HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

BRETT DWYER APPELLANT

AND

CALCO TIMBERS PTY LTD RESPONDENT

Dwyer v Calco Timbers Pty Ltd
[2008] HCA 13
16 April 2008
M88/2007

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 8 September 2006.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of Victoria for rehearing in accordance with the reasons of this Court.*

4. *The respondent pay the appellant's costs of the proceedings in the Court of Appeal of the Supreme Court of Victoria up to the listing for rehearing of the appeal to that Court.*

5. *The costs of the rehearing (and any consequential costs order respecting the application to the County Court of Victoria) abide the outcome of the rehearing of the appeal to the Court of Appeal of the Supreme Court of Victoria.*

On appeal from the Supreme Court of Victoria

Representation

J H Kennan SC with P T Vout for the appellant (instructed by Slater & Gordon)

D F Jackson QC with J P Gorton for the respondent (instructed by Wisewoulds Lawyers)

CATCHWORDS

Dwyer v Calco Timbers Pty Ltd

Courts – Jurisdiction and powers of Court of Appeal – Accident compensation – Appellant injured in course of employment – Appellant prevented by s 134AB of *Accident Compensation Act* 1985 (Vic) ("Compensation Act") from bringing proceedings for damages without leave of County Court – County Court obliged not to give leave unless satisfied on balance of probabilities that appellant's injury "serious injury" – County Court judge held appellant's injury not serious injury within meaning of s 134AB of Compensation Act – Appellant appealed to Court of Appeal – Section 134AD of Compensation Act required Court of Appeal to "decide for itself" whether injury serious injury – Court of Appeal dismissed appeal because not persuaded County Court was wrong – Meaning, effect, history and purpose of legislation – Significance of Court of Appeal's role as highest appellate court of State – Whether inconsistent with propounded appellate function – Whether Court of Appeal failed to exercise jurisdiction.

Words and phrases – "appeal", "serious injury", "statutory grant of right of appeal".

Accident Compensation Act 1985 (Vic), ss 134AA-134AG.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. This appeal from the Court of Appeal of the Supreme Court of Victoria (Maxwell P, Eames and Neave JJA[1]) turns upon the interrelation between two statutes of that State which apply to certain appeals to the Court of Appeal from the County Court.

2 The issues which arise illustrate the proposition, emphasised in a number of decisions of this Court, that an "appeal" is not a procedure known to the common law, but, rather, always is a creature of statute[2]. Further, the term "appeal" may be used in a number of senses. In *Fox v Percy*[3], Gleeson CJ, Gummow and Kirby JJ referred to the fourfold distinction drawn by Mason J in an earlier decision[4] as follows:

> "(i) an appeal stricto sensu, where the issue is whether the judgment below was right on the material before the trial court; (ii) an appeal by rehearing on the evidence before the trial court; (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and (iv) an appeal by way of a hearing de novo".

But these categories cannot represent a closed class and particular legislative measures, such as those with which this appeal is concerned, may use the term "appeal" to identify a wholly novel procedure or one which is a variant of one or more of those just described. It was in that vein that McHugh J pointed out in *Eastman v The Queen*[5]:

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1 [2006] VSCA 187.

2 The authorities are collected in *Fox v Percy* (2003) 214 CLR 118 at 124 [20]; [2003] HCA 22. In *Graziers Association of New South Wales v Australian Legion of Ex-Servicemen and Women* (1949) 49 SR (NSW) 300 at 303, Jordan CJ said that re-hearings under the pre-Judicature Act procedures of the Court of Chancery were appeals "in effect".

3 (2003) 214 CLR 118 at 124 [20].

4 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-622.

5 (2000) 203 CLR 1 at 40-41 [130]; [2000] HCA 29. See also *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA.

> "Which of these meanings the term 'appeal' has depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be."

In short, it is the proper construction of the terms of any particular statutory grant of a right of appeal which determines its nature[6].

The scheme of the Compensation Act

3 The appellant was born in 1964. On 27 March 2000 he was injured by a crane positioned on the back of a semitrailer. The semitrailer was operated by the appellant in the course of his employment by the respondent as a driver delivering its timber products, including roof trusses and frames. One of the arms of the crane became disengaged and fell on the appellant's right arm.

4 Whatever rights against the respondent which the appellant otherwise enjoyed under the common law of Australia were limited by Div 8A (ss 134AA-134AG) of Pt IV of the *Accident Compensation Act* 1985 (Vic) ("the Compensation Act"). Division 8A was introduced by the *Accident Compensation (Common Law and Benefits) Act* 2000 (Vic) ("the 2000 Act").

5 However, the limitation imposed by the 2000 Act was an alleviation of the abrogation of common law rights of workers injured in their employment (and their dependants) which had been effected by the *Accident Compensation (Miscellaneous Amendment) Act* 1997 (Vic) ("the 1997 Act"). Section 45 of the 1997 Act had inserted s 134A into the Compensation Act, a provision, which, in respect of non-fatal post 12 November 1997 employment injuries, denied to workers and their dependants the recovery of "any damages of any kind".

6 It may be noted that the *Transport Accident Act* 1986 (Vic) ("the Transport Act") established a scheme of compensation in respect of those injured or killed as the result of transport accidents. Some of the interstate consequences of that scheme were considered in *Sweedman v Transport Accident Commission*[7]. What is significant for the present appeal is that the Transport Act restricted (by

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6 *Elliott v The Queen* (2007) 82 ALJR 82 at 85 [7]; 239 ALR 651 at 654 [7]; [2007] HCA 51.

7 (2006) 226 CLR 362; [2006] HCA 8.

s 93) common law actions for damages by a criterion of "serious injury" and that various authorities to which the Court of Appeal referred in the decision now under appeal to this Court arose under the Transport Act. These included *Humphries v Poljak*[8] and *Mobilio v Balliotis*[9].

7 Returning to the Compensation Act, the central provision of Div 8A is s 134AB. This comprises no fewer than 42 sub-sections. A worker in the position of the plaintiff may recover damages "if the injury is a serious injury and arose on or after 20 October 1999" (s 134AB(2)). The expression "serious injury" is defined in sub-s (37) so as to include "permanent serious disfigurement" and "permanent serious impairment or loss of a body function".

8 The Compensation Act establishes (s 18) the Victorian WorkCover Authority ("the Authority") and reposes various powers and duties in that body. If the degree of impairment of the worker is assessed as less than 30 per centum, as was so with respect to the appellant, the worker may not bring proceedings for damages unless one of the conditions imposed by s 134AB(16) is met. First, the Authority may have issued a certificate consenting to the bringing of proceedings upon being satisfied that the injury relied on is a "serious injury" (par (a) of sub-s (16)). In the case of the appellant the relevant condition was that in par (b) of sub-s (16). This required the giving of leave by "a court" to bring the proceedings, and it appeared to be common ground that the "court" referred to in par (b) was the County Court.

The leave application

9 The County Court was obliged by par (a) of s 134AB(19) not to give leave unless satisfied on the balance of probabilities that the injury of the appellant was a "serious injury" in the defined sense. Section 134AE of the Compensation Act required the County Court to give reasons which were not "summary"; rather, they were to be "detailed reasons which are as extensive and complete" as would be given "on the trial of an action". This requirement of detailed reasons anticipates what counsel for the appellant submitted had become the usual course of litigation under the Compensation Act, namely that the "real fight" takes place at the stage of the leave application, with the result that if a serious injury

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8 [1992] 2 VR 129.

9 [1998] 3 VR 833.

certificate is granted usually the litigation is resolved without proceeding to a trial of the action.

10 Judge Millane held that the impairment and loss of function in the appellant's right arm and his disfigurement was not a "serious injury" within the meaning of s 134AB(16) and accordingly on 1 December 2005 refused the appellant leave to bring proceedings for the recovery of damages.

11 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 par (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.

12 If, as was the case here, the worker fails to satisfy the County Court on the leave application that his injury is a serious injury, the worker is barred by sub-s (21) from making a further leave application in respect of the same claimed cause of action. The remedy in such a case lies only in an appeal to the Court of Appeal.

13 On 8 September 2006, the Court of Appeal dismissed the appellant's appeal. The principal reasons were given by Eames JA. Maxwell P gave additional reasons and Neave JA agreed with Eames JA. From this Court the appellant seeks an order that the Court of Appeal rehear his appeal. The rehearing is sought on the ground that the Court of Appeal misconceived the nature of the statutory appeal of which it was seised and, as a result, failed (at least constructively[10]) to exercise its jurisdiction.

The County Court – a specialist tribunal?

14 Something further should be said respecting the jurisdiction of the County Court. The County Court is established by s 4 of the *County Court Act* 1958

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10 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 81-82 [80]-[81]; [2001] HCA 22; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 453 [189]; [2001] HCA 51.

(Vic) ("the County Court Act"). It is a court of record (s 35) and has a broad jurisdiction in civil and criminal matters. The County Court presently comprises about 55 judges.

15 In the course of his reasons in the Court of Appeal, Maxwell P referred to the importance of acknowledging "the experience which County Court judges bring to bear in hearing these applications" under s 134AB(16) of the Compensation Act. Eames JA remarked that "this is, in effect, an appeal from a specialist tribunal". His Honour also said:

> "Some County Court judges are dealing with cases almost daily and have become expert in the area. They see the worst and the least of like cases and are in the best position to assess a given case within the spectrum of such cases. That is an advantage which can be highly significant and it is one not ordinarily enjoyed by the appellate court."

In speaking in this way their Honours reflected the tenor of earlier remarks in the Court of Appeal. In particular, in *Barwon Spinners Pty Ltd v Podolak*[11], an appeal in which the Court of Appeal was construing the "serious injury" provisions in s 134AB, it had been said in the judgment of the Court:

> "Some County Court judges are dealing with such cases almost daily and have become expert in the area; they see the worst and the least of like cases and are in the best position to assess a given case within a spectrum of such cases. That is an advantage which can be highly significant and it is one not ordinarily enjoyed by the appellate court. Therefore, according to long-standing authority, it is one to which an appellate court should have regard, giving it such weight as it deems appropriate – and to do so is not to disobey the statutory injunction to 'decide for itself' the issue of serious injury[12]."

16 In this Court, the respondent does not join issue with the complaints by the appellant respecting those passages in the reasons of Maxwell P and Eames JA which have been set out above. The respondent does not seek directly to support the outcome in the Court of Appeal by reliance upon any attribution to the

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11 (2005) 14 VR 622 at 644.

12 See further what was said in *Mobilio v Balliotis* [1998] 3 VR 833 at 836-837 per Brooking JA.

County Court of the character of a "specialist tribunal"[13]. Indeed, the respondent makes the point that the applications litigated in the County Court would tend to be borderline cases so it would not be correct to say that the County Court judges see "the worst and the least of like cases"; experience in hearing applications under s 134AB(16) of the Compensation Act will vary from judge to judge, and, in any event, experience may not always coincide with good judgment.

17 The appellant submits that the Court of Appeal erred in its construction of the statutory provisions which founded and controlled the appeal from the County Court and it is to those provisions which we now turn. In doing so, it may be observed that, at least in this Court, the differences between the parties were not so much as to matters of statutory construction as to the alleged failure of the Court of Appeal to apply the statute law.

The appeal to the Court of Appeal

18 Section 75A(1) of the *Constitution Act* 1975 (Vic) divides the Supreme Court into the Court of Appeal and the Trial Division. Section 10(1)(c) of the *Supreme Court Act* 1986 (Vic) confers jurisdiction on the Court of Appeal to hear and determine all appeals from the County Court constituted by a Judge.

19 Against that background, s 74(1) of the County Court Act relevantly provides that:

> "Any party to a civil proceeding who is dissatisfied with any judgment or order of the court may appeal from the same to the Court of Appeal."

Upon such an appeal, the Court of Appeal may receive further evidence upon questions of fact either by oral examination in court, by affidavit, or by deposition taken before an examiner[14].

20 There is a requirement for leave to appeal from interlocutory judgments and orders of the County Court (s 74(2D) of the County Court Act) but s 134AC of the Compensation Act provides that a decision granting or refusing leave on

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13 cf *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 151-155 [39]-[48]; [2000] HCA 5.

14 Rules 64.22(3) and 64.02 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic).

an application made under s 134AB(16) of that Act – the situation in this litigation – should be taken not to be a judgment or order in an interlocutory application for the purpose of an appeal to the Court of Appeal. The result is that in the present case the appellant's appeal lay as of right.

21 The general nature of an appeal to the Court of Appeal from the County Court is identified in s 74(3) of the County Court Act. In particular this states that:

> "The Court of Appeal shall decide the matter of such appeal and shall have power to draw any inference of fact and shall on the hearing of such appeal make such order as is just, and may either dismiss such appeal or reverse or vary the judgment or order appealed from, and may direct the civil proceeding to be reheard before ... the County Court ..."

22 A statutory provision of this nature generally has been regarded as providing for that species of appeal in which the appellate court proceeds on the basis of the record before the court from which the appeal is taken, together with any fresh evidence which may be admitted pursuant to such powers to admit such evidence as may be conferred upon the appellate court[15].

23 In *State Rivers and Water Supply Commission v McIntyre*[16], Adam J described the appeal for which s 74 provides as "a rehearing *de novo* upon the material before the learned judge", and as requiring the appellate court "to consider for itself what was the proper order to have been made".

24 Subsequently, in *Humphries v Poljak*[17] the Appeal Division of the Supreme Court considered the nature of appeals from County Court determinations respecting injuries allegedly "serious" within the meaning of the Transport Act. Of the reading which Adam J had given to s 74(3) of the County Court Act, Crockett and Southwell JJ said[18]:

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15 *Fox v Percy* (2003) 214 CLR 118 at 124-125 [20]-[22].

16 [1965] VR 279 at 290.

17 [1992] 2 VR 129.

18 [1992] 2 VR 129 at 139.

> "The fact that the appellate court is empowered 'to decide the matter of such appeal' and 'to draw any inference of fact' and to 'make such order as is just' suggests that that court must (as Adam J said) 'consider for itself what was the proper order to have been made'. But to do so is to 'rehear' the matter in a more limited manner than would be undertaken on a rehearing *de novo*. For instance, in the latter case the witnesses could be led again in chief and cross-examined. We do not think that Adam J had in contemplation a rehearing of that nature. The conclusion that our power should not amount to such a rehearing is supported by the provision in s 74(3) that the Supreme Court may direct that the matter 'be reheard before the Supreme Court or [a judge of] the County Court'. This provision of this power suggests that it was not intended that the Supreme Court sitting in banc should conduct a rehearing *de novo* as properly so called."

In developing the proposition that the appellate court was to decide "for itself" the proper order which should have been made by the County Court, Crockett and Southwell JJ repeated[19] the statement by Gibbs ACJ, Jacobs and Murphy JJ in *Warren v Coombes*[20]:

> "The duty of the appellate court is to decide the case – the facts as well as the law – for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial."

25 However, matters did not rest there. In *Mobilio v Balliotis*[21], a five member bench of the Court of Appeal held that, in the absence of specific error, it should not interfere with a decision of the County Court on an application for leave under s 93(4) of the Transport Act to bring common law proceedings for damages unless it was satisfied that the decision was plainly wrong or wholly erroneous. Brooking JA said[22]:

> "[W]e should treat the ultimate finding – that 'serious injury' had not been shown – as, or as akin to, a discretionary determination. By this I mean no

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19 [1992] 2 VR 129 at 140.

20 (1979) 142 CLR 531 at 552.

21 [1998] 3 VR 833.

22 [1998] 3 VR 833 at 842.

> more and no less than that the nature of the determination is such that it should be held to be subject to the principles in [*House v The King*[23]]: I simply apply to it the convenient label 'discretionary' – or, if you will, 'quasi-discretionary' – to show that it is of such a nature as to be governed by *House*."

26 It was in that state of the authority respecting the operation of s 74 of the County Court Act upon leave applications under the Transport Act that the 2000 Act was introduced.

The 2000 Act

27 To the general appellate provisions found in the County Court Act the 2000 Act added the special provision now found in s 134AD of the Compensation Act. This states:

> "On the hearing of an appeal to the Court of Appeal from a decision made on an application under section 134AB(16)(b), the Court of Appeal shall decide for itself whether the injury is a serious injury on the evidence and other material before the judge who heard the application and on any other evidence which the Court of Appeal may receive under any other Act or rules of court."

It will be observed first that s 134AD provides for the consideration by the Court of Appeal of any other evidence which it may receive under any other statute or rules of court.

28 The controversy before this Court to a significant degree turned upon the significance of a second aspect of s 134AD. This is the statement that "the Court of Appeal shall decide for itself whether the injury is a serious injury ...".

29 In *Barwon Spinners*[24], the Court of Appeal noted that the reasoning in *Mobilio* with respect to the Transport Act was not to be translated to the interpretation of the changes made by the 2000 Act to the Compensation Act. In construing the phrase "the Court of Appeal shall decide for itself ..." which was now found in s 134AD, the Court of Appeal in *Barwon Spinners*[25] emphasised

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23 (1936) 55 CLR 499.

24 (2005) 14 VR 622 at 642.

25 (2005) 14 VR 622 at 643.

that "appropriate weight" was to be given by it "to the advantages of the trial judge", including allowance for any in-court demonstration, and that elements of "fact, degree and value judgment"[26] are involved. References also were made[27] to the expertise said to be acquired by County Court judges, a matter discussed earlier in these reasons.

30 The Court of Appeal concluded in *Barwon Spinners*[28]:

> "To put it shortly, the appellate function will always be encouraged by an appellant's demonstrating specific error, whether of fact or law. If it can be shown that the judge at first instance mistook his task or, for instance, erred in his understanding of the facts, the court must reconsider the case as a whole in order to confirm or to reject the decision below according to its own opinion on appeal on the question of serious injury. (Indeed it may even have to remit the case for further hearing if, say, one or other of the parties has not had a proper opportunity to establish its case or perhaps some finding of fact is needed which cannot be made without a rehearing.)"

31 In this Court the respondent emphasised that s 134AD is not a "free-standing provision", but an adjunct to the general appeal provision in s 74 of the County Court Act. Thus, not all appeals taken under s 74 to the Court of Appeal from a County Court decision on an application under par (b) of s 134AB(16) of the Compensation Act will turn wholly upon an issue as to whether the injury in question is a "serious injury". A particular appeal to the Court of Appeal may turn on issues respecting misconstruction or misapplication of a relevant provision of the Compensation Act (including the obligation imposed by s 134AE to give detailed reasons) and upon a failure to observe procedural fairness or upon some other alleged irregularity.

32 But s 134AC gives an appeal as of right, regardless of what is the ordinary requirement of leave in the case of interlocutory judgments. Further, where the issue before the Court of Appeal is whether the County Court erred in its decision whether the injury complained of is a "serious injury", s 134AD cuts in upon what otherwise are the generally expressed powers conferred by s 74(3) of

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26 (2005) 14 VR 622 at 644.

27 (2005) 14 VR 622 at 644.

28 (2005) 14 VR 622 at 645.

the County Court Act for the disposition of appeals by the Court of Appeal. One possibility provided by s 74(3) is a direction that the civil proceeding be reheard before the County Court. However, s 134AD enjoins the Court of Appeal, with the assistance of what should be the detailed reasons of the County Court, to decide "for itself" whether the injury is a "serious injury" and to do so on the evidence and material before the primary judge together with such other evidence as the Court of Appeal itself has received. If, on the balance of probabilities, the Court of Appeal does decide that the injury is a "serious injury" then the relief it gives will include the leave to bring the proceedings for damages which the appellant had sought under s 134AB(16)(b) but had failed to obtain in the County Court.

33 Contrary to what apparently was assumed in *Barwon Spinners*[29] there is no scope for an order for a rehearing by the County Court on an appeal to which s 134AD applies. (Where the ground of appeal falls outside s 134AD, for example, an appeal ground that the reasons of the County Court do not reach the standard required by s 134AE[30], a rehearing may be ordered under s 74(3).) In this way the changes made by the 2000 Act speed the path of the appellant to a trial of the common law action or to conclude the litigation. Counsel for the respondent accepted that with respect to the issue of "serious injury" the legislation takes the form just described so as to bring the leave proceedings to an end, something to the benefit of both sides.

34 The 2000 Act, which introduced into the Compensation Act s 134AD and the other provisions of Div 8A, was a measure with the purpose identified as follows in the second reading speech of the Minister to the Legislative Assembly[31]:

> "The purpose of this bill is to implement the Bracks government's election commitment to restore access to common-law damages for seriously injured workers to sue employers and recover damages. The government believes that the right of seriously injured workers to sue negligent employers is a fundamental right that should never have been

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29 (2005) 14 VR 622 at 645.

30 See *Barwon Spinners v Podolak* (2005) 14 VR 622 at 653.

31 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 April 2000 at 1001.

removed. The government is committed to the restoration of common-law rights for seriously injured workers within the context of a fully funded and financially stable system which maintains competitive premiums."

Of ss 134AC, 134AD and 134AE, the Minister said[32]:

"New section 134AC has the effect of permitting an appeal as of right to the Court of Appeal from a decision granting or refusing leave made on an application under new section 134AB(16)(b). Without this amendment, an appeal to the Court of Appeal from such a decision could only be made by leave of the Court of Appeal.

New section 134AD requires that, on the hearing of an appeal from a decision on an application under new section 134AB(16)(b), the Court of Appeal shall decide for itself whether the injury is a serious injury on the evidence and other material before the judge who heard the application and on any other evidence which the Court of Appeal may receive under any other act or rules of court.

New section 134AE requires that the reasons given by the court – which could be the Supreme Court – in deciding an application under new section 134AB(16)(b) shall not be summary reasons but shall be detailed reasons which are as extensive and complete as the court would give on the trial of an action.

The reason for these limitations of the jurisdiction of the Supreme Court is to ensure that decisions on applications for leave under section 134AB(16)(b), which are critical to the intended operation of the new common-law provisions, receive the appropriate level of judicial scrutiny." (emphasis added)

35 The Minister also said of s 134AD[33] that its purpose was to restore "the principles established by *Humphries v Poljak*"[34] where the Appeal Division had

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32 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 April 2000 at 1010.

33 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 April 2000 at 1005.

34 [1992] 2 VR 129.

followed the statement by the majority of this Court in *Warren v Coombes*[35], which is set out earlier in these reasons. However, the appellant makes several cogent points here. First, what was said in *Warren v Coombes* was addressed to s 75A of the *Supreme Court Act* 1970 (NSW); that provision, like s 74 of the County Court Act, was expressed in general terms and lacked the specific direction now found in s 134AD. Secondly, the statutory scheme implemented by the 2000 Act gives an appeal as of right upon the particular threshold issue of "serious injury" and gives final and preclusive effect to that outcome.

36 Of the regime introduced by ss 134AC, 134AD and 134AE, Maxwell P remarked in *Allsmanti Pty Ltd v Ernikiolis*[36] that the availability of a full rehearing on appeal is apt to undermine the work of the County Court by encouraging the losing party (in that case, the employee) to reagitate the facts in the hope that the Court of Appeal will take a different view. The President went on to contrast a limitation of the appeal to a question of law; this would achieve a situation analogous to appeals against sentence where there is appellate interference only "where something has gone badly – obviously – wrong". The reference to sentencing appeals is significant. This is because *House v The King*[37] was such a case and the translation of what was said there respecting the exercise of discretion[38] to the consideration of County Court leave applications in *Mobilio v Balliotis*[39] was a state of affairs which the 2000 Act was designed to avoid.

Discretion

37 The varied use of the term "discretion" is apt to create a legal category of indeterminate reference. This is because the term is used in the description or characterisation of many acts or omissions in the law. It is, as Dyson LJ recently

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35 (1979) 142 CLR 531 at 552.

36 [2007] VSCA 17 at [71]-[72]. See also *Barwon Spinners v Podolak* (2005) 14 VR 622 at 645.

37 (1936) 55 CLR 499.

38 (1936) 55 CLR 499 at 504-505.

39 [1998] 3 VR 833 at 842.

put it[40], "a somewhat protean word" which "connotes the exercise of judgment in making choices", and, in a sense, "most decisions involve the exercise of discretion".

38 The term "discretion" is sometimes used to describe the scope for selective choice in judicial determination of facts disputed on the evidence, particularly on the oral evidence. Thus in *Kades v Kades*[41] Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ, in the course of upholding the setting aside by the New South Wales Full Court of the decision of the primary judge in a custody dispute, said:

> "[The primary judge] saw and heard the parties as witnesses and he might thereby gauge the personality of each of them. His exercise of his discretion, moreover, should not be set aside except on firm grounds. Yet in this case the learned judge does seem to have mistaken the effect of what Mrs Kades was endeavouring to convey."

39 In other settings, "discretion" is used quite differently. Thus, the degree to which a court of equity will interfere in the administration of trusts has been held to reflect the width of discretionary powers which have been conferred on the trustees[42]. The judicial review of administrative decisions made in the exercise of a statutory power or "discretion" attracts a body of principles which in this Court may conveniently be traced back to what was said by Latham CJ in *Shrimpton v The Commonwealth*[43]. The exercise of what was called in *House v The King*[44] "a judicial discretion" to impose a particular sentence or to make a particular order under a power conferred by family provision legislation[45],

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40 *Carty v Croydon London Borough Council* [2005] 1 WLR 2312 at 2319; [2005] 2 All ER 517 at 524. See also the observations of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 204-205 [19]; [2000] HCA 47.

41 (1961) 35 ALJR 251 at 253-254.

42 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 417, 436, 441-442.

43 (1945) 69 CLR 613 at 620.

44 (1936) 55 CLR 499 at 504.

45 See *Vigolo v Bostin* (2005) 221 CLR 191 at 218-219 [74]-[75]; [2005] HCA 11.

attracts, upon subsequent exercise of a "general appellate power"[46], principles somewhat akin to those developed in public law. The well-known passage in *House v The King* illustrates this.

40 Rather different is the situation where statute creates a legal norm, in this litigation that of a "serious injury", and does so in terms which require for their operation in a given dispute the identification and evaluation of facts and assigns that fact-finding in the first instance to a judge sitting alone. The occasion for appropriate appellate intervention will depend upon the nature and scope of the particular statutory appeal for which the legislature provides. That inquiry is not advanced by describing the overall decision making process of the primary judge as "discretionary".

Conclusions

41 The Court of Appeal observed in *Barwon Spinners*[47] that, "arguably", all that was "made irrelevant by s 134AD is the type of error commonly identified (by reference to *House v The King*[48] ...) in appeals against the exercise of discretion". The Court of Appeal went on, in a passage set out earlier in these reasons, to emphasise the importance of demonstration by the appellant of "specific error" on the part of the primary judge when deciding whether there was "serious injury"[49]. This approach to the construction of s 134AD reflects the earlier statement in *Barwon Spinners* that, allowing for the terms of that section, "[n]one the less the appeal is justified by s 74 of the County Court Act ..."[50].

42 This confluence of ideas distracts attention from the terms of the imperative requirement of s 134AD with respect to determination of the question "whether the injury is a serious injury". Where it operates, s 134AD does so despite anything to the contrary which might be deduced from s 74 of the County Court Act or from *House v The King*. *Barwon Spinners* should not be accepted as providing a proper guide to the construction of s 134AD.

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46 (1936) 55 CLR 499 at 505.

47 (2005) 14 VR 622 at 640.

48 (1936) 55 CLR 499.

49 (2005) 14 VR 622 at 645.

50 (2005) 14 VR 622 at 643.

43 The classification of an injury as a "serious injury" within the meaning of the Compensation Act is a conclusion drawn from the facts disclosed by the relevant evidence, and after any resolution of disputed facts; it involves the application by the court in question of the statutory criterion of "serious" to the facts as found.

44 In the present case, upon the application by the appellant to the County Court there was no relevant issue of witness credibility, and upon his appeal to the Court of Appeal there was no challenge to the facts found by the County Court. Judge Millane considered the appellant to be a straightforward witness; he did not seek to embellish or exaggerate his condition or the impact upon him of his impairment.

45 In the County Court the respondent had led evidence on film, lasting about one hour, which showed that in October 2004 the appellant, as the primary judge put it, had appeared "to function well and to use his right arm effectively". The film was not shown to the Court of Appeal. The appellant did give an "in-court demonstration" to the Court of Appeal. This led to the statement by Eames JA: "It is indeed an unpleasant injury but it is markedly less so than at the time of the ... photographs [tendered to the County Court]."

46 Eames JA concluded that: "I am not persuaded that her Honour was wrong to conclude that [the appellant's injury] did not pass the threshold to become a serious disfigurement, within the terms of the Act." The respondent submits that in speaking of the ultimate issue for the Court of Appeal in this way, Eames JA was but expressing his own agreement with the conclusions of the primary judge and so was meeting the requirement of s 134AD that the Court of Appeal "shall decide for itself whether the injury is a serious injury".

47 However, if the reasons of Eames JA are read as a whole several further matters appear. First, his Honour treated *Barwon Spinners*[51] as stating among a number of important propositions respecting the phrase in s 134AD "to decide for itself", that it is for an appellant to persuade the Court of Appeal "that the decision produced below was the wrong one and should be reversed, or at least set aside". But for the Court of Appeal to do that is not to decide for itself whether on the balance of probabilities the injury of the appellant was a "serious injury" in the defined sense. Nor is the appellate jurisdiction one merely to set

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51 (2005) 14 VR 622.

aside the primary decision; the appeal is finally to resolve the question of serious injury by creation of the issue estoppel of which par (c) of s 134AB(19) speaks. Secondly, the tenor of what follows in his Honour's reasons, particularly in the references to the "specialist" expertise of the County Court, suggests a significant measure of deference to the outcome in the County Court and an approach seeking from the appellant the demonstration of error on the part of the County Court.

48 Maxwell P remarked[52]:

> "We are deciding for ourselves, as on any appeal, but subject to the principles governing such an appeal which *Barwon Spinners* so clearly spelt out.
>
> As Eames JA pointed out in argument and as is clear from the propositions from *Barwon Spinners* which are set out in his judgment, we must be satisfied that the trial judge [*sic*] was wrong in coming to the conclusion she did. Like his Honour, I am not persuaded that her Honour was wrong."

49 The appellant correctly submits that this passage, and those in the reasons of Eames JA, with both of which Neave JA agreed[53], misstated the statutory power and duty that the Victorian Parliament reposed in the Court of Appeal. The consequence is that the Court of Appeal failed to exercise the jurisdiction which it was called upon to exercise.

50 To the suggestion that this view of the legislation fails to pay regard to the status and role of the Court of Appeal, as the highest court of the State and as a general court of appeal, and to the appropriate deployment of its judges given the nature of the decisions to be made and the risks of inconsistent decision-making between its judges because they are "rarely exposed to physical evidence of this kind"[54], the answer is threefold. First, it is what the legislation says. Secondly, it is what the Minister implied to be the purpose of the legislation, aiming to restore rights to damages subject to conditions. Thirdly, it arguably reflects the compromises inherent in achieving such a purpose. It centralises the ultimate

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52 [2006] VSCA 187 at [33]-[34].

53 [2006] VSCA 187 at [44].

54 [2006] VSCA 187 at [43].

decisions on such matters in the Court of Appeal with its comparatively small cohort of judges, having the consequence that a fair degree of consistency is expected to emerge in a relatively short time. Any amendment of these arrangements is, as Maxwell P recognised[55], a matter for Parliament.

Orders

51 The appeal should be allowed with costs. Paragraph 1 of the order of the Court of Appeal made on 8 September 2006 should be set aside. It follows that the appeal to that Court must be reheard. Paragraph 2 of the Court of Appeal's order should be set aside and the respondent should pay the costs of the appellant of proceedings in that Court up to the listing for rehearing. The costs of the rehearing (and any consequential costs order respecting the application to the County Court) should abide the outcome of the rehearing.

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55 [2006] VSCA 187 at [42].