# HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND BELL JJ

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MAURICE BLACKBURN CASHMAN APPELLANT

AND

FIONA HELEN BROWN RESPONDENT

*Maurice Blackburn Cashman v Brown* [2011] HCA 22
*22 June 2011*
M176/2010

**ORDER**

1. *Appeal allowed.*

2. *Set aside so much of the order of the Court of Appeal of the Supreme Court of Victoria made on 25 August 2010 as answered the questions reserved for its opinion and in place thereof order that the questions reserved be answered as follows:*

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

   *Answer:* *No.*

   *Question 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?*

   *Answer:* *No.*

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

   *Answer:* *No.*

3. *The appellant pay the respondent's costs of the appeal to this Court.*

On appeal from the Supreme Court of Victoria

**Representation**

M F Wheelahan SC with S A O'Meara for the appellant (instructed by Minter Ellison)

P W Tree SC with S R McCredie for the respondent (instructed by Lennon Mazzeo)

## CATCHWORDS

### Maurice Blackburn Cashman v Brown

Torts – Negligence – Applicability and effect of legislation – Plaintiff alleged she had suffered injury including psychiatric injury as result of employer's negligence – Plaintiff made claim against employer pursuant to s 98C of *Accident Compensation Act* 1985 (Vic) ("Act") for compensation for non-economic loss – Pursuant to s 104B(9) of Act, Victorian WorkCover Authority referred questions to Medical Panel about extent of plaintiff's impairment – As result of Medical Panel finding, plaintiff deemed to have a "serious injury" for purposes of Act – As entitled under s 134AB(2) of Act, plaintiff commenced common law proceedings against employer for damages – Section 68(4) of Act provided that "[f]or the purposes of determining any question or matter", opinion of Medical Panel was to be applied by "any court, body or person" – In pleadings, employer denied plaintiff had suffered injury, loss and damage – Whether employer precluded by operation of Act from making that and other contentions in evidence or argument – Whether employer so precluded as a matter of issue estoppel.

Words and phrases – "for the purposes of determining any question or matter", "serious injury".

*Accident Compensation Act* 1985 (Vic), ss 68(4), 98C, 104B, 134AB.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL AND BELL JJ. The respondent to this appeal ("the plaintiff") was a salaried partner employed by the appellant firm ("the employer") in its legal practice in Melbourne. In 2007 the plaintiff commenced proceedings against the employer in the County Court of Victoria claiming damages for personal injuries she alleged she had suffered as a result of the employer's negligence. She alleged that between January and November 2003 she had been "systematically undermined, harassed and humiliated" by a fellow employee, despite complaints and requests for intervention made to the employer's managing partner, and that, as a result, she had suffered injury, including psychiatric injury.

2 The central issue in the appeal to this Court is whether, as the Court of Appeal of the Supreme Court of Victoria held[1], the employer is precluded by operation of the *Accident Compensation Act* 1985 (Vic) ("the Act") from making certain contentions in evidence or argument in the plaintiff's action in the County Court or is estopped from making those contentions as a matter of issue estoppel. (The question of issue estoppel was argued in, but not decided by, the Court of Appeal and is raised in this Court by the plaintiff on a notice of contention.)

3 Both the issue decided by the Court of Appeal and the issue raised by the notice of contention should be resolved in the employer's favour. The employer is not precluded in the manner alleged by the plaintiff, whether by the Act or as a matter of issue estoppel. The appeal should be allowed.

The asserted preclusions

4 To identify the subject of the alleged preclusions it is necessary to deal first with the parties' pleadings in the County Court.

5 By its amended defence the employer denied, among other things, that the plaintiff had suffered injury, loss and damage. The plaintiff filed an amended reply to the amended defence which joined issue with the employer and asserted that the employer was estopped from "making any assertion whether by pleading, submission or otherwise" and from "leading, eliciting or tendering evidence, whether in chief or in cross-examination or re-examination" that was inconsistent with four particular matters described in par 1A(i) of the pleading in the following terms:

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

"(A) the panel opinion;

(B) the plaintiff having, as at 28 June 2006, a serious injury as defined in s 134AB(37)(c) of the Act;

(C) the plaintiff having, as at 28 June 2006, a permanent severe mental disturbance or disorder;

(D) the plaintiff having, as at 28 June 2006, a psychological injury arising out of her employment with the defendant."

In par 1B of her pleading the plaintiff described the subjects of the alleged preclusions in different terms but nothing turns on those differences. By its rejoinder the employer admitted the facts that were alleged to give rise to the preclusions but denied that it was precluded in the manner alleged.

6 What was described in the plaintiff's reply as "the panel opinion", and each of the other matters identified in the reply as a subject of preclusion, depended upon steps that had been taken under the Act in consequence of the plaintiff notifying the employer that she claimed to have suffered "an injury arising out of or in the course of … employment"[2]. To explain what those matters were, and how they arose, it is necessary to trace a number of steps that were taken under the Act by the plaintiff or by others in relation to her claim.

The plaintiff's claim for compensation

7 In December 2005, the plaintiff had made a claim against the employer, pursuant to s 98C of the Act, for compensation for non-economic loss. Section 98C(1) provided for payment of compensation "in respect of an injury resulting in permanent impairment as assessed in accordance with section 91". Section 91 prescribed how the assessment of a degree of impairment of a worker was to be made. In most cases the assessment was to be made in accordance with a specified edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("the AMA Guides") as modified by the Act and any regulations made under the Act[3]. In the case of psychiatric impairment the AMA Guides were modified pursuant to s 91(6), but the detail of the modifications made need not be noticed.

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**2** *Accident Compensation Act* 1985 (Vic), s 82(1).

**3** s 91(8).

8 The amount of compensation to be allowed under s 98C was calculated according to the particular statutory formula that was engaged. Where, as in this case, the permanent impairment that the plaintiff claimed she suffered was permanent psychiatric impairment, s 98C(3) prescribed the formula that was to be applied. The variable in the formula was "the worker's degree of impairment expressed as a number". No compensation was payable if the degree of impairment was less than 30 per cent[4].

9 One of the functions of the Victorian WorkCover Authority ("the Authority") under the Act is[5] to "receive and assess and accept or reject claims for compensation". The Authority also has the function[6] of paying "compensation to persons entitled to compensation under" the Act. It can[7], and in this case did, perform those functions by an agent but it is convenient to describe the steps that were to be taken as if they were taken by the Authority.

10 The plaintiff's claim under s 98C having been made, the Authority was bound[8], within a limited time, to take a number of steps. So far as presently relevant, the Authority was bound to accept or reject liability for each injury included in the claim[9], to obtain an assessment or assessments in accordance with s 91 of the Act as to the degree of permanent impairment (if any) of the worker resulting from the injury or injuries in respect of which liability is accepted[10], to determine the degree of permanent impairment (if any) of the worker[11], to

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**4** s 98C(3)(a).

**5** s 20(1)(aa).

**6** s 20(1)(b).

**7** s 23.

**8** s 104B(2).

**9** s 104B(2)(a).

**10** s 104B(2)(b).

**11** s 104B(2)(c).

calculate any entitlement to compensation[12], and to advise the worker of the result of each of these steps[13].

11 In February 2006, the Authority accepted that the plaintiff had a psychological injury arising out of her employment with the employer.

"The panel opinion"

12 The first of the preclusions alleged by the plaintiff in her reply was that the employer could not dispute "the panel opinion". The other preclusions alleged are to be understood as articulations of the issues that were alleged to have been decided by "the panel opinion". The reference to "the panel opinion" was to an opinion given by a Medical Panel constituted under the Act. The opinion in question was given on the date stated in other alleged preclusions: 28 June 2006.

13 It is necessary to refer to the statutory provisions that dealt with Medical Panels and the provisions that were engaged in this case to produce "the panel opinion" referred to by the plaintiff in her reply. Division 3 of Pt III of the Act (ss 63-68) provided, among other things, for the establishment and constitution of Medical Panels[14], for their procedures and powers[15], for the examination of a claimant by a Panel[16], and for the formation and expression by a Panel of its opinion on a medical question referred to it[17]. As the name "Medical Panels" suggests, all members of a Medical Panel were to be medical practitioners. The members of any particular Panel were to be drawn from a list of members appointed by the Governor in Council[18].

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**12** s 104B(2)(e).

**13** s 104B(2)(f).

**14** s 63.

**15** s 65.

**16** s 67.

**17** s 68.

**18** s 63(2) and (4).

14 Section 104B(9) of the Act required the Authority "within 14 days of being advised by the worker that the worker disputes the [Authority's] determinations of impairment or total loss in respect of the injury or injuries claimed" to refer two questions "to a Medical Panel for its opinion under section 67" of the Act. Those medical questions were stated, in s 104B(9), as being:

> "(a) the degree of impairment assessed in accordance with section 91 resulting from the injury or injuries claimed for which liability is accepted or established; and
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> (b) whether the worker has an injury or injuries claimed for which liability is accepted or established which is a total loss mentioned in the Table to section 98E(1)".

15 In March 2006, pursuant to s 104B(9), the Authority referred to a Medical Panel for its opinion the following questions concerning the plaintiff:

> "Question 1. What is the degree of impairment resulting from the accepted injuries assessed in accordance with s 91, and is the impairment permanent?
>
> Question 2. Does the [plaintiff] have an accepted injury which has resulted in a total loss injury mentioned in the table in s 98E(1)?"

It being accepted that the reference was made under s 104B(9), it may be assumed that the plaintiff had disputed the determination of her impairment that had been made by the Authority. The questions referred to the Panel took a form different from that found in s 104B(9) but both parties have at all times treated the questions as being those for which s 104B(9) provided.

16 In June 2006, the Medical Panel provided its opinion. The answers that the Panel gave were:

> "Answer to question 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 s 91(2) for the purposes of s 98C and 134AB(3) & (15) of the Act. The degree of psychiatric impairment is permanent within the meaning of the Act.

Answer to question 2. No."

The degree of impairment

17 The Medical Panel's assessment in answering questions posed pursuant to s 104B(9), that the degree of impairment suffered by the plaintiff was 30 per cent, was significant for two reasons. First, as has already been noted, no compensation for non-economic loss in respect of permanent psychiatric impairment was to be allowed if the degree of impairment was less than 30 per cent[19]. Second, and of immediate relevance in this matter, because the assessment made under s 104B was 30 per cent, the injury suffered by the plaintiff was deemed[20] to be a "serious injury". And because her injury was deemed to be a "serious injury" she was entitled[21] to bring proceedings against her employer at common law. It is necessary to say more about this second consequence of the Panel's answers, not least because it is to be recalled that several of the preclusions alleged in this case were cast in terms that directly or indirectly referred to the definition in s 134AB of the Act of "serious injury". That is, the plaintiff alleged that the employer was precluded from making any assertion or adducing any evidence in her common law action inconsistent with her having suffered what the Act identified as a "serious injury".

"Serious injury" and common law action

18 Section 134AB(1) of the Act provided, in effect, that except "as permitted by and in accordance with" the section, a "worker who is, or the dependants of a worker who are or may be, entitled to compensation in respect of an injury arising out of or in the course of, or due to the nature of, employment on or after 20 October 1999", "shall not, in proceedings in respect of the injury, recover any damages" for non-pecuniary or pecuniary loss. Section 134AB(2) provided the exception to that prohibition which is presently relevant. It provided that:

> "A worker may recover damages in respect of an injury arising out of, or in the course of, or due to the nature of, employment if the injury is a serious injury and arose on or after 20 October 1999."

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**19** s 98C(3)(a).

**20** s 134AB(15).

**21** s 134AB(2).

19 Section 134AB made several different provisions concerning the subject of "serious injury". The term itself was defined in s 134AB(37). It will be recalled that one of the preclusions alleged by the plaintiff was preclusion from contending that, as at the date of the Medical Panel's opinion, the plaintiff was not in fact suffering an injury that was "a serious injury as defined in s 134AB(37)(c) of the Act". The form of "serious injury" identified in par (c) of the definition was "permanent severe mental or permanent severe behavioural disturbance or disorder". The plaintiff further alleged that the employer was precluded from contending that, as at the date of the Medical Panel's opinion, she was not in fact suffering an injury that was "a permanent severe mental disturbance or disorder".

20 Section 134AB(38)(b) amplified what was meant by the terms "serious" and "severe" but the sub-section provided that this was "[f]or the purposes of the assessment of ***serious injury*** *in accordance with sub-sections (16) and (19)*" (emphasis added). Those sub-sections (directed to cases where an assessment under s 104B of the degree of impairment was less than 30 per cent) were not engaged in this matter.

21 Section 134AB provided for five different ways in which the existence of a serious injury could be established. Of relevance to the plaintiff's claim was that provided by sub-s (15), which said:

> "If the assessment under section 104B made before an application under sub-section (4) is made of the degree of impairment of the worker as a result of the injury is 30 per centum or more, the injury is deemed to be a serious injury within the meaning of this section."

The reference in sub-s (15) to an application under sub-s (4) may be put aside from consideration. There was no dispute in this case that the procedures required by s 134AB(4) had been followed.

22 The other ways in which "serious injury" could be established were:

(a) under sub-s (7)(a), by the Authority (or a self-insuring employer) advising the worker, as a result of a determination under s 104B of the degree of impairment of the worker, "that the worker is deemed to have a serious injury"; or

(b) under sub-s (7)(b), by the Authority (or a self-insuring employer) issuing a certificate under s 134AB(16)(a) that it was "satisfied that the injury is a serious injury"; or

(c) under sub-s (9), by the worker being deemed to have a serious injury if the Authority (or a self-insuring employer) failed to advise the worker, within a fixed time of its decision, whether the worker had a serious injury; or

(d) under sub-s (19)(a), by a court, other than the Magistrates' Court, on an application of the worker being "satisfied on the balance of probabilities that the injury is a serious injury".

In the case of sub-s (19)(a), the court would give leave, under sub-s (16)(b), to the worker to bring a proceeding.

23 The Act thus provided for the ways in which a worker would be deemed to have suffered a serious injury[22], by which the Authority or a self-insuring employer could certify that it was satisfied of this fact[23] and by which a court could determine whether it was satisfied of this fact[24]. The deeming or determination of the existence of a serious injury, once made, met the first of the two conditions for a worker to be allowed to recover damages in respect of a work-related injury prescribed by the concluding words of s 134AB(2): "if the injury is a serious injury and arose on or after 20 October 1999".

24 If examination of the relevant provisions of the Act were to stop at this point it would readily be seen that the only fact relevant to the institution or prosecution of a common law action that related to the subject of "serious injury" was that either the Act deemed a plaintiff to have suffered such an injury, or the Authority (or self-insuring employer) or a court was satisfied of that fact. It is necessary, however, to notice two other provisions of s 134AB as it stood at the times relevant to this matter.

25 First, sub-s (19) provided that:

"For the purposes of sub-section (16)(b)—

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**22** s 134AB(7)(a), (9) and (15).

**23** s 134AB(7)(b) and (16)(a).

**24** s 134AB(16)(b) and (19)(a).

(c) 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."

It will be recalled that s 134AB(16)(b) provided for a court to give leave to commence proceedings and that s 134AB(19)(a) provided that a court must not do that unless satisfied that the injury is a serious injury. The introductory words of sub-s (19), "[f]or the purposes of sub-section (16)(b)", do not sit easily with par (c) of sub-s (19). Paragraph (c) of sub-s (19) was evidently intended to look forward from the proceedings (seeking leave) with which sub-s (16)(b) dealt. Paragraph (c) of sub-s (19) "looked forward" in the sense that it was concerned with what estoppels (necessarily in proceedings *other* than the leave proceeding) could arise from findings made *in* a leave proceeding. To speak of these provisions being made for the purposes of the provision governing the leave proceeding would be apposite only if some meaning were to be given to the phrase "for the purposes of" wider than it might normally have.

26 It is not necessary to decide in this case whether that should be done. In this case, no application for leave to commence proceedings was made or was necessary. The plaintiff was deemed by operation of s 134AB(15) to have a serious injury. It is important to notice, however, that if s 134AB(19)(c) were to be construed as speaking to proceedings other than leave proceedings brought under s 134AB(16)(b), the *only* estoppel that could arise from the determination of an application for leave would preclude debate about whether there was a finding that the injury in question was a serious injury[25]. That is, the preclusion provided by s 134AB(19)(c) would prevent a defendant in the common law proceeding from disputing that a plaintiff had met the first of the two conditions prescribed by s 134AB(2). That preclusion would not prevent the defendant from disputing whatever may have been the factual bases upon which a conclusion had been reached that the plaintiff had suffered a serious injury.

27 The other provision of s 134AB to which reference must be made is sub-s (23). It provided:

"In the trial of a proceeding brought under this section, a jury must not be informed—

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**25** *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 130 [11]; [2008] HCA 13.

(a) of the monetary thresholds and statutory maximums specified by or under sub-section (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

(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 sub-section (16)(a)."

The reference, in par (b) of sub-s (23), to an injury being "found" to be a serious injury is evidently a reference to a finding made under sub-ss (16)(b) and (19)(a). Thus sub-s (23) prohibits a jury being told of such a finding. When read as a whole, sub-s (23) points strongly to the conclusion that the Act treats the steps taken under the Act before common law proceedings may be brought as wholly irrelevant to those common law proceedings. That is, the matters mentioned in sub-s (23) are not to be mentioned to the jury because they are irrelevant.

28 Apart from sub-ss (19)(c) and (23), nothing in the provisions of s 134AB with respect to the determination or deeming of the existence of a serious injury speaks in any way to the conduct of an action brought in accordance with s 134AB(2). And the Court of Appeal did not decide to the contrary.

Proceedings in the County Court

29 In the present case, the plaintiff's action against the employer came on for hearing in the County Court before a judge (Judge Lacava) and a jury. Before a jury was empanelled, counsel for the plaintiff informed the trial judge that he would object to the employer cross-examining the plaintiff or her witnesses "in a way which suggests the plaintiff suffered no injury, or no serious injury" and that the plaintiff would also object to the employer calling evidence to that effect. Having regard to what was understood to be the then state of authority in Victoria, particularly the decision of the Court of Appeal in *Pope v W S Walker & Sons Pty Ltd*[26], the parties asked the trial judge to reserve questions in the form of a special case for the opinion of the Court of Appeal pursuant to s 76(1) of the *County Court Act* 1958 (Vic). The trial judge concluded that in light of the state

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**26** (2006) 14 VR 435.

of authority, the expected length of the trial of the action and the pendency of an appeal to the Court of Appeal against the judgment of Beach J of the Supreme Court of Victoria in the matter of *Norris v Brumar (Victoria) Pty Ltd*[27] (which raised similar but not identical issues) it was appropriate to reserve three questions for the opinion of the Court of Appeal. Those questions were:

> "(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 paragraph 1B(c) of her amended reply to amended defence?"

Proceedings in the Court of Appeal

30 The special case in the present matter was heard at the same time as the appeal against the judgment in *Brumar*. In the present matter, the Court of Appeal (Ashley and Mandie JJA and Ross AJA) ordered[28] that the questions reserved should be answered as follows:

> "**Question (1):** Unnecessary to answer.
>
> **Questions (2) and (3):** The defendant is prohibited in this proceeding from –
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> (a) making any assertion, whether by pleading, submission or otherwise; and
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> (b) leading or eliciting evidence, whether in evidence-in-chief, cross-examination or re-examination;

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**27** [2009] VSC 214.

**28** [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 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."

31 The reasons of the Court of Appeal were delivered by Ashley JA. Those reasons dealt with both the appeal in *Brumar* and the special case in this matter.

32 Ashley JA concluded[29] that the questions raised by the special case in this matter were resolved by reference to the operation of s 68(4) of the Act in the context of the operation of s 134AB. Section 68(4) of the Act provided that:

> "For the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive by any court, body or person irrespective of who referred the medical question to the Medical Panel or when the medical question was referred."

Two reasons were given[30] for holding that the opinion of the Medical Panel "was final and conclusive". First, reference was made to the provision in s 68(4) that the opinion was "to be adopted and applied by any court, body or person and

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**29** [2010] VSCA 206 at [161].

**30** [2010] VSCA 206 at [163].

must be accepted as final and conclusive by any court, body or person". The second reason was said to lie in s 104B(12)(a) of the Act. That sub-section provided that:

> "No appeal lies to any court or Tribunal from a determination or opinion—
>
> (a) as to the degree of permanent impairment of a worker resulting from an injury".

It may be noted in respect of this second consideration that the Court of Appeal of Victoria has held[31] that a provision like s 104B(12) preventing an appeal from the opinion of a Medical Panel does not prevent a person dissatisfied with an opinion expressed by a Medical Panel from seeking judicial review of that opinion, whether pursuant to the *Administrative Law Act* 1978 (Vic) or otherwise. The plaintiff did not submit that these decisions of the Court of Appeal were wrong. It is, however, unnecessary to consider whether or to what extent the availability of such relief should be understood as qualifying a description of the Panel's opinion as "final and conclusive"[32].

33 Ashley JA concluded[33] that, in her pleading, the plaintiff had expressed the effect of s 68(4) of the Act too narrowly. That being so, his Honour reframed[34] the preclusions which he considered followed from the application of s 68(4) in the broader fashion ultimately incorporated in the answer given by the Court of Appeal to the second and third questions reserved.

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**31** *Masters v McCubbery* [1996] 1 VR 635 at 647-648 per Winneke P, 652 per Ormiston JA, 656-658 per Callaway JA; *Lianos v Inner & Eastern Health Care Network* (2001) 3 VR 136 at 141-142 [20] per Chernov JA (Tadgell and Batt JJA agreeing at 137 [1], [2]).

**32** cf *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99]-[100]; [2010] HCA 1.

**33** [2010] VSCA 206 at [176].

**34** [2010] VSCA 206 at [191].

Section 68(4)

34 At first sight, s 68(4) of the Act is cast in terms of very general application. Reference is twice made to "any court, body or person". But the sub-section is introduced by the expression "[f]or the purposes of determining any question or matter". Those words should not be given a literal meaning[35]. The meaning of the phrase that best accords with its context, and which should be adopted, is "for the purposes of determining any question or matter *arising under or for the purposes of the Act*". Those are the purposes for which the opinion of a Medical Panel on a medical question is to be adopted and applied and accepted as final and conclusive.

35 Once that step is taken, it is then clear that s 68(4) does not speak at all to the litigation of questions or matters that are not questions or matters arising under or for the purposes of the Act. More particularly, s 68(4) does not speak at all to an action for damages brought by a worker against an employer.

36 An action of that kind presents no question or matter to which the opinion of a Medical Panel could be said to relate that is a question or matter arising under or for the purposes of the Act. The action that a worker brings against an employer (commonly for the tort of negligence, but sometimes for other causes of action such as breach of contract or breach of statutory duty) is an action for a cause of action which is not one created by the Act. Each cause of action either is a common law cause of action or has its origin in a statute other than the Act. Of course, as an examination of the provisions of s 134AB of the Act shows, the worker's bringing[36] of an action against his or her employer, the damages that may be awarded[37] in the action, the amount of interest that may be allowed[38] on damages, and even the orders that are to be made[39] for costs are all regulated by the Act. And s 134AB makes frequent reference to an action which a worker may bring against an employer as one which is brought "in accordance with"[40] or

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**35** cf *Pope v W S Walker & Sons Pty Ltd* (2006) 14 VR 435 at 444 [37] per Eames JA.

**36** s 134AB(1) and (2).

**37** s 134AB(24) and (32).

**38** s 134AB(34).

**39** s 134AB(28).

**40** s 134AB(1), (3), (5), (11), (12), (22), (28) and (34).

"under"[41] the Act. But none of these provisions detracts from the force of the observation that none of the causes of action on which the worker sues the employer is created by the Act. And because the relevant causes of action are not created by the Act, no question or matter arises in the action, to which the opinion of a Medical Panel could be said to relate, that can be described as a question or matter arising under or for the purposes of the Act.

37 Nor does s 104B(12) point to any different result. It provides that there is to be no appeal against a Medical Panel's opinion. That says nothing about when a Medical Panel's opinion must be applied. To the extent to which s 68(4) provides that the opinion of a Medical Panel as to the degree of permanent impairment of a worker resulting from an injury is "final and conclusive", it is necessary to identify from some source other than s 104B(12) the purposes for which, or circumstances in which, that description is legally significant. It is only if s 68(4) is treated as applying to an action brought by a worker against the worker's employer that the description of the Panel's opinion as final and conclusive is significant to the hearing or the determination of that action. And for the reasons given, s 68(4) does not apply to a worker's action for damages against the worker's employer, there not being any question or matter in that action that is a question or matter arising under or for the purposes of the Act.

38 As the plaintiff submitted in argument in this Court, s 134AB of the Act regulates when an action for damages may be brought by a worker against an employer. But contrary to the plaintiff's submission, once the steps required by s 134AB have yielded the result that there is either a determination or a deeming that a serious injury has been suffered, and the conditions prescribed by s 134AB have been satisfied, the prosecution of an action brought by the worker is not a matter with which the Act deals in any respect that permits or requires the application of s 68(4).

Issue estoppel

39 The conclusions reached with respect to the construction and application of s 68(4) entail the further conclusion that no issue estoppel arises out of the opinions expressed by a Medical Panel under s 104B(9) in an action later brought by a worker against the worker's employer.

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**41** s 134AB(23), (24) and (30).

40 It is a necessary condition for an issue estoppel to exist between parties that the decision from which the estoppel arises was a final decision[42]. Where, as here, the statute establishing the body in question prescribes that its decisions are final for the purposes of that Act, no greater ambit of finality should be attributed to its decisions than the Act itself marks out. Thus no estoppel arises because the quality of "finality" which the Act gives to an opinion expressed by a Medical Panel (in this case under s 104B(9)) is finality for the purposes of determining any question or matter arising under or for the purposes of the Act. No wider finality should then be ascribed to a Panel's opinion.

41 These are reasons enough to conclude that the issue estoppels alleged in this case do not arise from the Panel's opinion. It is not necessary in these circumstances to consider the further questions agitated in argument about who should be regarded as the "parties" immediately affected by a Panel expressing its opinion, who should be regarded as a privy of those parties, or whether the opinion expressed by a Panel about degree of impairment can or should be regarded as a "decision" of some question arising between parties.

Conclusion and orders

42 The appeal to this Court should be allowed. The Court of Appeal's order answering the questions reserved for its opinion should be set aside. In place of that order there should be an order that the questions reserved be answered as follows:

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

Answer: No.

Question 2: Is this honourable court obliged to accept as final and conclusive in any trial of this action, any, and if so which, of

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**42** See, for example, *Blair v Curran; Curran and Perpetual Trustee Co Ltd v Blair* (1939) 62 CLR 464 at 531-532 per Dixon J; [1939] HCA 23; *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 453 per Gibbs J; [1973] HCA 59; *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373 [21], 375 [25] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2004] HCA 34.

the matters pleaded by the plaintiff at paragraph 1B(a) and (b) of her amended reply to amended defence?

Answer: No.

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

Answer: No.

43 In accordance with the undertaking given at the time of the grant of special leave, the appellant should pay the respondent's costs of the appeal to this Court. The appellant applied for an order that the plaintiff pay its costs in the Court of Appeal. This being a test case on a point of general application and the undertaking having been given, the orders for costs made by the Court of Appeal in favour of the plaintiff should not be disturbed.