**Issue Estoppel – Can decisions of lower courts and tribunals**

**be binding on the Supreme Court?**

**Australian Insurance Law Association**

Justice Robert Pearce, Supreme Court of Tasmania

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I will commence with a disclaimer. Any views expressed in this paper are without the benefit of submissions from counsel and are not to be taken in any subsequent proceedings to express a concluded view. In any event, what is intended of this paper is to raise awareness of an issue rather than express opinions about the law.

The object of this paper is to alert you to the prospect that a decision of a lower court or tribunal may bind the Supreme Court, and *vice versa*, and to explain how and why that may happen. There are a range of tribunals and courts in Tasmania which come to mind:

* the Magistrates Court (in its various forms);
* the Workers Rehabilitation and Compensation Tribunal;
* the Motor Accidents Compensation Tribunal;
* the Resource Management and Planning Appeal Tribunal; and
* various professional disciplinary bodies.

Why is this issue relevant to insurers? The question of whether a decision in one tribunal is binding on another is relevant because the answer to it may affect how insurers and their advisors make forensic or tactical decisions about matters in that tribunal for which their insured or client may later attract some other liability in a separate proceeding. It can work both for and against a party. For example, an advisor may consider that it is possible to obtain an inexpensive, quick and binding determination of an issue in an inferior tribunal, and so avoid the need, at least in part, for later more expensive and time consuming proceedings. It can present a saving in time and cost. On the other hand, a party may wish to avoid the possibility of a determination which may prejudice their position in other proceedings. For example, a party facing a potentially substantial damages claim may wish to avoid the risk of an adverse finding in some preliminary or less important proceedings that may be binding. Recognition of that risk allows decisions to be made about somehow resolving them, or otherwise devoting appropriate resources to them with the future in mind.

I will, first, refer to and explain the legal principle underlying the issue. I will then explain when it may operate, and then apply the principles to the situations I have referred to.

**Issue Estoppel**

The issue I address is known as issue estoppel. An estoppel is a principle of law that prevents a person from doing something that person would otherwise be entitled to do. An issue estoppel prevents a party from having the same issue determined more than once. There are obvious reasons for this. It prevents the undesirable situation of different courts and tribunals coming to different and conflicting conclusions on the same issue and encourages the finality of judgments. Issue estoppel operates to prevent, in some circumstances, an issue of fact or of law already determined being raised again later to pursue some other claim or cause of action. It is different to *res judicata* which relates to the cause of action itself being finally determined. Issue estoppel concerns issues necessarily involved in the cause of action.

Dixon J explained this in the High Court in 1939 in *Blair v Curran* [[1]](#footnote-1):

"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 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."

An extension to issue estoppel is what has become known as an "*Anshun* estoppel". It is a reference to the decision in *Port of Melbourne Authority v Anshun Pty Ltd* [[2]](#footnote-2) which is authority for the proposition that if matters were not raised by a party in prior proceedings but which could and should have been raised, that party may be precluded from raising the issue in future proceedings. I mention it in passing but the focus of this paper is issue estoppel.

Three preconditions must exist before issue estoppel will apply. The following requirements are derived from the speech of Lord Guest in *Carl Zeiss Stiftung v Rayner & Keeler Ltd[[3]](#footnote-3)*:

(1) the first decision was final;

(2) the same question has been decided; and

(3) the same parties, or at least parties with the same legal interest, are the same.

**Finality**

Was the first decision final? The doctrine of issue estoppel extends to the decision of any tribunal which has the jurisdiction to finally decide a question arising between the parties: *Administration of Papua New Guinea v Daera Guba[[4]](#footnote-4)*. That case concerned the decision of a board established by legislation in Papua New Guinea in the 1970s to determine questions of ownership of land. The High Court said that the question is not whether the tribunal is exercising judicial or administrative power but whether the order is final. A final order is one which is final and conclusive on the merits. It is to be distinguished from an order of an interlocutory character: *Kuligowski v Metrobus[[5]](#footnote-5)*. The fact that an appeal lies from the decision does not make it any less final*[[6]](#footnote-6)*.

*Kuligowski* was a workers compensation case. A person under the WA legislation called a review officer had power to make determinations about disputed claims for compensation. He made findings that a worker had recovered from an injury and that certain other injuries did not arise from his employment and the question was whether there was an issue estoppel for later common law proceedings. Although no issue estoppel arose, for other reasons, the seven members of the High Court, in a joint judgment, found that the decision was final because it was one which was completely effective unless and until it should be rescinded, altered or amended: *Somodaj v Australian Iron And Steel Ltd[[7]](#footnote-7)*. That was so, although the decision was made pursuant to a speedy and informal process, the review officer was not bound by the rules of evidence, and lawyers were largely excluded.

In 2011 in *Tasmania Feedlot Pty Ltd v Stagg[[8]](#footnote-8)* Evans J gave as an example of an interlocutory order, which is a determination that is not final, an application for an extension of time. That case concerned an application by a worker to extend the two year time limit for making an election to make claim for damages under s138AA of the *Workers Rehabilitation and Compensation Act* as it then was. The first application was dismissed by consent because of an absence of evidence that the worker had 30 per cent impairment. However the worker, later armed with more evidence about his condition, made a second application. Evans J found that there was no issue estoppel because the law allows more than one application for an extension of time to be made. As a result, the dismissal of the first application was not a final determination of any issue between the parties.[[9]](#footnote-9)

The issue of finality has been considered in two recent decisions of the High Court. It seems to me that the decisions have somewhat narrowed the notion of finality. The first is *Maurice Blackburn Cashman v Brown[[10]](#footnote-10)*. Ms Brown was a salaried partner at Maurice Blackburn in Melbourne who claimed to have been bullied at work. She made a claim for permanent psychiatric impairment. WorkCover accepted that she had an injury arising from her employment but a dispute arose about the degree of her impairment. The dispute was referred to a medical panel which determined her psychiatric impairment at 30 per cent. That gave her the right to sue for damages because it meant that she had a "serious injury" within the meaning of that term in the legislation. She then sued for damages and in those proceedings the defendant denied that she had been injured at all, or at least the extent of her injury. She asked the court to rule that her employer was estopped from calling evidence or putting arguments that were inconsistent with the decision of the medical panel. She asserted that the employer should be estopped from arguing that she did not have a serious injury and that she did not have a psychological injury arising from her employment. The High Court found that there was no issue estoppel, even though the workers compensation legislation said that the decisions of the panel were final and binding. It did so largely based on a proposition that the legislation itself, properly construed, contemplated that steps taken under the Act were irrelevant to later common law proceedings. The Court reasoned that the panel decision was final but only for the purposes of the workers compensation legislation and the finality of the decision did not extend beyond that statutory context.

Ms Brown's case was applied last year in *Wingfoot Australia v Kovak[[11]](#footnote-11)*. This is another Victorian case. Mr Kovak suffered a neck injury at work. He claimed workers compensation and also applied for leave to sue at common law in the County Court. A medical panel determined questions in the workers compensation proceedings and the question was whether it created an issue estoppel in the application for leave. Again, the High Court found it did not because any finality of the panel's opinion was confined to proceedings under the Act and it had no continuing legal consequence beyond that.

I will return later to the issue of issue estoppel and workers compensation proceedings in Tasmania.

**The same question**

The second precondition to the existence of an issue estoppel is whether the same question has been decided? I referred earlier to the 1939 decision in *Blair v Curran*. That was an appeal to the High Court from a judgment of Justice Clarke in the Supreme Court of Tasmania arising from questions concerning the will of the late George Adams. George Adams was the founder of Tattersalls. He made a fortune originally from running sweeps on horse races. He died in 1904. In his will he provided that the sweep business was to be held by his trustees and the profits divided into shares and then paid to certain beneficiaries or their surviving spouse. In 1907 a judge in NSW made a ruling about the meaning and effect of these provisions. Then, in 1939, a widow of a beneficiary died and issues about the will arose in proceedings in Tasmania. The proceedings involved different causes of action but, when the case got to the High Court, Dixon J found that an issue estoppel arose because the two proceedings involved the same issue. Dixon J said at 531:

"The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion ...

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. … In the phraseology of *Coleridge* J. in *R v Inhabitants of the Township of Hartington Middle Quarter[[12]](#footnote-12)*, 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."

His Honour, referring to another authority, then said[[13]](#footnote-13):

"In the phraseology of Lord Shaw, 'a fact fundamental to the decision arrived at' in the former proceedings and 'the legal quality of that fact' must be taken as finally and conclusively established. But matters of law or fact which are subsidiary or collateral are not covered by the estoppel".

*Blair v Curran* and other authorities were applied by Holt AsJ in 2006 in *Cooper v Forestry Tasmania[[14]](#footnote-14).* His Honour pointed out that issue estoppel arises not only in respect of the final conclusion, but extends to matters which were necessary to decide and which were actually decided as the groundwork for the conclusion, but not to only evidentiary facts. He also referred to a passage of the judgment of Barwick CJ in 1968 in *Ramsay v Pigram[[15]](#footnote-15)*, requiring "that precise matter has already been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties. The issue thus determined, as distinct from the cause of action in relation to which it arose, must have been identical in each case."

Each case will therefore require a careful consideration of what issue the first tribunal was determining and what findings were a legally indispensable part of that determination. An estoppel may arise even if the judgment is by consent, depending on if it can be established what has been necessarily determined by it[[16]](#footnote-16).

An example of where the question is not the same is a criminal proceeding and a civil proceeding where the standard of proof is so obviously different. Another common example leading to the conclusion that an issue is not the same is where a finding contains a temporal element. In those circumstances an issue estoppel will arise if and only if the circumstances at the time of the second proceedings are precisely the same as they were at the time of the original decision.

* In *O’Donel v CMR for RD Transport[[17]](#footnote-17)* the High Court determined that a decision as to the cause of a worker's blindness at one time was not binding upon a decision as to the cause of his blindness at a later time.
* *Kuligowski* is another example. He was a bus driver injured at work. He twisted his ankle at work in March 1994. In December he exacerbated the injury, and in April 1995 his ankle gave way resulting in an injury to his knee. After April 1995 a doctor certified that he was unfit for work and Metrobus commenced paying workers compensation. Metro later disputed Mr Kuligowski’s entitlement to further compensation. A review officer determined that Mr Kuligowski was not unfit for work and ordered that the weekly payments cease. Mr Kuligowski then sued in the District Court for damages at common law. The High Court found that the finding that the original injury had recovered was a separate issue to whether Mr Kuligowski had instability in his ankle at the time he received the knee injury. Therefore the finding of the review officer did not operate as issue estoppel.
* A finding that a person is totally and permanently incapacitated at a particular time does not create issue estoppel as to whether the person will be totally incapacitated at a future time[[18]](#footnote-18).
* A finding that the appellant was fit to carry out full time employment at a particular time did not create an issue estoppel as to whether the appellant would remain in that condition[[19]](#footnote-19).
* On the other hand, a finding in common law claim that a worker’s injuries had not caused him to be incapable of work did create an estoppel on the issue of incapacity for work in subsequent workers compensation proceedings, when there was no suggestion that the worker’s condition had changed since the earlier proceedings[[20]](#footnote-20).

A situation will sometimes arise that persons are exposed to proceedings of a regulatory or disciplinary nature before a professional or vocational board or tribunal. Such cases usually involve allegations of "professional misconduct" or "unprofessional conduct" or "unsatisfactory professional conduct". It is sometimes the case that such persons may also be exposed to claims for damages for which they may be insured.

**Privity**

Issue estoppel will only arise if the first determination involves the same parties, or at least parties with the same legal interest. A decision involving A and B cannot bind C. In cases of multiple parties all those involved in the issue in dispute, not necessarily all the parties in the case, will be bound. It will also include third parties in cases where they are directly concerned with that dispute, for example indemnity or apportionment, and also where an order has been made that they are bound by the result of the proceedings. It will also include any party intervening in the proceedings.

Importantly for present purposes, it also includes any party with the same legal interest. In the authorities this is referred to as the "privy" of the party. It will, for example, include the estate of a deceased person where the estate is suing in right of the deceased. It may also include an insurer. It is usually the case that actions involving insurers are conducted in the name of the insured. Occasionally insurers have a right to sue. An employer's right of contribution or indemnity from third parties under the *Workers Rehabilitation and Compensation Act* 1988[[21]](#footnote-21) is an example. Rights of recovery given to the MAIB[[22]](#footnote-22) are another. In such cases the insurer's interest may be different, and different questions are to be resolved, but the possibility of an issue estoppel is always to be borne in mind.

**Special circumstances**

There is some English authority for the proposition that an issue estoppel will not operate if "special circumstances" exist[[23]](#footnote-23), such as new evidence, or a change in the law. The authority has not been applied in Australia and is said to rest on "uncertain foundation"[[24]](#footnote-24).

**Application of principle**

You will now be alive, I hope, to the prospect of when an issue estoppel may arise. I do however want to mention a couple of specific examples.

A commonly cited example of issue estoppel arises in proceedings arising from a motor vehicle accident. The same negligent act causing both property damage and personal injury gives rise to two separate causes of action. However the preponderance of authority is that a decision that one driver has breached the duty of care owed to another driver in an action for property damage creates an issue estoppel in a subsequent action between them for damages for personal injury suffered in the same incident, and *vice versa*.[[25]](#footnote-25) This will apply to decisions made by the Magistrates Court under the *Magistrates Court (Civil Division) Act* 1992. The Magistrates Court has jurisdiction to determine actions for both property damage and personal injury. Most often it deals with claims for property damage. Such claims involve determination of responsibility for a collision, including any issue of apportionment and contributory negligence, including those brought by an insurer under a right of subrogation. It is very likely to give rise to an issue estoppel in respect to an action for damages for personal injury, often involving a much greater amount, arising from the same collision. It will not, it seems, extend to decisions made on a Minor Civil Claim[[26]](#footnote-26). That is because the legislation provides that "The determination of an issue in a minor civil claim does not prevent the parties from again litigating the same issue in different proceedings based on a different claim."[[27]](#footnote-27) The meaning of the words "based on a different claim" are a little unclear to me, but seem to be intended to cover the difference between a claim for property damage and a claim for personal injury. How they apply in other circumstances is to be determined.

One particular situation I have been asked to address is the *Motor Accidents (Liabilities and Compensation) Act* 1973, under which the Motor Accidents Compensation Tribunal is established[[28]](#footnote-28). The Tribunal has power to determine a referral from a decision of the MAIB, including whether or not a person is to be treated as a person within a class of persons to whom scheduled benefits may be paid and the right of a person to be paid any scheduled benefit[[29]](#footnote-29). Benefits are payable to those who suffer personal injury resulting directly from a motor accident. Thus, the Tribunal may be called upon to determine whether there has been a motor accident, whether there has been a personal injury and whether the injury results directly from the accident[[30]](#footnote-30). None of those questions involve a determination of liability in tort, but of course tort liability necessarily involves questions of causation and injury. Subject to the principles I have outlined, a determination of the Tribunal is a potential source of issue estoppel. I can find no statutory modification of that principle although those who work intimately in this area may be aware of something that I am not.

Another situation I have been asked to address involves disputed claims for workers compensation. Such claims are referred to the Workers Rehabilitation and Compensation Tribunal. Thus, the Tribunal may be called upon to decide:

* whether a person is a worker, that is, working under a contract of service[[31]](#footnote-31);
* whether an injury has been suffered[[32]](#footnote-32);
* whether the injury arises out of or in the course of employment[[33]](#footnote-33);
* whether an injury results in incapacity or death[[34]](#footnote-34);
* whether injury results in total or partial incapacity for work[[35]](#footnote-35).

All of those questions are a potential source of issue estoppel subject to the principles I have explained.

My attention has been drawn also to the provisions concerning the statutory restriction on awards of damages which were amended in 2010. This picks up on the *Maurice Blackburn* case to which I said I would return. The Tasmanian Act provides that, except as otherwise provided, the payment or an entitlement to the payment of compensation in respect of an injury does not affect the right to obtain damages in respect of that injury[[36]](#footnote-36). The Act restricts the right to claim damages against an employer independently of the Act if "the injury was caused by the negligence or other tort of, or a breach of contract or statutory duty by, an employer".[[37]](#footnote-37) A person may not commence proceedings for an award of damages unless a threshold requirement of a 20 per cent whole person permanent impairment is met[[38]](#footnote-38). Whether the threshold is met is to be determined by the Tribunal, which may refer the question of the degree of impairment to a medical panel. Does an issue estoppel arise from such a decision? I do not presently see how the Tribunal would be called on to determine whether there is negligence or breach of statutory duty. The Tribunal's function is limited to determining the degree of impairment. And as to that I would doubt that its finding would bind the Supreme Court in a damages claim, but I may be wrong. However, there are other issues that are necessarily involved in the threshold determination under s138AB(2) and (3), namely whether:

* there has been an injury to a worker;
* the injury is one for which compensation is payable under the Act, that is, that it arises out of or in the course of employment[[39]](#footnote-39);
* the injury causes a permanent impairment of at least 20 per cent of the whole person.

The application of the decision to the Tasmanian legislation requires careful consideration. I may at some stage be called upon to deal with it, and so I do not express a concluded view. The legislation in Tasmania is not the same as the legislation in Victoria dealt with by the High Court in *Maurice Blackburn*. However, if the result reached in *Maurice Blackburn* applies in Tasmania, no issue estoppel would arise from a determination about whether a worker has at least a 20 per cent whole person impairment that would bind the Supreme Court in a damages claim, either as to whether an injury occurred or the effects of the injury. It remains to be seen whether the same applies to the questions involved in a Tribunal determination of the original claim for compensation.

Finally, I mention again decisions of the various professional tribunals. My preliminary view is that findings of such tribunals that a lawyer, doctor, psychologist or builder is guilty of unprofessional conduct or professional misconduct is unlikely to give rise to an issue estoppel in a claim for damages for negligence or breach of contract, because a different issue is being determined.

**Conclusion**

The aim of this paper has been to inform you about issue estoppel and tell you when and why it may apply. Armed with that information you may better recognise the possibility that it may arise and take time to consider what you may do, either to take advantage of an opportunity or guard against a trap, perhaps by returning to this paper and using it as a starting point for a more detailed consideration.

1. (1939) 62 CLR 464 at 531 – 532 [↑](#footnote-ref-1)
2. (1981) 147 CLR 589 at 599 [↑](#footnote-ref-2)
3. [No 2] [1967] 1 AC 853 at 935 [↑](#footnote-ref-3)
4. (1973) 130 CLR 355 at 453 [↑](#footnote-ref-4)
5. (2004) 220 CLR 363, at 375 [↑](#footnote-ref-5)
6. *Kuligowski* at 375 [25]. [↑](#footnote-ref-6)
7. [1963] HCA 50; (1963) 109 CLR 285 [↑](#footnote-ref-7)
8. [2011] TASSC 48 [↑](#footnote-ref-8)
9. In some circumstances an order in an interlocutory proceeding can be "final" so as to constitute an issue estoppel: *De Gelder v Rodger* [2014] NSWSC 872 [↑](#footnote-ref-9)
10. (2011) 242 CLR 647. Distinguished in *Withyman v New South Wales* [2013] NSWCA 10, [2013] Aust Torts Reports 82-124 [↑](#footnote-ref-10)
11. (2013) 303 ALR 64 [↑](#footnote-ref-11)
12. (1855) 4 E. & B. 780, at p. 794 [119 E.R. 288, at p. 293] [↑](#footnote-ref-12)
13. At 532 [↑](#footnote-ref-13)
14. [2006] TASSC 65 [↑](#footnote-ref-14)
15. [1968] HCA 34; (1968) 118 CLR 271 at 276 [↑](#footnote-ref-15)
16. *Tasmania Feedlot Pty Ltd v Stagg* [2011] TASSC 48 at [17]; *Marshall v Prescott (No 3)* [2013] NSWSC 1949 [↑](#footnote-ref-16)
17. (1939) 59 CLR 744 [↑](#footnote-ref-17)
18. *AMP Workers Compensation Services Ltd v Chalkley* [1998] VSC 29 [↑](#footnote-ref-18)
19. *Waddington v Silver Chain Nursing Assn* (1998) 20 WAR 269 [↑](#footnote-ref-19)
20. *United Construction Pty Ltd v Maketic* [2003] WASCA 138 [↑](#footnote-ref-20)
21. S134 [↑](#footnote-ref-21)
22. *Motor Accidents (Liabilities and Compensation) Act* 1973, s28B and s28C [↑](#footnote-ref-22)
23. *Arnold v National Westminster Bank PLC* {1991} 2 AC 93, per Lord Keith at 107. His Lordship referred to Wigram VC in *Henderson v Henderson* [1843] EngR 917; (1843) 3 Hare 100 at 114-115. [↑](#footnote-ref-23)
24. *O'Toole v Charles David Pty Ltd* [1991] HCA 14; 171 CLR 232 at 258, per Brennan J. See also Callaway JAin *Linsley v Petrie* [1998] 1 VR 427 at 449 and Murray ACJ in *Squires Transport Pty Ltd v Turnor* [2004] WASCA 245 at [5]. More recently, in *Cassegrain v Gerard Cassegrain & Co Pty Limited* [2013] NSWCA 454, it was assumed but not decided that there may be exceptions to the application of an issue estoppel in special circumstances: see at [96]-[98]. Refer also to the discussion in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [2006] NSWCA 322. [↑](#footnote-ref-24)
25. *Tuifino v Warland* [2000] NSWCA 110; 50 NSWLR 104 at [27]; *Charafeddine v Morgan* [2014] NSWCA 74. There is authority to the contrary in *Linsley v Petrie* {1998} 1 VR 427. [↑](#footnote-ref-25)
26. See *Magistrates Court (Civil Division) Act* 1992, Part 5, Division 4. In such proceedings the court is not bound by the rules of evidence, may proceed by inquiry, with expedition and little formality and technicality. [↑](#footnote-ref-26)
27. *Magistrates Court (Civil Division) Act* 1992, s31AG. Estoppel*[Section 31AG of Part 5 Inserted by No. 53 of 2003, s. 11, Applied:25 Sep 2003]*  [↑](#footnote-ref-27)
28. S12 [↑](#footnote-ref-28)
29. S28(2) and (3) [↑](#footnote-ref-29)
30. S23. See also s2(4) [↑](#footnote-ref-30)
31. S25(1)(a) and s3. [↑](#footnote-ref-31)
32. S25(1)(a) [↑](#footnote-ref-32)
33. S25(1)(a) [↑](#footnote-ref-33)
34. S67 [↑](#footnote-ref-34)
35. S69 [↑](#footnote-ref-35)
36. S133(1) [↑](#footnote-ref-36)
37. Part X Division 2. [↑](#footnote-ref-37)
38. S138AB (2) and (3) [↑](#footnote-ref-38)
39. The reference to "the injury" in s138AB(3) relates back to the injury referred to in s138AB(2). [↑](#footnote-ref-39)