Section 138 of the *Accident Compensation Act*: unwrapping the statutory claims

Wrapped in many layers come section 138 recovery actions. I want to unwrap those layers.

I will start by revisiting the building blocks of a section 138 *Accident Compensation Act (Vic)* (''ACA'') recovery action. I will then explore some issues that frequently, and perhaps not so frequently, crop up in these claims.

I should say that, section 138 claims, as they are affectionately known, will be a dying breed. For incidents from 1 July 2014 (see section 6 of the WIRCA), recovery actions will be brought under section 369 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ("WIRCA"), ushering in a new era, I suppose, of ''section 369 claims''. The material wording of the section itself is the same under the WIRCA as the ACA.

Part 1: the Operation of Section 138

The section

Sub-section 138(1) provides:

> "Where an injury or a death for which compensation has been paid, or is or may be payable, by the Authority, a self-insurer or an employer was caused under circumstances creating a liability in a third party to pay damages or that would have created such a liability if the injury or death had been caused in Victoria or that would, but for section 134A, create such a liability in respect of the

injury or death, the Authority, self-insurer or employer is entitled to be indemnified by the third party in accordance with this section."

Breaking the section down, for section 138(1) to engage, the following must apply:

1. a worker must be injured or have died;

2. compensation for that injury or death must have been paid or be payable under the ACA;

3. the compensation must be paid or payable by the Victorian WorkCover Authority ("VWA"), a self-insurer or an employer;

4. a third party must have a liability to pay damages to that injured worker or worker who died - be it actual or theoretical (thus, if an injured worker chooses not to sue, or is not permitted to sue, that does not bar a recovery action).

Sub-section 138(2) provides that, for determining whether a legal liability arises in a third party, the Court must not consider Division 8A or 9 of the ACA. Those divisions permit an injured worker to sue for damages in certain circumstances, such as when an injured worker has a "serious injury".

Obviously enough, then, a third party cannot raise a defence that the injured worker would not have a serious injury and thus it cannot have a legal liability for the purposes of section 138[1].

Nor could the third party seek to rely on a 'withdraw or bear own' or some other

[1] The position is different if the injured worker was injured in a transport accident to which the employer's WorkCover policy responds. Because section 138(2) does not provide an exception for workers who do not bring claims under section 93 of the *Transport Accident Act*, the Court of Appeal has held there is no 'legal

settlement with the worker to argue it does not have a legal liability under section 138. This is made clear by sub-section 138(4).

On the other hand, if the Court determines that the third party in a worker's damages proceeding has no legal liability to the injured worker, then axiomatically the section 138 recovery action cannot succeed against it[2]. This is because it could not satisfy the fourth limb of sub-section 138(1) set out above, that the third party have a legal liability to the worker.

Sub-section 138(3) provides what the VWA, self-insurer or employer is entitled to recover. It is the lesser of the compensation paid or payable (para a) or an amount calculated by a formula (para b), whatever is the lesser of those two amounts. I will return to the operation of sub-section 138(3) later in this paper.

What is the purpose of section 138 ACA? And a little history

Section 138 is said to trace its history from section 6 of the antiquated *Workmen's Compensation Act 1906* (UK) (HCA - Esso's case, para 13). That section provided a mechanism of recovery from an employer who had paid an injured worker compensation to then recover it from a *"stranger*". A stranger was said to be any party other than the actual employer, today's equivalent of a 'third party' (*Willis's Workman's Compensation Acts*, 13th Edition, page 89 et. seq. See also *VWA v DSG* [2008] VSCA 42 for a discussion on who a third party is).

One can see immediately the purpose of the section - to enable an employer or its insurer, commonly VWA, to recover compensation paid to an injured worker from a

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liability' to a third party when the injured worker did not obtain a Serious Injury Certificate to sue for damages under the transport accident regime: *Primary Health Care Ltd v Giakalis* [2013] VSCA 75.

non-employer who would be liable to that injured worker.

As we will see, the idea underlying the formula of section 138(3)(b) is to seek to limit a third party's liability to that which it would have been liable if the worker had sued the third party at common law.

What type of claim is a recovery action?

The High Court of Australia has confirmed that a recovery action is a creature of statute, entitling VWA (or self-insurer or employer) to seek an indemnity for past compensation payments and a declaration in respect of future potential payments (*VWA v Esso*). It is not a claim for damages or a "debt" in the common law sense of the word.

Can the VWA sue a third party in its own name?

The answer to this question is yes.

In *VWA v Concept Hire Limited & Ors* [2009] VSC 194, an issue arose about whether the VWA should have sued in its own name or whether the proceeding should have been issued in the employer's name because it too was liable to pay compensation to the injured worker.

Justice Beach accepted that the VWA was entitled to bring the proceeding in its own name given its direct liability to pay compensation to the injured worker and given the wording of section 138(1) ACA.

Since that decision, VWA is now permitted to seek recovery of the excess an employer

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[2] Subject, though, to potential arguments on the *Wrongs Act* application and issue estoppel (discussed further below).

has to pay on a compensation claim being made by an injured employee (sub-section 138(6) ACA). This would avoid an absurd situation of an employer having to also sue the third party to seek recovery of such payment or avoid the VWA suing in the name of the employer directly to recover payments by the employer and itself.

What legislation applies?

From time to time, section 138 ACA has undergone Parliamentary amendment, often following an unexpected judicial interpretation of the section.

It is important that parties look to the correct iteration of section 138, in particular in cases where a worker was injured a number of years ago.

This follows from the construction of section 138 of Vincent JA (to which Ormiston and Batt JJA agreed) in *VWA v Kenman Kandy Pty Ltd; VWA v A V Jennings Ltd* [2002] VSCA 190.

At paragraph 15, Vincent JA said this:

> "Section 138(1) confers an enforceable right, of definite and calculable extent, which arises upon the happening of the death or injury concerned, and determines the position for each of the affected parties. The right is one to be indemnified "in accordance with this section", which prima facie means the section as existing at the time the event happens".

Obviously, if Parliament were to stipulate in the transitional provisions of amending legislation that the amendments had retrospective effect, then the later provisions would apply. Otherwise, parties should look to the version of the act in force at the date of injury or death.

What is the limitation period?

It is commonly accepted in this jurisdiction that the limitation period is six years from the date that each payment of compensation is made. This is the result of section 5(1)(d) of the *Limitation of Actions Act 1958* that provides a six year limitation period for the recovery of "any sum recoverable by virtue of enactment".

The judicial authority on this point is *VWA v Manildra Pty Limited & Ors* [1999] VSC 220. Justice O'Bryan rejected VWA's submissions that section 138 ACA creates a code to which no limitation period attaches as section 138 is silent on limitation periods.

Interestingly, his Honour relied on a line of cases that spoke of the statutory cause of action in a claim under section 138 as arising "as often as the person liable to pay compensation is called upon to pay compensation and in fact does so". This line of authority was inferentially supported by the High Court in *VWA v Esso* (decided two years after *VWA v Manildra*) when Gleeson CJ, Gummow, Hayne and Callinan JJ said this at paragraph 18:

> "Some of the indemnity provisions in worker's compensation statutes have been interpreted as conferring distinct rights of action against the tortfeasor which arise when each compensation payment is made by the employer or insurer and which will succeed if the other conditions laid down in the provision are satisfied. It may be taken, for present purposes, that s 138 is such a provision."

Thus, it appears that *VWA v Manildra* is good law, despite being decided before *VWA v Esso*.

Does Part X of the *Wrongs Act* apply?

I noted earlier that, because of sub-section 138(2), a third party cannot say, for example, that the worker would not have obtained a Serious Injury Certificate and thus it could not be liable in a section 138 recovery action, because those provisions of the ACA are excluded.

However, in *VWA v Jones Lang Lasalle (Vic) Pty Ltd* [2012] VSC 412, the third party sought to invoke the provisions of Part X of the *Wrongs Act 1958 (Vic)*. Part X of the *Wrongs Act* relates to modifications of the common law test of negligence following the Ipp Reforms.

Justice Beach held that Part X of the *Wrongs Act* did apply to determining whether a third party had a legal liability under sub-section 138(1) because section 138(1) and (2) were silent on its application.

Section 45(1) of the *Wrongs Act* provides that claims for "*damages*" under Part IV of the ACA are excluded, but not statutory claims. As noted earlier, because a section 138 ACA action is not a claim for damages, it appears that *Jones Lang Lasalle* is 'good' law.

This could have the unusual effect of a third party being held liable to an injured worker under the ACA provisions, to which Part X of the *Wrongs Act* does not apply, still escaping liability in a section 138 action because of the operation of Part X of the *Wrongs Act*.

If the Defendant is not seeking to rely on the provisions to create a statutory defence,

then it should not have to plead those sections in its defence[3]. It would be a different story if it relied on a defence such as section 59 of the *Wrongs Act* (a section relating to the standard of care of professionals, such as doctors).

Bizarrely, and highlighting the confusion caused by the application of Part X of the *Wrongs Act*, in *VWA v Probuild & Ors* [2016] VSC 102, the Court sought to apply Part X of the *Wrongs Act* relating to contributory negligence (section 62) to whether the injured worker was contributorily negligence. In my view, such application is erroneous.

Sub-section 138(1) is about the liability of the defendant to the worker and does not appear to include determining contributory negligence of the worker.

Moreover, given contributory negligence is assessed as part of Factor X under section 138(3)(b) of the *Accident Compensation Act*, to which Part X of the *Wrongs Act* is specifically excluded, it appears that the *Wrongs Act* should have no application to such a determination.

In other words, in my view, Part X of the *Wrongs Act*, so far as it applies to contributory negligence, has no application in a section 138 dispute.

Can a third party be sued pursuant to breaches of the OH&S Regulations?

Claims against third parties are not limited to claims in negligence. On the plain reading of section 138, it relates to a legal liability the third party would have to the injured worker.

Indeed, Justice Jack Forrest in *VWA v Stoddart (Vic) Pty Ltd* [2015] VSC 149 found a

[3] See for example *Sydney South West Area Health Service v MD* [2009] NSWCA 343.

third party liable for breaches of OH&S regulations, despite it being neither employer nor host employer.

In that case, Stoddart, a specialist roofing company, was contracted to install a roof of a home (the Basset Drive house). The injured worker was a labourer employed by Rowville Way, the employer. The Employer did 80% of its work for Stoddart.

The injured worker fell from the roof which was not fenced or guarded at that part of the roof, in breach of OH&S regulations relating to prevention of falls from heights above two metres.

Stoddart argued it was not bound by the regulations as it did not have sufficient control over the injured worker's work.

His Honour disagreed with Stoddart's propositions and said this at paragraph 73:

> "In my opinion, the evidence clearly demonstrates that Stoddart 'entered the field', so to speak, in its management and direction of the guarding of the roof. It exercised, in a practical sense, control over the risk of a fall which was the hazard facing Rowville Way's employees:
>
> (a) Stoddart knew that Rowville Way's employees (and only Rowville Way employees) would be working on the roof;
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> (b) Rowville Way's employees were on the roof pursuant to its contract with Stoddart;
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> (c) Stoddart contracted directly with Access Guard for the provision of the guardrail;

(d) Stoddart personnel (in Mr Sardone) attended the site and marked up the location of the guardrail prior to sending the plans on to Access Guard;

(e) Stoddart directed Access Guard as to the placement of the guardrail;

(f) Stoddart, through Mr Sardone, was the point of contact if Access Guard had any concerns or issues about the guardrail placement;

(g) Stoddart was in charge of the placement of the guardrail throughout the course of construction...; and

(h) Stoddart had overall management of the roof construction and was the authority on this aspect of the work on the Basset Drive house."

In the result, his Honour held Stoddart to be 50% liable under Factor X, which Factor I will analyse further below.

Part 2: the recovery

What is being recovered under section 138?

From time to time, disputes arise about the payment of compensation to an injured worker.

In years gone by, it might have been assumed that a third party ought not to be able to look behind the payments the VWA made in compensation to avoid liability.

In *VWA v Jones Lang Lasalle (Vic) Pty Ltd* [2012] VSC 412, Beach J considered whether the third party could look behind the payments made.

There, the third party argued VWA should not have paid compensation to the injured

worker because the incident did not occur in the course of the injured worker's employment.

VWA argued that, once compensation had been paid to which section 138 applied, the third party could not go behind those payments as section 138 was engaged.

Albeit only in obiter, Beach J, having held that the third party was not negligent, said VWA must be liable to pay the compensation to be entitled to recover it under section 138 [para 59].

Having said that, cases like *VWA v Michaels* [2009] VSCA 261 demonstrate how rare it would be that injury did not occur in the course of employment. In that case, a university lecturer was injured in a book store when poring over books in preparation for lecturing at university. The Court held that the injured person was injured in the course of his employment.

The next issue that sometimes arises is whether the third party's liability relates to the payments of compensation.

In *VWA v The Australian Steel Company (Operations) Pty Ltd* [2015] VSC 58, the third party disputed whether the compensation payments related to an injury to the worker while the worker carried out work on the third party's premises. This was because the worker had suffered an aggravation injury doing work at a later date.

His Honour Kaye JA held that the compensation paid related to the incident at the third party's premises and was therefore claimable. His Honour did, however, adjust the amount recoverable under the formula in section 138(3)(b) to take into account the aggravation injuries for which injuries the third party had no liability.

In *VWA v Clarke* [2015] VCC 62, the worker suffered two injuries, the first with a host employer and the second with his 'actual employer'. He put in two claim forms. He was paid separately under the two claims.

VWA sued the host employer relating to the first incident. But VWA faced a problem; the payments for the first incident were statute barred. VWA therefore argued the injuries from the second incident were traceable to the first incident.

Judge Morrish disagreed. From paragraph 20, her Honour said:

> "[Counsel for the VWA] *submits that the injuries sustained in both accidents gave rise to two Claim Forms, yet resulted in concurrent obligations in the VWA to pay the worker. In oral submission, he argued that the obligations "fused" or merged. No authority was cited for this doctrine of "fusion".*
>
> *In any event, Mr Griffin did not explain how a claim for damages can arise in respect of an action that is statute barred, even if there was "fusion" as postulated.*
>
> *There is no evidence to support Mr Griffin's submission that "the two accidents involve the same injury". This assertion of fact is beyond the four corners of the agreed facts. In any event, with all due respect to Mr Griffin, it makes little sense to say that harm caused in separate accidents, in separate circumstances, on separate days, caused by different people can constitute "the same injury". True, similar consequences may flow from each discrete accident, but that does not make them "the same injury" in my view. Accordingly, I will proceed on the basis that the first accident resulted in one compensable injury and the second accident resulted in another compensable injury.*"

While Judge Morrish raised an issue about the first claim being statute barred, this

appears somewhat to be at odds with the limitation period running from the date of each payment of compensation, as discussed in *VWA v Manildra Pty Limited & Ors* [1999] VSC 220.

On different facts, facts that draw a clear link between the two incidents, it seems this case may be distinguishable. Section 138 goes to the liability a defendant would have had at common law for the injuries the worker sustained for which compensation has been paid. The section itself does not state it must relate to a particular claim. And at common law:

> "*a negligent tortfeasor does not always avoid liability for the consequences of a plaintiff's subsequent injury, even if the subsequent injury is tortiously inflicted. It depends on whether or not the subsequent tort and its consequences are themselves properly to be regarded as foreseeable consequences of the first tortfeasor's negligence.*[4]*"*

It therefore arguably follows that a third party could have a liability for compensation paid under a separate claim, if that injury links back to the first injury.

The lesser of compensation paid and the formula amount

Earlier, I mentioned that, once liability in the third party is established, VWA is entitled to the lesser of the amount of compensation paid or payable and the amount calculated in accordance with a formula.

In effect, the formula amount either limits the third party's liability to less than compensation paid or, in most cases, creates a ceiling of the third party's liability on future potential payments.

To use an example, compensation payments may be $100,000. If the formula amount comes out at $80,000, then $80,000 is the Defendant's total liability. If the formula amount comes out at $120,000, then the Defendant is liable to pay VWA $100,000 and to indemnify VWA up to a ceiling of $20,000 on future payable amounts. It will then have discharged its liability to VWA.

In most cases, then, the third party looks to the formula in an effort to limit its liability.

The Formula

The formula provides that:

1. the Court must calculate the worker's notional common law assessment of damages under Factor A;

2. the Court must then take from the notional assessment any amount the Defendant has paid the injured worker in the injured worker's claim under Factor C; and

3. the Court must then divide Factor A, less Factor C, by the extent to which the third party would be liable at common law under Factor X. In other words, any liability of the employer, other third party or contributing negligence must be stripped away to determine the third party's contribution.

In this way, if the Factor A notional assessment of damages was $500,000, the third party had paid the injured worker $100,000 under Factor C and its contribution was 70%, the formula amount would be $280,000 ($500,000 - $100,000 = $400,000 x

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4 *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37; (1985) 156 CLR 522.

70/100).

If, in that example, VWA had paid $200,000 in compensation, the third party would be liable to pay that $200,000 and liable to pay up to $80,000 in future payable compensation.

Factor A

Factor A is the notional common law assessment of a worker's damages. It explicitly excludes any damages provisions in the ACA or *Wrongs Act*.

It follows that the discount rate is 3% (*Todorovic v Waller* (1981) 150 CLR 402) and includes claims for general damages and *Griffiths v Kerkemeyer* damages for gratuitous care without the caps that apply under the *Wrongs Act*.

It does not include *Fox v Wood* claims because they only relate to a worker's damages claim.

Factor C

- What is Factor C?

As noted, Factor C is the amount the third party paid to the injured worker, if any, in an injured worker's claim.

There is County Court authority to the effect that it is not the amount that all defendants to a section 138 action paid the worker. The formula is applied separately to each defendant to the suit: *VWA v Bruck Textiles & Anor* [2010] VCC 463.

- Is material relating to Factor C discoverable?

The answer here is yes, according to Judge O'Neill of the County Court in VWA *v*

National Foods & Ors [2009] VCC 0305.

In that case, VWA sought a copy of the release in the worker's settled proceeding and documents relating to what each defendant in the worker's proceeding paid the worker. The Defendants refused to provide such documents because they claimed the documents were confidential.

His Honour held that, as the documents were relevant to the proceeding, to the formula amount and to considerations of settlement, documents relating to the amount paid by the defendants and their respective contributions were discoverable.

- When should the Court be told Factor C?

In my experience, the Court is usually informed of Factor C at the close of the evidence, enabling the Court to calculate the formula amount. This accords with paragraph 17 of *v National Foods & Ors* [2009] VCC 0305 referred to above.

Recently, in a Supreme Court case before his Honour Justice Bongiorno of *VWA v Lindsay Transport* (judgment reserved), in which I appeared for VWA, the Defendant argued Factor C should not be disclosed to the Court until after the Court had determined all other issues. The Defendant argued that it was not relevant as it was not an issue in dispute.

I submitted that (a) Factor C was relevant to the issues in dispute and needed to be calculated (b) the trial was not a two-part trial, with the formula needing to be calculated by the judge to dispose of the dispute and (c) there was nothing privileged in the Factor C amount.

Justice Bongiorno made a ruling whereby he accepted my submissions on behalf of

VWA and the Defendant was ordered to disclose the amount of Factor C at the end of the evidence.

- What if Factor C has not been paid yet?

In *VWA v Direxa Engineering Australia Pty Ltd* (Ruling) [2013] VCC 1959, the third party argued that it may have to pay an amount to the injured worker if such worker brought a claim against it.

The third party therefore argued that the Court should make a conditional order that, should the Defendant have to make a payment to the injured worker, the formula amount should be re-calculated.

The VWA argued the appropriate order would be 'liberty to apply'.

Judge O'Neill accepted VWA's submissions and said that the formula calculation could be reviewed under 'liberty to apply' should it become necessary.

<u>Factor X</u>

- How is Factor X to be determined?

President Winneke in *Esso Australia Ltd v VWA & Anor* and Ashley JA in *VWA v Carrier Air Conditioning Pty Ltd* [2006] VSCA 63 at para 59 have held that contribution and contributory negligence for the purposes of Factor X ought to be determined in the same fashion as contribution and contributory negligence is determined under the *Wrongs Act*.

Under section 24 of the *Wrongs Act*, the Court is required to determine contribution on the basis of what is "just and equitable having regard to the extent of that person's

responsibility for the damage".

- Who bears the burden of proof?

I have not been able to find any authority on who bears the burden of proof for Factor X. This is particularly relevant when it comes to the calling of evidence about the liabilities of potential other parties, including the employer.

The section itself simply says the third party is liable to pay an amount calculated by the formula, including the amount of its liability to the extent it contributed to the worker's injuries.

However, it is usually the third party who seeks to limit its liability under the formula and pleads in its defence that its liability ought to be limited by the contribution of others. Also, contribution under the *Wrongs Act* is a fight between defendants. It would also be an unusual course for the Court to apportion the third party's liability to other potential contributors not identified by the third party in its defence.

It seems, therefore, arguable that the burden falls on the third party.

- Is a determination of Factor X easily appealable?

It has been held that the determination of Factor X is a discretionary determination of the judge: *Hazeldene's Chicken Farm Pty Ltd v VWA* [2005] VSCA 185.

The authority of *House v R* (1936) 55 CLR 499 makes it plain that, where a judge is exercising a discretionary power, even if it is exercised inadequately, it may only be reviewed if the decision is "*unreasonable or plainly unjust*".

Consequently, it may well be difficult to upset a trial judge's determination on Factor X

in an appellate court.

- Should the Court be told of the contribution in the settlement of a worker's proceeding / is such evidence admissible in the section 138 trial?

This issue came up in *VWA v BlueScope Steel* [2013] VSC 562.

VWA sought to adduce evidence that the Defendant had paid a particular contribution to the worker's proceeding which settled out of Court, presumably because the contribution in the worker's settlement was significant. VWA argued it was relevant to an admission of liability and contribution in a similar way to *Ansett Australia Ltd v Taylor* [2006] VSCA 171.

Justice Kaye said it was of little to no probative value because there are any number of reasons a party may seek to settle a worker's proceeding and further held it would be an undue waste of the Court's time to hear evidence about the reasons the third party settled the worker's proceeding on that basis. He therefore disallowed any evidence of contribution from the worker's proceeding.

- Is contribution as determined by a Court in the worker's proceeding binding in VWA's proceeding?

There is 'loose' authority for the proposition that the Court's determination of contribution in a worker's proceeding cannot be disturbed in the later related section 138 action: *Bourke v Hassett & Ors; Bourke v VWA & Anor* [1998] VSCA 24 at paragraphs 49 and 50. This is consistent with the principle that courts should not be determining the same dispute twice, either as an issue estoppel or as an abuse of the court's processes.

Interestingly, however, in *VWA & Ors v Latrobe Shire Council* [1998], Judge Strong ruled that VWA could rely neither on the jury's verdict against the defendant in the worker's matter, nor on contribution. This was on the basis that VWA was not a party to the worker's proceeding. It appears that case settled, but it otherwise would have led to the absurd result of a judge having to determine what a jury had already determined in the worker's matter. Such a result cannot be right.

Looking at the issue a little deeper, there are three elements to an issue estoppel as follows:

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel was final;
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies[5].

Usually, 1. and 2. would be satisfied in a related-section 138 proceeding, except where Part X of the *Wrongs Act* would warrant a different result in the section 138 recovery action in a relevant case, as discussed above.

Factor X might also need adjusting if the worker did not sue all parties who might be liable for the purposes of Factor X.

If there are new issues to be added to the dispute, then it makes sense that those issues should be determined.

But the sticking point is 3, as VWA was not a party to the proceeding.

To get around that problem, I moot the following arguments:

a. the 'estoppel' VWA would seek to rely on is one between worker and third party – both parties to the worker's proceeding;

b. VWA was privy to the worker's proceeding where it was the insurer of the employer.

The fallback argument would be that it would be an abuse of process for a party to ask the Court to determine the same dispute all over again. This might also have *Civil Procedure Act 2010* implications.

The High Court recently looked at the authorities on issue estoppel and abuse of process and said this at paragraph 40:

> "…it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel. Similarly, it has been recognised that making such a claim or raising such an issue can constitute an abuse of process where the party seeking to make the claim or to raise the issue in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel."

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5 *Carl Zeiss Stiftung v Rayner & Keeler Ltd [No 2]*

Part 3 – the application of other provisions to section 138 claims

Use of evidence from the worker's proceeding

To overcome the *Harman* principle (*Harman v Secretary of State for the Home Dept* [1983] 1 AC 280) that evidence in one proceeding cannot be used in another, Parliament enacted section 48A of the ACA (section 269 of the WIRC Act).

This section enables the use of evidence in one proceeding to be used in the other proceeding. So, for example, if a worker gives evidence in the worker's own proceeding, which then settles, that evidence may be used in the recovery action.

This section extends even to any "claim" and includes claims or proceedings for "compensation, damages or other payment" under the ACA or WIRC Act and is thus broad in its scope.

Use of interrogatories from the worker's proceeding

Given evidence of a third party in a worker's proceeding in the form of interrogatories is treated as sworn evidence in that proceeding, and in light of section 48A ACA, there appears to be no basis on which a Defendant can resist VWA tendering its answers to interrogatories into evidence.

This is particularly relevant in a case where the third party chooses not to lead any evidence in the section 138 proceeding and the worker's proceeding settled before trial.

Subpoenaing witnesses

While evidence may be used from a worker's proceeding, the evidence still needs to be

admissible. This may require witnesses coming to court to authenticate the evidence or to be available for cross-examination.

It is therefore critical that all relevant witnesses be subpoenaed to give evidence in the section 138 proceeding. One should always assume that the worker's proceeding will settle before trial for this purpose.

Is VWA entitled to claim interest?

This was an issue that meandered its way to the High Court of Australia (*VWA v Esso Australia Ltd* [2001] HCA 53; 207 CLR 520).

As noted earlier, it is accepted that a section 138 action is a statutory indemnity claim, not a claim for damages or a debt as the term is understood at common law.

This created a legal quandary.

At common law, there were only narrow exceptions where a party was entitled to interest following a successful suit for the recovery of money (at para 23).

The *Supreme Court Act 1986 (Vic)* therefore enacted a provision entitling parties to interest under section 60, which provided:

> "The Court, on application in any proceeding for the recovery of debt or damages, must, unless good cause is shown to the contrary, give damages in the nature of interest [as determined by the Penalty Interest Rates Act 1983]"

If a section 138 action is not a claim for debt or damages, on what basis should the third party have to pay interest once VWA has established it is liable to indemnify it for payment of compensation?

The Court's way through the quandary was to interpret the phrase as a "composite phrase", saying at paragraph 41:

> "It [section 63] embraces any proceeding in which a claim for money is made, in contrast to declaratory relief and claims for specific forms of relief such as mandatory injunctions, charging orders and orders for specific performance..."

It is added that, unlike the *Supreme Court Act*, the *County Court Act 1958 (Vic)*, sub-section 74(4) provides that "every judgment debt shall carry interest at the rate…[fixed by the *Penalty Interest Rates Act 1983*]", a far broader wording. In every case I have been involved in, the parties have accepted that VWA is entitled to interest following a judgment in its favour in a section 138 claim.

How is interest calculated?

Although I am not aware of any appellate authority on how interest is calculated, in my experience, and following his Honour Judge Coish's approach in *VWA v Sakata Rice Snacks Australia Pty Ltd*, interest is calculated on payments already made to the date of judgment in the following way:

1. the Court is provided the compensation paid at the date of issue;
2. the Court is then provided the compensation paid at the date of judgment;
3. the Court then calculates the average of compensation paid over the time between the date of issue and date of judgment;
4. using that figure, the Court applies the relevant penalty interest rate to calculate the amount of interest.

By way of example, if compensation was $50,000 on date of issue and $100,000 on judgment, the average is $75,000. If the average penalty interest rate over a 12 month period was 10% p.a., then interest is $7,500.

Does Order 33 of the Rules of Court apply to a section 138 proceeding?

It seems clear that, in a Supreme Court matter, Order 33 does not apply. However, in the County Court, the Rules specifically state that Order 33 does apply to any proceeding under the ACA.

Order 33 of the Supreme Court Rules apply to proceedings for damages. As noted earlier, a section 138 claim is not a claim for 'damages' (a legal maxim could also apply - *expressio unius est exclusio alterius* - where one rule specifically mentions the act and is silent in the other, the Court ought to assume is does not to apply on the other, although they are two separate Rules of Court).

If that is correct, it means all expert evidence, including medical reports, are subject only to the provisions of Order 44 of the Rules of the Court. Different rules on the admissibility of evidence apply under Order 44, including that, unless the Court otherwise orders, a party may tender into evidence a report served on it by the other side without calling the expert to give evidence (Rule 44.04).

Part 4 - Costs issues

Section 138 proceedings give rise to a host of interesting costs issues. I will set out the principal issues below.

Enforcement of Offers of Compromise

The Rules of the Court provide that, unless the Court otherwise orders, a party who beats its Offer of Compromise should be entitled to indemnity costs from certain dates, depending on the offer and the Court in which the offer is served.

In *VWA v The Australian Steel Company (Operations) Pty Ltd (No 2) (Costs)* [2015] VSC 81, Kaye JA held that VWA was entitled to rely on its Offer of Compromise of $73,000 plus costs when it achieved a verdict of around $170,000 plus an indemnity for additional compensation not exceeding some $82,000.

The Defendant sought to argue the Court should "otherwise order" because at the time of the offer, some interlocutory steps were outstanding, so the Defendant could not assess its potential liability. Justice of Appeal Kaye rejected that argument as he found that the Defendant was in possession of a significant amount of information at the time.

In that case, the Defendant then sought to apportion costs because the Defendant succeeded in its defence to one of VWA's causes of action. That argument was also rejected[6].

It is noted that section 278 of the WIRC Act, which limits costs awards, has no application to section 138 proceedings because section 278(1) excludes its operation

for claims brought by the VWA, a self-insurer or employer.

No issues were raised about the uncertainty of the Offer of Compromise, notwithstanding the potential complications of attempting to calculate a third party's liability under the formula. In the appropriate case, that could be an arguable point, with parallels to *Waterfall v Antony (No 2)* [2012] VSC 467.

***Calderbank* offers**

It is worth remembering that the leading decision in this State on *Calderbank* offers is a section 138 decision, *Hazeldene's Chicken Farm Pty Ltd v VWA (No 2)* [2005] VSCA 298.

Suffice it to say a VWA *Calderbank* offer was relied on, successfully, to obtain indemnity costs against a third party who unreasonably rejected VWA's offer.

Bullock Orders

In *VWA v Kagan Bros Consolidated Pty Ltd* [2011] VSCA 91, VWA successfully sued one defendant, failing against the other.

At paragraph 25, the Court said this:

> "We can discern nothing in the assessment called for by s 138 which would preclude the making of a Bullock order as between 'third parties' against whom an apportionment is sought, if the circumstances justify it..."

At paragraph 26, the Court then described the circumstances in which an order would be appropriate:

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6 For a recent discussion on apportionment of costs, see *Dual Homes Pty Ltd v Moores Legal Pty Ltd & Anor (Costs Ruling*) [2016] VSC 113 per John Dixon J.

> "The conduct of the unsuccessful defendant must be such as to make it fair to impose some liability on it for the costs of the successful defendant. Such conduct will be found where the unsuccessful defendant tells the plaintiff in one way or another that it should look to the successful defendant for its remedy or has done something to induce the plaintiff to maintain its suit against the successful defendant."

However, the Court went on to hold that this was not an appropriate case where the unsuccessful defendant should pay the costs of the successful defendant because it had not pointed to the other defendant or induced it to sue the successful defendant.

Scale of costs

Under section 50(3) ACA, a Court is enamoured to awards costs on a Magistrates' Court scale in the County Court if the proceeding could have been determined in the Magistrates' Court. This sub-section seems to be directed to statutory benefit claims issued in the County Court.

However, in a decision of *VWA v Goodman Fielder Consumer Foods Pty Ltd (No 2)* [2014] VCC 1722, Judge Murphy held that that section extended to section 138 claims.

Using that decision, in *VWA v Twentieth Super Pace Nominees Pty Ltd* [2015] VCC 1074, the Defendant argued that the appropriate scale of costs should be the Magistrates' Court scale.

Judge Morrish, after an exhaustive review of the provisions, ruled that section 50(3) (or section 278(5) of the WIRC Act) could not apply to a section 138 ACA claim. Thus, she held that the appropriate scale of costs was the County Court scale.

This sub-section does not appear to have been tested at appellate level.

There may also be arguments, depending on the amount VWA recovers, about which scale should apply. For example, it is open to a Supreme Court to apply a County Court scale if a Plaintiff does not receive judgment for an amount of $100,000 or more (Rule 63.24 of the *Supreme Court Rules*. If a VWA proceeding is transferred to the Supreme Court to join with the worker's proceeding, then Rule 63.24 does not apply.). However, in most cases, VWA issues proceedings or proceeds together with a worker's proceeding. It would seem a harsh decision to rule a lower scale applies in such circumstances.

Costs in a worker's proceeding

In *VWA v Roman Catholic Trusts Corporation for Archdiocese of Melbourne & Anor* [2013] VSC 26, the Defendant argued that VWA, who unsuccessfully sued the Defendant, should pay the Defendant's costs of the worker's proceeding (i.e. non-common costs).

This was argued on the basis that VWA was standing behind the worker and encouraging her to proceed against the Defendant.

Justice John Dixon held that, because VWA had not actively engaged in the worker's proceeding and the Defendant could not point to any additional costs it incurred in the worker's proceeding because of VWA's conduct, it was not entitled to non-common costs.

However, it appears arguable that at least some of the costs incurred by the Defendant in a worker's matter are also costs it incurred in VWA's proceeding and therefore additional costs may be recovered from VWA on the basis that the costs are "common

costs".

Part 5 – other issues

Can an employer indemnify a third party for the purposes of section 138 ACA?

Since amendments to the ACA in 2010, a third party cannot rely on a contract in which the employer contractually indemnifies the third party for the third party's liability under section 138.

Sub-section 4A provides:

> "A term of any contract that requires the employer or has the effect of requiring the employer to indemnify the third party in respect of any liability that the third party has or may have under this section is void. "

There might be an argument that this section does not cover contractual provisions requiring the employer to take out public liability insurance for the third party. I am not aware of such an argument raising its head yet. It appears, however, that such a contractual provision could well be held to be void because that, in effect, would be a contract requiring the employer, through its public liability insurer, to indemnify the third party in respect of any liability.

What happens if the worker loses in the related proceeding, but appeals the judgment?

As regards *VWA v Roman Catholic Trusts Corporation for Archdiocese of Melbourne & Anor* [2013] VSC 26, the worker (Hudspeth) failed before the jury. That meant VWA's claim failed too as there was no legal liability of the third party to the worker.

However, by the time the Court came to finalise VWA's proceeding, Hudspeth had issued an appeal. VWA argued that it would prejudicial to it if the Court entered judgment against it in those circumstances - if Hudspeth successfully appealed, it would then seek to re-agitate its claim against the Defendant.

Like the decision of Judge O'Neill relating to Factor C in *VWA v Direxa Engineering Australia Pty Ltd* (Ruling) [2013] VCC 1959, Justice Dixon held that he would permit liberty to apply to VWA to re-agitate its claim if Hudspeth successfully appealed, on giving written notice to the Defendant of that course.

What orders are sought on a successful recovery action?

Generally speaking, where VWA has successfully sued a third party, the third party is ordered to pay compensation payments to date, together with interest, and a declaration is made that the third party is liable to indemnify VWA up to the ceiling amount based on the formula calculation for any payable amounts.

Should a VWA proceeding be heard before a worker's?

The answer to this would seem to depend on the case.

If it is not clear that the worker will ever issue proceedings, then VWA is left with little choice but to prosecute its claim, as Judge O'Neill recognised in *VWA v Direxa*. Courts are also increasingly anxious, under case management principles, to keep claims moving through the system.

On the other hand, it seems inappropriate to force a VWA recovery proceeding on ahead of a worker's, forcing a worker to give evidence and asking a Court to determine issues that may affect, or bind, a Court in a subsequent worker's proceeding.

Part 6 – do's and don'ts

Some do's and don'ts in section 138 proceedings:

Do:

- assume the worker's proceeding will settle before trial, but the section 138 action will not;
- carefully analyse the formula in section 138(3)(b);
- remember to calculate interest, especially when making, accepting or rejecting settlement offers;
- subpoena all necessary witnesses; and
- be ready to argue a plethora of potential costs issues once judgment is handed down.

Don't:

- be put off by the formula - it is not that difficult, despite the 'scary looking' mathematical equation;
- assume the formula will limit a third party's liability - often it does not;
- assume evidence in the worker's proceeding that settles before trial is admissible evidence, without complying with the *Evidence Act* provisions relating to admissible evidence;
- assume the jury's verdict against a third party is the end of the recovery proceeding - Part X of the *Wrongs Act* could change things; and

- assume settlement offers will not bite if the other side gets a better outcome than the offer.

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Peter Hamilton has an extensive practice in all areas of personal injury, professional/medical negligence, property damage and general insurance law.

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Peter read with Aine Magee QC. His senior mentor was David Curtain QC

Selection of recent cases

Supreme Court trial - jury verdict $835,000 (led by John Richards QC)

Supreme Court trial - unled - VWA v Linsday Australia

Supreme Court application - unled - privilege dispute - Skarbek v The Society of Jesus

Supreme Court trial - jury - successful defence (led by Michelle Britbart QC)

Serious Injury application - unled - Bilgin v TAC

Coroners Court - inquest into the death of Mr Pezzimenti

Other publications include

* The Renaissance of Public Liability Claims: Occupiers' Liability and the Australian Consumer Law