39/09; [2009] VSC 601

SUPREME COURT OF VICTORIA

DERKS v R & J FIBREGLASS INDUSTRIES PTY LTD

Beach J

14, 15, 18 December 2009

CIVIL PROCEEDINGS – ISSUE-ESTOPPEL/*RES JUDICATA* – CLAIM BY EMPLOYEE AGAINST EMPLOYER FOR COMPENSATION FOR INJURIES SUFFERED IN THE COURSE OF EMPLOYMENT – SIMILAR CLAIM PREVIOUSLY DISMISSED BY CONSENT IN COUNTY COURT – WHETHER EMPLOYEE ESTOPPED FROM CLAIMING COMPENSATION IN THE MAGISTRATES' COURT – FINDING BY MAGISTRATE THAT THE MAIN ISSUE DETERMINED IN THE COUNTY COURT WAS WHETHER EMPLOYEE SUFFERED INJURY IN THE COURSE OF EMPLOYMENT – EMPLOYEE'S CLAIM DISMISSED ON GROUND THAT EMPLOYEE WAS ESTOPPED FROM RE-LITIGATING THAT QUESTION – WHETHER MAGISTRATE IN ERROR: *ACCIDENT COMPENSATION ACT* 1985, SS98, 98A.

D. issued proceedings against his employer R & J Fibreglass claiming to have suffered injury in the course of his employment. D. sought compensation pursuant to ss98 and 98A of the *Accident Compensation Act* 1985 ('Act'). When the matter came on for hearing, the Magistrate dismissed the proceeding on the ground that D. was estopped from maintaining the proceeding because of the earlier dismissal of a claim for weekly payments and medical and like expenses in the County Court between the same parties. In the County Court proceeding, no evidence was led and the Judge struck out the serious injury proceeding and dismissed the weekly payments proceeding by consent. Upon appeal—

HELD: Appeal allowed. Remitted to the Magistrate for further hearing and determination.

1. In order to recover weekly payments under the Act, a plaintiff must establish that he or she has suffered an injury which entitles him or her to compensation under the Act and an incapacity for work during the relevant period. So far as medical and like expenses are concerned, a plaintiff must again establish the existence of an injury which gives rise to an entitlement to compensation. However, what then needs to be established to recover medical and like expenses is that the relevant medical service was received because of the injury.

2. In order to be entitled to a payment of compensation pursuant to s98 of the Act, a plaintiff merely has to bring his or her compensable injury within the table contained in that section. A plaintiff who establishes that his or her compensable injury falls within the table in s98 has an entitlement to compensation under both ss98 and 98A of the Act. Such a plaintiff does not have to go on and establish incapacity during any particular period or that any particular medical or like treatment was received because of the compensable injury.

3. A dismissal of an action which could succeed on establishing either X or Y, is a decision negativing both, but if the action is found on X plus Y, its dismissal does not necessarily involve a decision as to either, since the action may have failed because X had not been established, though Y had been, or vice versa, or because neither had been established.

***ACCC v Australian Safeway Stores Pty Ltd (No 3)* [2001] FCA 1861; (2001) 119 FCR 1; [2002] ATPR (Digest) 46-215, applied.**

4. On its face, the weekly payments proceeding in the County Court was of the X plus Y variety. That is, in order for D. to succeed in his claim for weekly payments, he had to establish an injury in the course of his employment with the respondent and an incapacity for work during the period in which he claimed an entitlement to weekly payments. Similarly, in order to succeed in his claim for medical and like expenses, D. had to establish an injury in the course of his employment with the respondent and that the relevant treatment was received because of that injury. Absent some concession from the respondent, D. could have lost his claim for weekly payments either by failing to establish that he suffered an injury in the course of his employment with the respondent or by failing to establish a relevant incapacity for work. So far as the claim for medical and like expenses was concerned, this could have been lost by D. either failing to establish an injury in the course of his employment with the respondent or by failing to establish that the treatment in respect of which compensation was sought was received by the appellant because of that injury.

5. Undoubtedly, a very significant issue (if not the main issue) in the weekly payments proceeding was the question of whether or not D. sustained injury in the course of his employment with the

respondent. However, proving that this issue was a significant issue (or the main issue) in the weekly payments proceeding did not establish that there were no other issues upon which D. had to succeed in order to have had a judgment entered in his favour in that proceeding.

6. It was not open to the Magistrate to conclude that the only issue in dispute in the weekly payments proceeding in the County Court was the question of whether or not D. sustained injury in the course of his employment with the respondent. If this proceeding truly was a one issue case, one would have expected the pleadings to reflect that fact or there to be in evidence communications between the parties advising that the respondent took no issue with the existence of an incapacity or a liability to pay for specified medical treatment if D.'s injury was shown to have occurred (or been aggravated) in the course of his employment with the respondent.

7. The only conclusion open to the Magistrate was that this case was of the X plus Y variety involving issues as to the existence of incapacity and whether or not specified treatment was received because of the claimed injury. The respondent's defence in the weekly payments proceeding admitted nothing but formal matters, the denial of D.'s claim as referred to above and the fact that a conciliation had occurred resulting in the issuing of a certificate within the meaning of s49(b)(i) of the Act. Everything else was disputed.

8. There being no evidence to support the proposition that the only issue in dispute in the weekly payments proceeding in the County Court was the question of whether or not D. suffered injury in the course of his employment with the respondent (and the only proper conclusion being that the existence of an incapacity was in issue, together with the issue of whether any specified medical treatment was received because of such an injury), the dismissal of the weekly payments proceeding in the County Court did not estop D. from pursuing his claim for compensation under ss98 and 98A of the Act. When the Magistrate referred to the question of the relationship between the injury and employment with the respondent as "effectively the main issue", if the Magistrate meant the only issue, then this approach was wrong.

BEACH J:

Introduction

1. Mr John Derks, the appellant, was employed by R & J Fibreglass Pty Ltd, the respondent, between September 1995 and 28 July 1996.

2. In Magistrates' Court proceedings issued by the appellant against the respondent in December 2006, the appellant claims to have suffered injury in the course of his employment with the respondent. The injuries claimed in the Magistrates' Court proceeding are particularised as follows:

> "Injury to the left leg and left knee.
> Injury to the right leg and right knee.
> Injury to the patello femoral joints in the right and left knees.
> Aggravation and acceleration of degenerative changes in the right and left knees.
> Injury to the lumbar spine and aggravation, acceleration and degeneration of the lumbar spine.
> Depression, anxiety and shock.
> Erectile dysfunction and loss of genitals.[1]"

3. In the Magistrates' Court proceeding, the appellant sought compensation pursuant to ss98 and 98A of the *Accident Compensation Act* 1985 ("the AC Act") "for loss of use and permanent disability of the right leg, left leg, loss of genitals and sexual organs and permanent impairment of the back". Sections 98 and 98A are the provisions providing lump sum compensation for maims and pain and suffering respectively.

4. The matter came on for hearing in August 2008. On 13 August, Wright M dismissed the appellant's claim and ordered the appellant to pay costs. His Honour dismissed the proceeding because his Honour held that the appellant was estopped from maintaining the proceeding by the earlier dismissal of a County Court proceeding between the same parties in relation to claims by the appellant pursuant to the provisions of the AC Act for weekly payments and medical and like expenses.

5. Mr Derks appeals, pursuant to s109 of the *Magistrates' Court Act* 1989 on a question of law, from the order dismissing his proceeding. For the reasons given below, the appeal will be allowed and the matter remitted for further hearing and determination in accordance with these reasons.

The prior County Court proceedings

6. In March 2001, the appellant brought two proceedings in the County Court against the respondent. The first was an application for leave to commence common law proceedings pursuant to s135A of the AC Act ("the serious injury proceeding") and the second was a claim for weekly payments and medical and like expenses ("the weekly payments proceeding").

7. On 3 October 2001, Judge Jenkins struck out the serious injury proceeding and dismissed the weekly payments proceeding.[2] No evidence was led in either proceeding. Apparently, the respondent was advised by a barrister briefed on his behalf that both cases would be lost, and accordingly he "agreed to have them dismissed".[3] In his reasons for judgment, the Magistrate records that it is not clear on the face of the record whether the Court dismissed the weekly payments proceeding of its own motion on the basis that no evidence was led or whether this was done by consent. However, nothing turns on this.[4]

8. The Magistrate's reasons for dismissing the appellant's claim relate solely to the dismissal of the weekly payments proceeding.[5] In any event, for reasons which will become apparent, even if the serious injury proceeding had been dismissed (rather than struck out), it would not have given rise to any relevant estoppel or *res judicata*. I turn now to look more closely at the weekly payments proceeding.

The weekly payments proceeding

9. In the weekly payments proceeding, the appellant sought weekly payments of compensation and medical and like expenses pursuant to the AC Act. The injury relied upon by the appellant in the weekly payments proceeding was pleaded in the following terms:

> "Injury and/or aggravation of injury to the right knee".

10. Immediately one can see that the injury in respect of which relief was claimed in the weekly payments proceeding was described in far more limited terms than the injuries particularised in the Magistrates' Court claim. However, in argument, Senior Counsel for the appellant conceded that the additional injuries pleaded in the Magistrates' Court proceeding were consequential upon the claimed right knee injury – so that if there was an estoppel in relation to the right knee claim, there were also estoppels in relation to the other injuries pleaded.

11. In the weekly payments proceeding, the appellant pleaded that:

> (a) at all material times he was employed by the respondent in the State of Victoria;
> (b) at all material times he was a worker within the meaning of the AC Act;
> (c) at all material times he was acting in the course of his employment with the respondent;
> (d) over the course of his employment with the respondent, he suffered injuries for which his employment was a significant contributing factor;
> (e) he had been incapacitated for work from 1 July 1996 and continuing;
> (f) his incapacity for work resulted from or was materially contributed to by his injuries.

12. In its defence in the weekly payments proceeding, the respondent put in issue each of the matters referred to in the previous paragraph.[6] However, the respondent admitted an allegation by the appellant that it (the respondent) had rejected the appellant's claim on the basis that the claimed injury did not arise out of or in the course of the appellant's employment with the respondent and the appellant's employment with the respondent was not a significant contributing factor to the claimed injury.[7] This was a reference to a rejection in 1997 of the appellant's claim for weekly payments ("the rejection decision"). The reason for the rejection decision was stated in a notice to the appellant as follows:

> "After careful consideration of all available information, your claim was rejected as:
> - your claimed injury did not arise out of or in the course of employment.
> - your employment was not a significant contributing factor to the claimed injury."

Attached to this document was a statement which provided further detail of the reasons for the rejection decision as follows:

> "On 19 May 1997 you were examined by Mr John Chew, general surgeon, on behalf of the authorised insurer. Mr Chew diagnosed you as suffering from a further aggravation of the chondromalachia

(sic) in the right patella.

On 26 May 1997, a circumstances investigation report from Lindalow Pty Ltd was completed, a copy of which was forwarded to Mr Chew.

Upon perusal of the report, Mr Chew issued a supplementary report dated 30 May 1997, which noted that you had telephoned your employer on Monday 1 July 1996 advising that you had injured your knee while playing with your children on wet grass on the preceding Sunday. As such, Mr Chew declared that your work was not a significant contributing factor to the aggravation of your injury.

The investigator's report corroborates this information with a statement from Cindy Elliott, clerical assistant, who spoke to you on Monday 1 July 1996.

A notation in the employer's sick leave records – '3 July – sore knee, not work related' – is further corroboration."

The issue between the parties

13. The issue between the parties is a narrow one. The appellant contends that if the dismissal of the weekly payments proceeding gave rise to any estoppel, it was no more than that the appellant was estopped from recovering weekly payments or medical and like expenses as claimed in the weekly payments proceeding. However, the respondent contends that the dismissal of the weekly payments proceeding estopped the appellant from asserting or proving that he suffered the injuries referred to in the Magistrates' Court proceeding in the course of his employment with the respondent.

The proceeding below

14. In his reasons for judgment, the Magistrate recorded that the plea of issue estoppel and/or *res judicata* had been raised by the respondent prior to trial, and that the appellant had sought to have the plea struck out some months earlier. In a ruling delivered by his Honour in March 2008, his Honour stated that he was unable to make any ruling either way on the respondent's plea in view of the limited material that had been tendered at that stage.

15. It would appear that because of his Honour's inability to make a ruling on the question of issue estoppel (due to the "limited" material), the parties embarked upon a course which involved the appellant giving evidence before his Honour and the tendering of in excess of 500 pages of material which were said to bear on the issues before his Honour below.

16. Ordinarily, one might have thought that the Court below could have resolved the issue estoppel question by a comparison of the pleadings and particulars in the weekly payments proceeding with the pleadings and particulars in the instant proceeding. However, that was not the course the parties chose to take. As a result, in resolving this appeal, it is necessary for this Court to consider the relevance and significance of the considerable body of evidence adduced below.

The decision below

17. In the decision below, the Magistrate correctly identified the issue as being what was necessarily decided against the appellant in the weekly payments proceeding. His Honour then said:[8]

"In the present case, I find that on the evidence before me, the issue of any work-related injury was necessarily decided by [the dismissal of the weekly payments proceeding]. The [appellant] acknowledged that at no time was the question of any work-related injury accepted by the [respondent] ... Any work injury was strongly disputed on the lay and medical evidence held by the [respondent] ... at the time of the rejection decision.

In fact, issues of incapacity, the non-incurring of medical expenses and other subsidiary issues were not apparently in dispute. ... [T]he question of work relationship with the [respondent] was always going to be, and always was, in dispute.

The question of work relationship to the alleged later injury with the [respondent] was *effectively* the *main* issue to be determined, having regard to the Notice of Rejection of 6 March 1997[9] and as set out in the statement of claim in [the weekly payments proceeding] and echoed in the defence [in that proceeding]." (Emphasis mine.)

18. His Honour then appears to have concluded from the fact that the issue of whether or not the appellant suffered injury in the course of his employment with the respondent was "effectively the main issue to be determined", that the dismissal of the weekly payments proceeding had determined that issue adversely to the appellant. Accordingly, it followed, in his Honour's judgment, that the appellant was estopped from re-litigating that question.

The principles to be applied

19. The starting point so far as the current analysis is concerned is the judgment of Dixon J in *Blair v Curran*.[10] His Honour said:[11]

> "A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between *res judicata* and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.
>
> Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J in *R v Inhabitants of the Township of Hartington Middle Quarter* [1855] EngR 264; 119 ER 288; (1855) 4 E & B 780, the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous."

20. Consent judgments (or judgments where no reasons are given) provide particular difficulties. This is all the more so where such a judgment has been entered for a defendant. As the learned author of Spencer Bower, Turner and Handley, *Res judicata* (3rd Edition) put it:[12]

> "Though consent judgments and orders are decisions and their operative parts binding, it may not be clear what questions were concluded. The court will examine the available evidence to ascertain the matters in dispute. Any issue which the parties recognised was the subject of the litigation and was fundamental to the judgment or order will be conclusively determined. Where, however, there are no such materials neither party is estopped from disputing anything but the actual judgment or order. The proper approach to determining the scope of a consent judgment was stated by Lord Herschell LC:
>
> > 'a judgment by consent is intended to put a stop to litigation between the parties, just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments and were to allow questions that were really involved in the action to be fought over again in a subsequent action.'"[13]

21. The issue has been more recently discussed by Goldberg J in *ACCC v Australian Safeway Stores Pty Ltd (No. 3)*.[14] In that case, his Honour said:[15]

> "Where a judgment is given in favour of an applicant or plaintiff, it is easier to determine the issues that are fundamental to the judgment than it is when a judgment is given in favour of a respondent or a defendant in respect of causes of action that require a number of elements to be established, the failure to prove any one of which will result in the claim being dismissed. In a multi element cause of action, a dismissal of the proceeding without reasons will not demonstrate which elements were not made out. The proposition is succinctly set out in Spencer Bower, Turner and Handley at pp56-57:
>
> > 'A dismissal of an action which could succeed on establishing either X or Y, is a decision negativing both, but if the action is found on X plus Y, its dismissal does not necessarily involve a decision

> as to either, since the action may have failed because X had not been established, though Y had been, or *vice versa*, or because neither had been established.'"[16]

22. In determining questions of the present kind, it will often be important to consider what material can be looked at for the purpose of ascertaining the matters that were in dispute. The pleadings in the earlier proceeding are obviously of critical importance.[17] In Spencer Bower, Turner and Handley,[18] the position is put as follows:[19]

> "It was formerly considered that the subject matter of a decision for the purposes of *res judicata* could only be ascertained from the formal judgment or order and the court could not examine 'what was said by the judges'. The previous author was in some doubt but preferred the view that the court's reasons could be considered. There were then many cases favouring the broader view.
>
> Since then the law has been settled in favour of the broader view. In *R v Humphrys* [1977] AC 146, Lord Hailsham said: 'The court will inquire into realities, and not mere technicalities', and in *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462, Brennan J said that the court would look at 'any material that shows what issues were raised and decided'. The point now seems to be assumed. Thus, in *Thrasyvoulou* [1990] 2 AC 273; [1990] 1 All ER 65; (1989) 88 LGR 217 the House considered reports of planning inspectors. In *Arnold* it held that issue estoppel was excluded because of the special circumstances but that question could not be investigated if the court were confined to the pleadings and the order.
>
> The court can consider the pleadings, particulars, evidence, the notice of appeal or cross-appeal, the reasons for judgment, the summing up, any questions put to the jury and its answers."

23. The respondent placed considerable reliance upon the words of Lord Hailsham (referred to above) that "The Court will inquire into realities, and not mere technicalities". However, it is necessary to put these words into the context in which they were stated. The words appear in the sixth proposition of a ten proposition summary of Lord Hailsham's opinion in *R v Humphrys*.[20] It is sufficient to set out the first six propositions of Lord Hailsham's summary:

> "(1) The doctrine of issue estoppel as it has been developed in civil proceedings is not applicable to criminal proceedings. It follows that the decision in *R v Hogan* [1974] QB 398; [1974] 2 All ER 142 was wrong and should not be followed. The decision in *H.M. Advocate v Cairns* [1967] SLT 165; 1967 JC 37 was correct and is applicable in England. (2) Although the civil doctrine of issue estoppel as it has been developed in civil proceedings is not applicable to criminal proceedings, there is a doctrine applicable to criminal proceedings which is in some ways analogous to issue estoppel, and has sometimes been described by that name. However, (3) the civil doctrine is based on the necessity for finality between private litigants, whereas the doctrine in criminal proceedings is based on the prohibition of double jeopardy, that is, the maxim *nemo debet bix vexari pro una et eadem causa*. It follows (4) that whereas the civil doctrine is equally applicable to either of the two civil parties, the criminal doctrine is available to the accused but not to the Crown. (5) Whereas the civil doctrine applies to all cases where an individual issue can be isolated and identified as determined, the criminal doctrine is not so limited but is primarily concerned with verdicts, and applies to verdicts which are either in form or in substance inconsistent. (6) In general, the doctrine in criminal law precludes the Crown from adducing evidence or making suggestions which are inconsistent with a previous verdict of acquittal when its real effect is determined. The doctrine is one of substance rather than form. The court will inquire into realities and not mere technicalities."[21]

24. As is apparent from the context of His Lordship's opinion, His Lordship was discussing the doctrine applicable to criminal proceedings, not the doctrine of issue estoppel as developed in civil proceedings, when he said that the Court would inquire into realities and not mere technicalities. That is not to say that when considering the question of issue estoppel in a civil proceeding, the Court should take some different approach. Few would dispute the general proposition that a Court should always inquire into realities, rather than mere technicalities.[22] However, the application of this proposition cannot be used to ignore the existence of an issue that was alive at the time of an earlier trial, merely because it was not the main issue or the issue upon which the parties focused their primary attention.

Analysis

25. In order to recover weekly payments under the AC Act, a plaintiff must establish that he or she has suffered an injury which entitles him or her to compensation under the AC Act and an incapacity for work during the relevant period. So far as medical and like expenses are concerned, a plaintiff must again establish the existence of an injury which gives rise to an entitlement to

compensation. However, what then needs to be established to recover medical and like expenses is that the relevant medical service was received because of the injury.

26. In order to be entitled to a payment of compensation pursuant to s98 of the AC Act, a plaintiff merely has to bring his or her compensable injury within the table contained in that section. A plaintiff who establishes that his or her compensable injury falls within the table in s98 has an entitlement to compensation under both s98 and 98A of the AC Act. Such a plaintiff does not have to go on and establish incapacity during any particular period or that any particular medical or like treatment was received because of the compensable injury.

27. On its face, the weekly payments proceeding was of the X plus Y variety as described in Spencer Bower, Turner and Handley and cited with approval by Goldberg J in *ACCC v Australian Safeway Stores Pty Ltd (No. 3)*.[23] That is, in order for the appellant to succeed in his claim for weekly payments, he had to establish an injury in the course of his employment with the respondent and an incapacity for work during the period in which he claimed an entitlement to weekly payments. Similarly, in order to succeed in his claim for medical and like expenses, the appellant had to establish an injury in the course of his employment with the respondent and that the relevant treatment was received because of that injury.

28. Absent some concession from the respondent, the appellant could have lost his claim for weekly payments either by failing to establish that he suffered an injury in the course of his employment with the respondent or by failing to establish a relevant incapacity for work. So far as the claim for medical and like expenses was concerned, this could have been lost by the appellant either failing to establish an injury in the course of his employment with the respondent or by failing to establish that the treatment in respect of which compensation was sought was received by the appellant because of that injury.

29. However, the respondent submits that the only live issue in the weekly payments proceeding at the time of its dismissal was the issue of whether or not the appellant suffered an injury in the course of his employment with the respondent. The respondent submitted that the Magistrate found as a fact that the only issue in dispute in the weekly payments proceeding was the question of whether or not the appellant suffered injury in the course of his employment with the respondent – and that it was open on the evidence for his Honour to so conclude. Effectively, this Court was invited to conclude that when the Magistrate referred to this issue as effectively being "the main issue" in the weekly payments proceeding, his Honour was in fact saying that it was the only issue.

30. In support of the proposition that there was evidence before the Magistrate which entitled him to conclude that the only issue in the weekly payments proceeding was the question of injury in the course of employment with the respondent, the respondent initially attempted to rely upon the fact that the appellant gave evidence before the Magistrate and that no transcript of that evidence now exists. Thus it was said that this Court was therefore not in any position to review the finding of the Court below as to what issues were in dispute in the weekly payments proceeding. However, in argument, counsel for the respondent properly conceded that the appellant could not have given any evidence as to what issues were alive in the weekly payments proceeding.[24] At best, any such evidence would have been inadmissible as hearsay.

31. So far as the documentary evidence that was tendered in the Court below is concerned, counsel for the respondent again properly conceded that much of the material which post-dates 31 October 2001 (the date upon which the weekly payments proceeding was dismissed) was not capable of identifying the question or questions in dispute at the time the weekly payments proceeding was dismissed. Nevertheless, the respondent relied upon a number of pieces of material.[25] This material was relied upon to support the proposition that the issue of whether or not the appellant was incapacitated for employment and the issue of whether or not the appellant was entitled to some compensation for medical and like expenses was not in dispute in the weekly payments proceeding. Further, it was submitted that all of this evidence (that is, all of the evidence tendered to the Magistrate and, more particularly, the evidence to which I have just referred) established that what was very much in issue in the weekly payments proceeding was a question of whether or not the appellant sustained injury in the course of his employment with the respondent.

32. Undoubtedly, a very significant issue (if not the main issue) in the weekly payments proceeding was the question of whether or not the appellant sustained injury in the course of his employment with the respondent. However, proving that this issue was a significant issue (or the main issue) in the weekly payments proceeding does not establish that there were no other issues upon which the appellant had to succeed in order to have had a judgment entered in his favour in that proceeding.

33. It was submitted by the respondent that the evidence tendered to the Magistrate (and in particular the specific pieces of evidence to which I have referred above) established that there was no dispute in the weekly payments proceeding that the appellant had an incapacity for work or an entitlement to a payment in respect of specified medical treatment for his right knee. The respondent submitted that when one examined the relevant medical reports of Dr Chew, Mr Reid, Mr Jones, Dr McIntosh and Mr McQueen, the conclusion to be drawn was that none of the relevant medical witnesses who might have been called to give evidence in the weekly payments proceeding disputed the existence of an incapacity or a need for medical treatment. The correctness of this submission can be doubted. For example, Mr Reid, in his report of 28 August 1996, stated "The [appellant's] current condition does not incapacitate him from work".[26] Nevertheless, even if all of the medical evidence produced before the Magistrate could fairly be said to show that all of the medical practitioners accepted the appellant was suffering from some incapacity or need for specific medical treatment, the question of what was actually in dispute between the parties in the weekly payments proceeding would still need to be examined. Ordinarily, one would think that in order to work out what was or was not in issue in a particular proceeding, one would look primarily (if not solely) at the pleadings (and perhaps other documents passing between the parties[27]), rather than at reports prepared by medical practitioners who might or might not have been called to give evidence had the proceeding been fought.

34. The doubtful utility of examining medical reports in order to determine what was in issue between the parties was underscored in argument when I asked counsel for the respondent if, in the weekly payments proceeding, the appellant had established an injury to his right knee in the course of his employment, whether the respondent would then have disputed incapacity and the "subsidiary issues" referred to by the Magistrate in his reasons for judgment. Counsel for the respondent said that the answer to this question was not clear.[28]

35. In support of the proposition that the only issue in dispute in the weekly payments proceeding was the question of whether or not the appellant suffered injury in the course of his employment with the respondent, counsel for the respondent referred to a note dated 14 December 2001 in the records of the appellant's general practitioner, Dr McIntosh. Self-evidently, the note was made some six weeks after the dismissal of the weekly payments proceeding. The note provides:

> "Legal issues – unable to relate to R & J Fibreglass for operation → stopped proceedings.
>
> So now trying to relate back to old Pilk's claim.
>
> Therefore continue certificates for W/C [workers compensation] until instructed by solicitor.
>
> On disability pension. ..."

36. The reference to "old Pilk's claim" is a reference to an injury suffered by the appellant to his right knee in the course of earlier employment with ACI Pilkington Glass on 22 December 1989. It is not possible to say from Dr McIntosh's note what the source of it was. Whilst it was most likely the appellant or the appellant's solicitor,[29] the note merely discloses a belief by its source in an inability to relate the need for an operation to the respondent (or employment with the respondent). The note does not purport to define what were the issues in dispute in the weekly payments proceeding.

37. Having examined all of the material, in my view it was not open to the Magistrate to conclude that the only issue in dispute in the weekly payments proceeding was the question of whether or not the appellant sustained injury in the course of his employment with the respondent. There is no substance in the respondent's arguments that the medical reports tendered before the Magistrate somehow limited the issues that were in dispute as identified in the pleadings. If the weekly payments proceeding truly was a one issue case, one would have expected the pleadings to reflect that fact or there to be in evidence communications between the parties advising that

the respondent took no issue with the existence of an incapacity or a liability to pay for specified medical treatment if the appellant's injury was shown to have occurred (or been aggravated) in the course of his employment with the respondent.

38. In my view, the only conclusion open to the Magistrate was that this case was of the X plus Y variety[30] involving issues as to the existence of incapacity and whether or not specified treatment was received because of the claimed injury. The respondent's defence in the weekly payments proceeding admitted nothing but formal matters,[31] the denial of the appellant's claim as referred to above and the fact that a conciliation had occurred resulting in the issuing of a certificate within the meaning of s49(b)(i) of the AC Act. Everything else was disputed.

39. There being no evidence to support the proposition that the only issue in dispute in the weekly payments proceeding was the question of whether or not the appellant suffered injury in the course of his employment with the respondent (and the only proper conclusion being that the existence of an incapacity was in issue, together with the issue of whether any specified medical treatment was received because of such an injury), the dismissal of the weekly payments proceeding does not estop the appellant from pursuing his claim for compensation under ss98 and 98A of the AC Act. In the light of this conclusion, it is not necessary for me to consider the respondent's submission that when the Magistrate referred to the question of the relationship between the injury and employment with the respondent as "effectively the main issue", his Honour meant the only issue. It is sufficient to say that if his Honour looked at the case on the basis that this issue was one of two or more which had to be established by the appellant in order to succeed, then this approach was wrong.

Conclusion

40. It follows, for the reasons given above, that the appeal will be allowed and the matter remitted for further hearing and determination in accordance with these reasons.

41. In paragraph 4(b) of the notice of appeal, an order is sought from this Court that "The appellant be given leave to continue his proceeding in the Magistrates' Court and have the matter referred to the medical panel as previously sought by the appellant". This is a reference to the fact that at the commencement of the proceeding before his Honour, the appellant foreshadowed an application to refer questions relating to the appellant's claim to a medical panel. It is not appropriate for this Court to consider that matter. The proceeding is to be remitted to the Magistrates' Court where the appellant can make such application as he is advised concerning the referral of any medical question to a medical panel.

42. Subject to hearing from counsel, the orders I propose to make are:

(1) Appeal allowed.

(2) The decision and orders of the Magistrates' Court made on 13 August 2008 in matter number W00118511 be set aside.

(3) The proceeding be remitted to the Magistrates' Court for further hearing and determination in accordance with these reasons.

43 I will hear counsel on the question of costs.

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[1] From the material in evidence before me, it would appear that the claimed "loss of genitals" is not a claim for actual physical loss, but rather a claim in respect of lost or impaired function.
[2] Whilst the Magistrate's reasons suggest that these events may have occurred on 31 October 2001, the County Court records in evidence disclose that they occurred on 3 October 2001.
[3] Reasons for judgment below at p 6.
[4] Cf *Chamberlain v Deputy Commissioner of Taxation* [1988] HCA 21; (1988) 164 CLR 502 at 508; 78 ALR 271; (1988) 19 ATR 1060; 62 ALJR 324 and *Houvardas v Zaravinos* [2003] NSWSC 387; (2003) 202 ALR 535 at 564 [108].
[5] See in particular p 8 of the reasons for judgment below.
[6] Some matters were denied, while others were not admitted.
[7] See paragraph 9 of the statement of claim and paragraph 9 of the defence in the weekly payments proceeding.
[8] Page 10 of the reasons for judgment below.

[9] This is the rejection decision, to which I have already referred.
[10] [1939] HCA 23; (1939) 62 CLR 464.
[11] [1939] HCA 23; (1939) 62 CLR 464 at CLR 531-2.
[12] At 39 [39].
[13] See also *Isaacs v The Ocean Accident and Guarantee Corporation Limited* (1958) 58 SR (NSW) 69 at 75; 75 WN (NSW) 48 per Street CJ and Roper CJ in eq.
[14] [2001] FCA 1861; (2001) 119 FCR 1; [2002] ATPR (Digest) 46-215.
[15] At paragraph [1152].
[16] Whilst an appeal against this decision was allowed in part in *ACCC v Australian Safeway Stores Pty Ltd* [2003] FCAFC 149; (2003) 129 FCR 339; (2003) 198 ALR 657; [2003] ATPR 41-935, that appeal did not concern the question of issue estoppel.
[17] See *Isaacs v The Ocean Accident and Guarantee Corporation Limited* (1958) 58 SR (NSW) 69 at 75; 75 WN (NSW) 48 per Street CJ and Roper CJ in Eq.
[18] Ibid.
[19] At 203 [204].
[20] [1977] AC 1 at 40-41; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857.
[21] See also *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462.
[22] Cf Kirby J in *Forsyth v Deputy Commissioner of Taxation* [2007] HCA 8; (2007) 231 CLR 531 at paragraph [53]; (2007) 233 ALR 254; (2007) 81 ALJR 662; 64 ATR 573 wherein his Honour said:
"Yet it is of the first importance for the rule of law which underpins Australia's constitutional arrangements, that technical legal arguments, if found to be valid, should ordinarily be upheld. If they have merit in law, that is normally sufficient to attract relief from a court of law."
[23] Ibid.
[24] See T29.6 – 29.19.
[25] The three page notice of rejection to which I have already referred, statements of the respondent's staff (as set out in the respondent's Court Book and the additional schedule of exhibits folder), medical reports of Dr Chew dated 19 May 1997 and 30 May 1997, a medical report of Mr B.G. Reid dated 28 August 1996, a medical report of Mr Clive Jones dated 23 March 2001, medical reports of the appellant's general practitioner Dr McIntosh dated 7 September 1994, 20 February 2000, 10 November 2002, 10 October 2004, 24 May 2005 and 1 August 2007, a note in Dr McIntosh's records dated 14 December 2001 and medical reports of Mr Andrew McQueen dated 30 July 1996, 20 November 1996 and 16 December 1996.
[26] Whilst counsel for the respondent sought to explain this opinion by saying that when Mr Reid examined the appellant on 26 August 1996 the appellant was still working, this proposition does not sit with all of the other evidence and the finding of the Court below that the appellant last worked on 28 June 1996 (see for example p 4-5 of the reasons for decision below).
[27] For example, correspondence containing admissions.
[28] T18.31 – 19.9.
[29] The notes reveal consultations between Dr McIntosh and the appellant and at least one meeting between Dr McIntosh and the appellant's solicitor (see the entry of 28 September 2001).
[30] See paragraph [21] above.
[31] The incorporation of the respondent and the fact that Commercial Union Workers Insurance (Vic) Pty Ltd was its authorised insurer.

APPEARANCES: For the appellant Derks: Mr PJ Cosgrave SC with Ms V Minz, counsel. MW Law, solicitors. For the respondent R & J Fibreglass Industries Pty Ltd: Mr MF Fleming with Mr MJ Richards, counsel. Herbert Geer, solicitors.
