facts in the Appellant's narrative and chronology.

5. In paragraph 7 of the Appellant's submissions the respondent's claim made on 12 December 2005 referred to was a claim for statutory compensation for non-economic loss under s.98C and a claim that she had a deemed serious injury pursuant to s.134AB(15). The elaborate procedural requirements of s.104B governed the making of the claim.
6. In paragraph 8 of the Appellant's submissions the Authority's decision referred to on 23 February 2006 to accept that the respondent had a psychological injury arising out of her employment with the appellant was in compliance with s.104B(2)(a) which required it to accept or reject the claim.
7. In paragraph 10 of the appellant's submissions there is a typographical error. In fact the certificate of opinion correctly refers to section "98C" and not section "98(c)" as alleged.
8. On or about 31 August 2006 the respondent advised the Authority that she accepted the entitlement to compensation in response to the letter of the Authority dated 15 August 2006.
9. The application made by the respondent referred to in paragraph 12 of the appellant's submissions was required to be made as a pre-condition to recovering damages by reason of s.134AB(3)(a)&(4)(a)(ii).

Part V – Appellant's statement of applicable statutes

10. The respondent accepts as applicable the statutes set out in Part VII of the Appellant's submissions.

Part VI – Respondent's argument

Epitome of the appellant's submissions and the respondent's response

11. The appellant contends[1] that the construction placed by the Court of Appeal on s.68(4) and s.134AB(15) conflicts with s.134AB(23). The appellant further contends that the Court of Appeal's construction of s.68(4) is inconsistent with the decision of *Pope*.[2]

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1 At [21] of its submissions dated 1 February 2011.

2 *Pope v WS Walker & Sons Pty Ltd* (2006) 14 VR 435.

12. The respondent submits no such errors were made by the Court of Appeal and in particular:-

(a) The appellant's process of reasoning to support its interpretation of s.134AB(19)(c) is circular.

(b) The appellant's construction of ss.(19)(c) is, as found by the Court of Appeal, contrary to the obiter of this court in *Dwyer v Calco Timbers Pty Ltd.*[3] Further, difficulties with the appellant's construction identified by the Court of Appeal at [59] and [60] have thus far gone unanswered.

(c) The Court of Appeal was right to conclude that *Pope* was not inconsistent with its interpretation of s.68(4)[4]. Further it is submitted first that this interpretation was consistent with the logic underpinning *Pope*. Secondly, in any event, *Pope* was wrongly decided and failed to give full effect to the unambiguous language and purpose of the provision.

(d) The legislature employed s.134AB(15) to clothe a Medical Panel opinion that a worker has a 30% or more permanent impairment with the mandated attributes of a "serious injury" within the meaning of the s.134AB. The Court of Appeal was right to give effect to the statutory deeming by the impugned orders made.

(e) Alternatively, if the Court of Appeal went too far by the orders made, then in any event the more circumspect orders sought by her below are properly made

(f) By her Notice of Contention the respondent submits that in any event the Court of Appeal ought to have concluded that the Medical Panel opinion gave rise to an issue estoppel with the same effect as it found to arise from s.68(4).

13. The logic of the structure of these submissions is as follows:-

(a) The legislative history of Medical Panels under the Act is provided to give context to their statutory function.

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3 (2008) 234 CLR 124. at [11].

4 At [174].

(b) The procedures instituted by s.104B in respect of a s.98C impairment claim are set out to enable a resulting Medical Panel opinion to be seen in its proper statutory context.

(c) The operation of s.68(4) is explained, exposing the error in *Pope*.

(d) The inter-relationship of ss.(2), (15), (19)(c) and (23(b) of s.134AB is examined, exposing the fallacies of the appellant's submissions identified in 12(a)&(b) above.

(e) With all the above necessary backgrounding, the effect on the common law trial of the Panel opinion of 28 June 2006 is explained.

10 (f) Finally, in the alternative, the point raised by the Notice of Contention is dealt with.

The Medical Panels' dispute resolution function

14. Medical Panels were first introduced to the Act by s.8 of Act No. 64 of 1989. Under s.72E of the Act as it was the function of the Medical Panel to give its opinion on any *medical question* referred to it by the Appeals Board or the Tribunal (statutory bodies abolished in 1992[5]). The Tribunal then had exclusive jurisdiction to determine matters under the Act[6] with rights of appeal limited to questions of law raised during the proceedings before the Tribunal[7]
20 A *medical question* was, (and still is) defined in s.5(1) of the Act. By s.60(3) the Tribunal was obliged to adopt the opinion as the answer to the medical question but with qualifications provided for in s.60(4)&(5) as follows:[8]

(4) An opinion of a Medical Panel . . . need not be adopted by the Tribunal -

(a) if the Tribunal is satisfied that –

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5 By Act No. 67 of 1992.
6 S.51 of the *Accident Compensation Act 1985* (reprint No. 2)
7 S.61(3) of the *Accident Compensation Act 1985* (reprint No. 2)
8 See Calloway J.A. in *Masters v McCubbery* [1996] 1 V.R. 635 at 655.32 *et seq.*

(b) if, on the application of a party, the Tribunal is satisfied that there are exceptional circumstances which make it unjust or manifestly unreasonable for the opinion to be adopted.

(5) Exceptional circumstances include, but are not limited to –

(a) an error of law made by the Medical Panel; or

(b) a case where the Medical Panel acted unfairly; or

(c) a failure of the Medical Panel to observe its own procedures.

15. Upon the abolition of the Tribunal in 1992 the County Court was given exclusive jurisdiction to hear and determining disputes in respect of decisions made under the Act[9] by the Authority, employer or self-insurer. Under s.45(1) the Court could itself refer a medical question to a Panel for opinion and was required to do so at the request of either party. The function of Medical Panels to give opinions in respect of medical questions remained unchanged but s.45(1)(c)&(3) provided:

S.45(1)(c) *the opinion of the Panel on that question shall, subject to this section, be adopted by the Court as the answer to that question.*

S.45(3) *If in the opinion of the County Court –*

(a) new information in respect of the medical question had emerged since the Medical Panel gave the opinion; or

(b) there is evidence that the worker's medical condition had changed since the Medical Panel gave the opinion –

the Court may refer the new medical question to the Medical Panel for opinion.

16. The Court of Appeal in *Masters v McCubbery* [1996] 1 VR 635 found that a Medical Panel was a tribunal within the meaning of the *Administrative Law Act 1978* because it was obliged to observe the rules of natural justice. Thus it was required to give reasons for its opinion pursuant to s.8 of that Act.

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9 S.39(1).

Winneke P.[10]: made important observations in respect of the function of medical panels.

> *It cannot be denied, as the trial judge found (correctly in my view) that the scheme of the legislation is such that the medical panels are empowered to decide, in a manner which binds the court making the referral, the critical issues which have arisen between the worker and the authorised insurer,* [liability has since reverted to the Authority, self-insurer and/or employer] *which issues the worker has referred to the court as a consequence of action taken by the insurer. Although these critical issues are referred to the medical panel couched in terms of "medical questions" and the responses of the panel to them are couched in terms of "opinions", such legislative terminology cannot obscure the fact that the panel is being called upon to decide matters of mixed law and fact which decisions operate by virtue of the provisions of the Act to bind the court and thus to effectively dispose of the issues which have been raised by the worker and placed by him before the court for its determination."*

17. Winneke P noted the range of powers the panels had to carry out their function and opined[11]:

> *These ultimate conclusions expressed by the panel as "opinions" dispose in all practical senses with the dispute raised by the claim between the worker and the authorised insurer and leave the court with no relevant function but to give effect to them in money terms. . . . In my view it can be seen that the legislature did intend to create the medical panels as an alternative method of dispute resolution to the court.*

18. By s.21(7) of Act No. 107 of 1997 s.45(1)(c) & (3) were repealed and s.68(4) as it now is was inserted. Amendments to the Act since the decision in *Masters v McCubbery* only confirm the conclusions of Winneke P.

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10 At 642.19 - 0

11 At 643.

(a) S.65(6A)(b) was inserted[12] to require the referring body (in the present case this was the Authority pursuant to s.104B(9)) to submit in writing details of the facts or questions of fact relevant to the medical question which have been agreed and those facts or questions in dispute;

(b) written reasons of the Panel opinion are now required – see s.68(2)[13];

(c) s.45(1D)-(1H) was inserted[14] to enable the Court (where applicable) to determine factual issues more appropriately determined by it than the Medical Panel.

19. Despite the range of medical questions defined in s.5 having expanded, at no time has a Medical Panel been able to give opinion in respect of a medical question designed to determine whether an injury in the "primary sense" has been relevantly caused by a worker's employment: "primary" as opposed to injury in the extended sense set out in (a),(b)&(c) of the definition of injury in s.5(1). Although an injury might satisfy the primary definition and the extended definition[15], only injury in the extended definition is capable of being the subject of a medical question.[16]

20. Following *Masters v McCubbery* a body of case law developed in respect of the adequacy of the reasons for opinion of Medical Panels.[17] The result of these decisions has been that considerable scrutiny has been and is available by way of judicial review in respect of opinions made and reasons given.

Procedures under s.104B for the determination of lump sum claims under s.98C

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12 Inserted by Act No 26 of 2000. As an illustration of the extent to which this provision has been given adversarial content see *Kamener and ors v Griffin and ors* (2005) 12 VR 192 at [18], [19], [28] and [29].

13 Inserted by Act No 9 of 2010.

14 Inserted by Act No 9 of 2010.

15 For which see *Kennedy Cleaning Co. v Petkovski* 200 CLR 206.

16 *Kamener v Griffin and ors* 12 VR 192 per Ashley J (as he then was) at 205-8 particularly at [76].

17 A useful epitome of the approach is found in *Moyston Court Fisheries Ltd v Malios & Ors* [2007] VSC 518 per Forrest J. at [69] to [72]. This was generally the approach taken to the adequacy of reasons before the Court of Appeal decision of *Sherlock v Lloyd & Ors* [2010] VSCA 122 (28 May 2010) – a decision the effect of which has itself been reversed by the amendment of s.68(2) that now requires written reasons be given.

21. Section 104B applies to claims initiated by workers under s.98C[18] and, where liability has been accepted by the VWA or otherwise determined in respect of an injury, by the VWA from 18 months post-injury.[19] It is a complex section[20] but in essence operates by taking the following sequential steps:-

    (a) All injuries arising from *the given event or circumstance* must be included in the claim[21].

    (b) Where liability is disputed for any injury, that is, whether a claimed injury gives rise to an entitlement to compensation under the Act, then the liability dispute must be resolved before an impairment assessment is made.[22] Where there is a dispute as to liability, after conciliation, the courts have jurisdiction to determine the dispute under s.39(1).

    (c) Once liability is determined for all injuries arising from the given event or circumstance, s.104B(5) or s.104B(7) as is applicable, provide that the VWA obtain a permanent impairment assessment in accordance with s.91 in respect of those injuries.

    (d) Where a worker disputes the determination of impairment resulting from the impairment assessment the VWA is required by ss.(9) to refer the medical question to a Medical Panel.

22. Section 91(8) prescribes the use of the AMA Guides 4th ed. To assess psychiatric impairment s.91(6)[23] provides that Chapter 14 of the AMA Guides is substituted for guidelines entitled "*The Clinical Guidelines to the Rating of Psychiatric Impairment*" as provided for by s.91(1)(a). The AMA Guides are

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18 S.104B(1)

19 S.104B(1C) & (1CA).

20 It has received judicial criticism in *VWA v Del Borgo and ors.* (2003-04) 9 VR 470, Winneke P at 473; Eames JA at 475; and in *VWA & anor v Wilson* 10 VR 298, Winneke P at 300 and subsequent further amendment.

21 See s.104B(5A)-(5E).

22 See s.104B(2)(a), (2)(f), (2AA) definition of *relevant date* (b) and (3). Where there is a dispute as to liability, after conciliation, the courts have jurisdiction to determine the dispute under s.39(1).

23 As it was at the relevant time – for which see the appellant's submissions

guides for the evaluation of *permanent impairment*[24] and this is defined in the Glossary to the AMA Guides at p.315 as:

"impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment."

23. The medical question referred under s.104B(9)(a) is as *"to the degree of impairment in accordance with section 91 resulting from the injury or injuries claimed for which liability is accepted or established".* Paragraph (d) of the definition of "medical question" in s.5(1) permits such a medical question to be asked.[25]

10 24. The appellant submits at [36] that the differences in procedural rigour between a court decision on a s.134AB(16)(c) application and the opinion of a medical panel explain the different outcomes in respect of issue estoppel. A close examination of the procedural steps involved in referring an opinion under s.104B coupled with the very narrow overtly medical nature of the decision required of a Medical Panel in respect of permanent impairment obviates the need for a curial hearing or cross-examination.

The operation of s.68(4)

25. By its terms it provides that the opinion of a Medical Panel on a medical
20 question is to be *adopted and applied* by any court, body or person. It must be accepted as final and conclusive by any court, body or person. This is so irrespective of who referred the medical question or when the medical question was referred.

26. The language is plain and unqualified. The virtue of finality[26], even with administrative decisions, is recognized. It is accepted that the "*basic rule*

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24 Reinforced by the requirement in s.91(1A) that assessment must be made after the injury has stabilised.

25 It is noted in passing that paragraphs (h) and (i) of the definition of medical question together with s.45(1A), inserted by the *Accident Compensation (Common Law Benefits) Act* 2000, give a court on a s.134(AB) application, wide powers of referral, presumably in respect of the "narrative test".

26 See *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v Workcover Authority of New South Wales* at [93].

which applies to privative clauses generally ... that it is presumed that the Parliament [or, it may be interpolated, a State parliament] does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies.[27]

27. That the panel opinion must be adopted and applied by any court, body or person and this adoption and application is not confined to the referring court, body or person underlines the finality with which the issue the subject matter of the opinion is dealt. Further, that the adoption and application is irrespective of when the medical question was referred (and, by necessary implication, when the medical opinion was given) the subject matter of any issue raised by the opinion is unhinged by time. This is in stark contrast to earlier legislative formulations noted at [14] and [15] hereof.

28. In *QBE Workers Compensation (Vic) Ltd v Freisleben* [1999] 3 V.R. 401 Phillips J.A., with Buchanan J.A. agreeing, interpreted s.68(4) at p.415 as follows:

> *I must say that this seems to me a most extraordinary provision, appearing as it does to make conclusive, for all purposes it would seem, the opinion of a medical panel on a medical question, no matter when obtained or by whom. . . . What matters now is that by virtue of the 1997 amendments* [by which s.68(4) was introduced], *if the authority, an authorised insurer or a self-insurer did refer a medical question to a medical panel, the opinion would be binding, at least in the main and even in later court proceedings.*

29. It was on the basis of this consideration that Phillips J.A. held at pp.415-6 that, whether an implication arose before the 1997 amendment permitting an authorised insurer to refer medical questions to a medical panel, no such implication could be drawn after the 1997 amendment. This was so notwithstanding s.67(1) as it then applied stated that the function of a medical

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27 *Fish v Solution 6 HoldingsLimited* (2006) 225 CLR 180 at [33] per Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ quoting *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505 [72] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ

panel was "to give its opinion on any medical question . . . referred by . . . authorised insurer . . . ".[28]

30. The appellant's submissions at [52]-[54] seek to draw support for a limitation on the language of s.68(4) from the reasons of Eames J.A in *Pope*. At issue in Pope was the effect of a medical panel opinion given in respect of an accepted claim of right knee injury that, at the date "*of the opinion that there is now no medical condition of the knees relevant to the claimed injuries*" upon a subsequent s.134AB(16)(b) "serious injury" application. In reaching his decision that the medical panel opinion in question was not determinative of the serious injury application as had been held by the trial judge Eames J.A. relied upon the fact that s.68(4) was introduced at the same time common law rights were abrogated and must, by necessary implication, not have been intended to apply to common law rights or to "serious injury" applications made to pursue those common law rights.

31. Even assuming Eames J.A. was correct in supplying the words to s.68(4) that he did (at 444 [37]) this does not support the submissions of the appellant for the reasons given below by the Court of Appeal at [174]. Further, if the distinction drawn by Eames J.A. between "statutory benefits" and "serious injury applications" is valid, the underlying logic would suggest that if an issue estoppel arises at trial from the decision of the court on a "serious injury" application then likewise a medical panel opinion, as here, which was for dual s.134AB and statutory benefits purposes ought be adopted and applied[29].

32. In any event the preconditions nominated by Eames J.A. to supplying words to a statute "to avoid absurdity and inconsistency" are not met[30]. The same policy considerations apply as are well-recognised and under-pin the rationale for issue estoppels. It avoids inconsistent "final" decisions and reduces the cost to parties of having to relitigate the same issue.[31]

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28 In the same matter Tadgell J.A. with whom Buchanan J.A. also agreed made a similar point at 408.

29 This is the extent of the argument based on "symmetry".

30 At 445.

31 For which see particularly the extract of the responsible minister's second reading speech set out at 441 of the reasons of Eames J.A. in *Pope*.

The inter-relationship between subsections 134AB(2), (15), (19)(c) & (23)(b)

33. The appellant's construction of ss.(2) at [28] represents a change of position to the approach it adopted below and referred to at [17] of the Court of Appeal's reasons. The change of position is made, presumably, because the analysis of the Court of Appeal particularly at [59] and [60] is unanswerable. But, with the change of position, the work the appellant gives ss.(19)(c) at [28] is pointless.

34. The respondent adopts the reasons of the Court of Appeal in respect of the proper construction of ss.(19)(c) at [75] to [79].

35. The appellant submits that an intention is evinced from the words of s.134AB(23)(b) which intention is supported by the appellant's construction of ss.(19)(c)[32]. The obstacle to the appellant's approach is that ss.(23)(b) makes perfect sense without the evinced intention. With it, the Court of Appeal at [104] rightly observed it is "odd" there should be a different regime depending on whether there was a trial by jury or judge alone. If the appellant's construction of ss.(19)(c) is rejected there then is no need to for the forced and problematic interpretation of ss.(23)(b).

36. Whilst ss.(15) clearly has as a purpose the revival of the worker's common law rights as explained by the appellant at [30] of its submissions, the Court of Appeal was right to conclude at [170] that the mandated serious injury consequences of the medical panel opinion were to be adopted and applied by reason of s.68(4). Neither ss.(19)(c) as it was or any amendment subsequent to its repeal has affected the position.

Application of s.68(4) to the facts

37. The answer to question 1 in the Medical Panel opinion dated 28 June 2006 set out in paragraph 1A(d) of the Amended Reply expressly acknowledges its status as an opinion for the purpose of both s.98C (lump sum statutory benefits) and s.134AB(3)&(15).

38. The opinion contained findings. The finding that the plaintiff had a 30% psychiatric impairment meant that upon the plaintiff's application under

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32 At [32] of the Appellant's submissions.

s.134AB(4) the injury was deemed by s.134AB(15) to be a "*serious injury*" as defined. The finding that the impairment was permanent was a finding that the psychiatric impairment had stabilised with or without medical treatment and was not likely to remit despite medical treatment. Being in respect of psychiatric impairment the statutory import of the deemed injury was that it was a *permanent severe mental or permanent severe behavioural disturbance or disorder* in accordance with paragraph (c) of the definition of serious injury at s.134AB(37).

39. The doctrine of estoppel and/or the wider requirement under s.68(4) that the opinion be *adopted and applied*[33] by any court, person or body prevents the assertion at the trial of the damages proceeding "*of a matter of fact or of law in a sense contrary to that in which that precise matter has already been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties in the same respective interests or capacities, . . .*"[34].

40. In particular it is inconsistent with the opinion for the defendant to conduct its case on the basis that the plaintiff did not have a psychiatric impairment as at June 2006 or to assert through evidence or submission that the plaintiff's psychiatric impairment was not as at that date permanent. Indeed unless there be a basis for demonstrating (in a jury trial on a voir dire) that circumstances have subsequently changed significantly, the adoption and application of the opinion prevents the defendant from asserting that the psychiatric impairment does not continue unabated.

41. Finally the appellant's submissions at [51] that damages are to be assessed at the date of trial and that the existence, cause, nature and extent of the respondent's injuries are not to be determined by the medical panel applying the relevant criteria for permanent psychiatric impairment are beside the point.

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[33] In *Ajinvan P/L v Fry* (2001) 3 VR 644 Phillips JA, with whom Ormiston and Batt JJA agreed, recognised that adoption and application of an opinion was required in respect of future events unless "*circumstances subsequently change significantly*": at 650-1, [16]-[17]. This involves a wider restriction than would arise from an issue estoppel.

[34] Per Barwick CJ in *Ramsay v Pigrim* 118 CLR 271 at 276 and quoted with approval by the court in *Kuligowski v Metrobus* (2004) 220 CLR 363 at 379.

The Court of Appeal's reasons at [103] and the authorities[35] there referred to and discussed at [88]-[94] are apposite.

Part VII – Respondent's argument on notice of contention

42. In order for an estoppel to arise in this case, the respondent needs to satisfy the strict requirements articulated in *Ramsay v Pigram*[36] namely that there was a final decision between the same parties in relation to the same question that arises in the present litigation.

43. The finality of the Medical Panel's opinion does not appear controversial: s.104B(12).

44. Next, although described as an opinion, the product of the Medical Panel upon a reference under s.104B(9) is clearly a decision in that:-

    (a) it contains findings of fact;

    (b) it is completely effective and not of an interlocutory character[37];

    (c) the Medical Panel is a "Tribunal" which must observe the rules of natural justice[38].

45. Given the emphatic language of s.68(4) and the effect of s.134AB(15) it is artificial in the extreme to suggest that the opinion does not affect rights.

46. As to the parties being the same, there seems little room for argument that the VWA was the privy of the appellant. The absence of formal appearance or the like before the Medical Panel does not prevent the conclusion that there are parties. The procedure identified by Ashley J at [184-186] are adopted and relied upon by the respondent.

47. Finally the question determined by the opinion is one of the precise questions which arise in this litigation, namely the degree to which the plaintiff is

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35 The decisions are *Blair v Curran* (1939) 62 CLR 464; *Somodaj v Australian Iron & Steel Ltd.* (109) CLR 205; *Tringali v Stweardson Stubbs & Collett Ltd* (1965) 66 SR (NSW) 335; *Lombardo v Stuart Bros Pty Ltd* (1967) 68 SR (NSW) 335; *Egri & anor v DRG Australia Ltd* (1988) 19 NSWLR 600 and *Metrobus* (supra).

36 At 276.

37 See *Kulighowski v Metrobus* (2004) 220 CLR 363 at 375.

38 *Masters v McCubbery* [1996] 1VR 635.

impaired arising from the injuries which are alleged in her Statement of Claim. It is not to the point that the Medical Panel is obliged to, in answering that question, have regard to a guide in relation to impairment which is not one to which a Judge or jury in a common law trial would have regard. The ultimate question is the degree of impairment – and that is one of the questions which squarely arises in the trial. Of course the scope of the question in the common law trial is much broader in that it has a much greater temporal span, however necessarily one of the dates which the Court must directs its attention is the very same date upon which the Medical Panel expressed its opinion.

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Dated 15 February 2011

Stephen McCredie

(On behalf of and as junior counsel for Peter Tree)