

## In the Supreme Court of Canada

BETWEEN: Workers' Compensation Board of British Columbia

AND: F.E. Kovach

AND: G.S. Singh

AND: Attorney General of British Columbia

APPEAL NO.: 25784

DATE: October 16, 1997

CORAM: L'Heureux-Dubé Sopinka and Iacobucci JJ.

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Upon the applications of the Workers' Compensation Board of British Columbia and Dr. G.S. Singh for leave to appeal to this Court from the decision of the British Columbia Court of Appeal dated December 2, 1996, quashing the Board's Certificate issued under s. 11 of the *Workers Compensation Act*, R.S.B.C. 1979, c. 437, it is ordered that the matters which are the subject of the said judgment are hereby remanded to the Court of Appeal of British Columbia to be reconsidered and dealt with in accordance with this Court's judgment in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, S.C.C. appeal no. 24913, released August 28, 1997.

Sur demandes présentées par la Workers' Compensation Board (la "Commission") de la Colombie-Britannique et le D' G.S. Singh en vue d'obtenir l'autorisation d'appeler à notre Cour de la décision de la Cour d'appel de la Colombie-Britannique datée du 2 décembre 1996, annulant le certificate délivré par la Commission en application de l'art. 11 de la *Workers Compensation Act*, R.S.B.C. 1979, ch. 437, il est ordonné que les questions faisant l'objet du jugement de la Cour d'appel de la Colombie-Britannique soient renvoyées à ce tribunal pour réexamen et décision conformément à l'arrêt de notre Cour *Pasiechnyk c. Saskatchewan (Worker's Compensation Board)*, C.S.C. No 24913, rendu le 28 août 1997.

J.C.S.C.  
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## In the Court of Appeal for British Columbia

BETWEEN: FRANCES ELIZABETH KOVACH Appellant (Petitioner)  
AND: G.S. SINGH and THE WORKERS' COMPENSATION BOARD  
OF BRITISH COLUMBIA Respondents (respondents)  
AND: HEALTH EMPLOYERS' ASSOCIATION OF BRITISH COLUMBIA  
Intervenor

Before: The Honourable Mr. Justice Donald  
The Honourable Madam Justice Newbury  
The Honourable Madam Justice Proudfoot

S.B. Stewart and  
S.M. Katalinic Counsel for the Appellant

J.M. Lepp Counsel for the Respondent, Dr. G.S. Singh

R.M. Powers and  
S.A. Nielsen Counsel for the Respondent,  
Workers' Compensation Board

C.L. Woods Counsel for the Intervenor, Health  
Employers' Association of British Columbia

Place and Date of Hearing Vancouver, British Columbia  
February 26, 1998

Place and Date of Judgment Vancouver, British Columbia  
May 28, 1998

Written Reasons by: The Honourable Madam Justice Newbury  
Concurred in by: The Honourable Madam Justice Proudfoot  
Dissenting Reasons by: The Honourable Mr. Justice Donald (Para. 23)

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## **Reasons for Judgment of the Honourable Madam Justice Newbury (Madam Justice Proudfoot concurring):**

[1] On December 2, 1996, we issued reasons for judgment in this matter, which have now been reported at (1996) 84 B.C.A.C. 176. At paras. 28-35 thereof we relied in part on a decision of the Saskatchewan Court of Appeal in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* [1995] 7 W.W.R. 1. Subsequently, the Supreme Court of Canada allowed the appeal from the Court of Appeal's decision in that case, for reasons reported at [1997] 2 S.C.R. 890. The respondents in the case at bar had meanwhile sought leave to appeal this court's decision, and on October 16, 1997, L'Heureux-Dubé, Sopinka and Iacobucci JJ. ruled as follows:

Upon the application of the Workers' Compensation Board of British Columbia and Dr. G.S. Singh for leave to appeal to this Court from the decision of the British Columbia Court of Appeal dated December 2, 1996, quashing the Board's certificate issued under s. 11 of the Workers' Compensation Act, R.S.B.C. 1979, c. 437, it is ordered that the matters which are the subject of the said judgment are hereby remanded to the Court of Appeal of British Columbia to be reconsidered and dealt with in accordance with this Court's judgment in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, S.C.C. Appeal No. 24913, released August 28, 1997.

Accordingly, we heard argument on this point, with the assistance of counsel for the intervenor Health Employers' Association of British Columbia, who had not been represented in the original appeal.

## **Analysis**

### **Jurisdiction**

[2] The facts of *Pasiechnyk*, and the reasoning of the Saskatchewan Court of Appeal, were summarized in our earlier reasons at paras. 28-30. It is noteworthy that the privative clause at s. 22(1) of the Saskatchewan statute (S.S. 1979, c. W-17.1) is very similar to its British Columbia counterpart, at s. 96(1) of R.S.B.C. 1979, c. 437 (the "Act"). The "in lieu" provisions of the Saskatchewan statute, on the other hand, differ somewhat from those of British Columbia. Sections 167 and 168 of the Saskatchewan Workers' Compensation Act provide as follows:

167. The right to compensation provided by this Act is in lieu of all rights of action, statutory or otherwise, to which a worker or his dependents are or may be entitled against the employer of the

worker for or by reason of any injury sustained by him while in the employment of the employer.

168. Any party to an action may apply to the board for adjudication and determination of the question of the plaintiff's right to compensation under this Act or as to whether the action is one barred by this Act, and that adjudication and determination is final and conclusive.

In British Columbia, s-s. 10(1) provides that the provisions of Part 1 are in lieu of any right of action founded on a breach of duty of care or other cause of action to which a worker may be entitled against (*inter alia*) any worker in respect of personal injury arising out of the course of employment, where the breach was caused by a worker or employer arose out of and in the course of employment. Section 11 states that where an action based on a personal injury is brought:

. . . the board shall, on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this Act and, without limiting the generality of the foregoing, may determine whether

(a) a person was, at the time the cause of action arose, a worker within the meaning of this Part;

(b) injury, disability or death of a worker arose out of, and in the course of, his employment; . . .

*and shall certify its determination to the court.*  
[Emphasis added]

[3] As noted in our earlier reasons, counsel for the Board and Dr. Singh contended in their written submissions to us in late 1996 that there was a "fundamental difference" between the two statutes. At that time Mr. Lepp argued:

In Saskatchewan, it is the Board, and not the courts, that determines whether an action is barred. In British Columbia, the Board may only certify that a person is an employer, or a worker, and that the injury arose out of the employment relationship. *It is then for the courts to determine whether or not certification is a bar to the action.*

If the Saskatchewan legislation had been the same as that in British Columbia, then the Board would have issued a certification but could not have barred the action. That would have been for the court and, presumably, it would have allowed the lawsuit to proceed. To that extent, the *Pasiechnyk* case may be an example of when courts in British Columbia will not bar an action following a certification. In other words, our courts may agree that the capacity in which a person is sued is paramount to the finding the person happens to be an employer. [Emphasis added]

[4] In our earlier reasons, we suggested that the difference pointed out by Mr. Lepp seemed “more apparent than real” and that the effect of ss. 10 and 11 of the British Columbia Act was that where a worker was injured by another worker and the injury arose “out of and in the course of employment”, her cause of action was superseded or effectively barred. Thus, we said, “once the Board issues a determination under s. 11 to that effect, any further determination by the court is on the face of the statute unnecessary.” (para. 32)

[5] In the course of argument in the most recent hearing, however, counsel for the Board advised the Court that an application under Supreme Court R. 18A had in fact been brought in the court below requesting a determination of whether Mrs. Kovach’s action was in fact barred under s. 10(1), but that that application had been adjourned pending the outcome of this proceeding to determine the validity of the Board’s certificate. Further, he said, it would be open to a court to find that an action is not barred even where the Board has issued an affirmative certificate under s. 11 in respect of the incident giving rise to that action. He had no instructions as to what position the Board would take on the R. 18A application in Mrs. Kovach’s case, but suggested it was possible the Board would decide as a matter of policy not to bar her action for medical negligence and to see the lawsuit proceed despite her status and that of Dr. Singh as “workers” for purposes of the Act. In this regard, Mr. Power argued, the Act was distinguishable from its Saskatchewan counterpart, and the comments of the Board’s appeal division in their reasons in Mrs. Kovach’s case could be explained. The division said:

Any arguments that medical malpractice or professional negligence go beyond what is contemplated in section 10(1) of the *Act* are arguments to be made to the Court, not to the Appeal Division. As set out above, the Appeal Division only determines the status of the parties under s. 11 of the *Act*. The Court determines what effect that has on the legal action. Thus, any issue as to the interpretation and application of section 10(1) of the *Act* in this matter is not within the jurisdiction of the Appeal Division.

[6] I suspect that Mr. Powers' submission took the other parties somewhat by surprise, since as we stated at para. 7 of our previous reasons it appeared to be accepted that "the filing of the certificate [issued by the Board under s. 11] effectively prohibited any further proceedings in Mrs. Kovach's action against Dr. Singh." Ms. Woods on behalf of the Employers' Association met the point directly by suggesting that s. 11 is simply a "rubber stamp" provision under which the court *must* declare an action barred once the Board has issued a certificate in respect thereof. In this regard, she noted the decision of this court in *Smith et al. v. Vancouver General Hospital* (1981) 31 B.C.L.R. 358, which rejected arguments that s. 96 of the Act was in "potential conflict with the function of the judge" or that it was unconstitutional because it purported to confer jurisdiction on the Board contrary to s. 96 of the *B.N.A. Act of 1867*. Carrothers J.A. concluded for the Court that a determination by the Board under s. 11 did not constitute "interference" in the judicial process but rather "a determination whether the action is to take place at all". In his analysis, the Board was "not concerned with the tort, merely the compensation. Section 11 is not concerned with the wrongdoing, but merely with the status of the parties under the scheme. Section 11 is part of the scheme of the statute and part of the function of the board in carrying out that scheme." (at 362)

[7] *Smith* was not a case of judicial review, but the Court's comments were markedly similar to those made by Sopinka J. for the majority in *Pasiechnyk* in rejecting the argument that s. 168 of the Saskatchewan statute (roughly equivalent to s. 11 of the British Columbia Act) should be interpreted narrowly because of the inherent jurisdiction of superior courts. Sopinka J. observed:

This argument mischaracterizes the nature of the provisions at issue here. Section 168 does not give the Board the power to "direct" the Superior Court; it *simply gives the Board the authority to answer a question about whether the action is statute-barred*. In this context, it is significant that the Act does not speak of staying actions before the Superior Court, but rather, abolishes rights of action, as discussed below. Thus the effect of the respondents' submissions would be to impair the power of a provincial legislature to abolish common law rights of action by according them constitutional protection under s. 96 of the *Constitution Act, 1867*. [at para. 19; emphasis added]

The Court in *Pasiechnyk* also cited several higher authorities as illustrating consistent holdings by past courts that "the question of whether the statutory bar applied to an action was finally committed to the board." For example, Sopinka J. noted at para. 31 of *Pasiechnyk* that in *Alcyon Shipping Co. v. O'Krane* [1961] S.C.R. 299:

...the Court rejected the submission that the Board could determine whether a defendant was an “employer” in the administration of the Act but that the court could determine the matter independently. Judson J. found in *Dominion Cannery v. Costanza*, [1923] S.C.R. 46 a recognition of the exclusive jurisdiction of the Board. He said at pp. 304–5:

As far as I know, this principle has never been in doubt since this decision. If it is departed from it will involve a serious breach in the administration of the *Workmen's Compensation Acts* across the country.

[8] His Lordship made these comments under the heading “History and Purpose of Workers’ Compensation”, which in turn formed part of the majority’s “functional and pragmatic” analysis of workers’ compensation schemes. This approach de-emphasizes the wording of the statute (and particularly the privative clause) in question and brings to the forefront the court’s view of the larger purposes of the legislation and its workings. For this reason, I doubt that the answer to the questions raised by this case lies in a comparison of the detailed provisions of the Saskatchewan and British Columbia statutes. In any event, the “final and conclusive” wording of s. 168 of the Saskatchewan statute also appears in s. 96(1) of the British Columbia *Act*.

[9] Returning, then, to the functional analysis undertaken by the Court in *Pasiechnyk*, I note that after reviewing the earlier authorities on the purposes of workers’ compensation and the effectiveness of the bar to actions, Sopinka J. stated:

The bar to actions is not ancillary to this scheme but central to it. If there were no bar, then the integrity of the system would be compromised as employers sought to have their industries exempted from the requirement of paying premiums toward an insurance system that did not, in fact, provide them with any insurance. [at para. 27]

In the case at bar, of course, the situation is reversed: a medical practitioner seeks to shield himself from professional liability for which he is (assumedly) otherwise insured, thus exposing the scheme to risks arising from the doctor-patient relationship rather than the employee-employer relationship which the scheme is designed to cover.

[10] Under the headings “Purpose and Role of the Board” and “The Expertise of the Board”, Sopinka J. in *Pasiechnyk* summarized the structure of the Saskatchewan statute, the substantive provisions of which are very similar to those of the British Columbia *Act*. I infer that like this court in the case at bar, the Supreme Court had little or no

evidence before it as to the actual operations of the workers' compensation scheme. Certainly the Court's conclusion that the Saskatchewan board had "very considerable expertise in dealing with all aspects of the workers' compensation system" appears to be based solely on the fact that half of the appointees represent employers and the other half represent workers, and that the legislation imposes on the board "the general duty of treating workers and their dependants in a fair and reasonable manner." The Court appears to have endorsed the approach taken in *Dominion Cannery Ltd. v. Costanza* [1923] S.C.R. 46 at 53, where Idington J. noted:

The past experience of the members of the board, no doubt was sufficient guide and we should at least give them credit therefor, and knowledge, by this time of the Act, superior, I imagine, to ours.

With respect, one wonders whether this fulfils the functional and practical analysis mandated by the Court in cases as *U.E.S., Local 298 v. Bibeault* [1988] 2 S.C.R. 1048. To "imagine" or assume superior expertise merely because board members are given broad powers does not in my opinion take one very far in functional terms.

[11] Sopinka J. in *Pasiechnyk* then turned to consider "The Problem Before the Board" and noted the three provisions of the Saskatchewan statute that bar actions, namely, ss. 44, 167 and 180. After noting the particular definitions of "employer", "worker", and "injury" set forth in the Act, his Lordship noted that "[t]he concept of being 'in the course of his employment' is central to a worker's eligibility for compensation: an injury is not an 'injury' for the purposes of the Act unless it arises out of and in the course of employment." (para. 39) In what I regard as the determinative passage of the majority judgment, he then continued:

Essentially, then, the question before the Board on an application under s. 168 is *whether the plaintiff is eligible for compensation, and whether the defendant is immune from suit by virtue of being a contributor to the workers' compensation system*. In both cases, the Board is passing on a matter that relates intimately to the purposes and structure of the workers' compensation system, and that is expressed in terms whose meaning is inseparable from their meaning elsewhere in the Act.

There can be no question that the question of eligibility for compensation is one that is within the Board's exclusive jurisdiction. It is also clear upon examination that the issue of whether an action is barred is equally within the Board's exclusive jurisdiction. *It would undermine the purposes of the scheme for the courts to assume jurisdiction over that question. It could lead to one of the problems that workers'*

*compensation was created to solve, namely, the problem of employers becoming insolvent as a result of high damage awards. The system of collective liability was created to prevent that, and thus to ensure security of compensation to the workers. Individual immunity is the necessary corollary to collective liability. . . .*

In view of the above, the issue as to whether the proposed action is barred is one that is committed to the Board for final decision and is not reviewable unless it is patently unreasonable. [at paras. 41–3; emphasis added]

[12] In the case at bar, counsel for the intervenor and the Board argued that if the tribunal did not have the jurisdiction to determine whether all of Mrs. Kovach's injuries (including those allegedly arising as a result of Dr. Singh's negligence) arose out of and in the course of her employment, and if her action against Dr. Singh were not barred, the purposes of the scheme would be similarly undermined. I remain unconvinced, however, that workers' actions based on medical malpractice are required to be barred in order to protect the efficient functioning of the workers' compensation scheme. To the contrary, it seems to me that the integrity of the system will be compromised if professionals are able to look to the scheme to pay compensation for their negligent acts, rather than to have to resort to the insurance normally purchased by them, often in accordance with the rules of the self-governing professions. Certainly there was no evidence in the case at bar that the "historic trade-off" between individual immunity and collective liability was intended to extend to cases of professional malpractice. The "problem of employers becoming insolvent as a result of high-damage awards" referred to by Sopinka J. in *Pasiechnyk* does not exist because doctors pay for and provide their own coverage, and patients who are injured by reason of doctors' negligence are normally entitled to assume they may have access to that coverage should the need arise. The proposition that a worker can be denied her legal cause of action against a negligent practitioner because that practitioner's company is now required to be registered as an "employer" under the Act seems, with respect, a distortion of the purposes of the workers' compensation scheme.

[13] Nevertheless, I recognize that the Supreme Court of Canada's decision in *Pasiechnyk* is a strong statement of the jurisdiction of workers' compensation boards, and that I am bound by that conclusion. As well, the clear trend of decisions of the Supreme Court in recent years barring judicial review of administrative tribunals suggests that at present, extreme deference is to be accorded to tribunals such as the Board. Accordingly, I must conclude on the authority of *Pasiechnyk* that the issue of whether Mrs. Kovach's alleged injury at the hands of Dr. Singh arose out of and in the course of her employment, was committed by the Act to the Board for final decision and was therefore not reviewable by a court of law unless the decision was patently unreasonable.

## Was the Decision Patently Unreasonable?

[14] At the same time, I remain of the view that the Board's decision was patently unreasonable. In re-stating this conclusion, I note first the instruction given by La Forest J. (for himself and Dickson C.J.C.) in *CAIMAW v. Paccar of Canada Ltd.* [1989] 2 S.C.R. 983, that:

Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result. [at 1004]

In our earlier reasons, we noted that the reasoning of the Board's appeal division in Mrs. Kovach's case seemed flawed. The division suggested that *because* the Board had accepted responsibility for the consequences of her surgery, any injury caused by the surgery must have arisen out of the course of her employment. As Mr. Stewart argued, this seems backward: the question before the Board was whether the second injury in fact arose out of and in the course of Mrs. Kovach's employment so that it was therefore compensable by the Board. As well, the whole question of *novus actus interveniens* was avoided by the logic that because Mrs. Kovach had been seeking treatment for her original injury when she consulted Dr. Singh, any injury that he caused to her through negligence must be a direct result of and must have arisen out of her employment. For the reasons set forth in our earlier judgment, I find this analysis to be inconsistent with any common sense view of causation as well as with the authorities.

[15] The decision — if in fact that is the effect of the appeal division's reasoning — that Mrs. Kovach's action against Dr. Singh is barred, also contains a logical mis-step that becomes apparent if one accepts for the moment its conclusion, developed at considerable length, that because Mrs. Kovach's alleged injury during surgery was a "direct result" of her original compensable injury, it "arose out of and in the course of employment." This finding triggered the "compensation" provision at the heart of the Act, s. 5(1). It states:

Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part shall be paid by the board out of the accident fund.

As I read the section, compensation is payable only where the *injured person* is a “worker” under the Act. It does not extend to an outside party, e.g. a customer of an employer who might be injured by an act or omission of a worker (or employer) who is acting in the course of employment. As well, it is the *worker* who must have been acting in the course of employment. Coverage would surely not be extended, for example, to the patient of a medical practitioner who negligently injures a woman giving birth, even though the practitioner is acting in the course of his or her “employment” and the patient might usually have the status of a “worker” for purposes of the Act.

[16] Conversely, coverage *is* extended to every worker injured in the course of his or her employment, and to all the “consequences” (to use the Board’s terminology) of such injuries. In Mrs. Kovach’s case, the Board was at pains to state that her second injury was compensable only as a “direct consequence” of her workplace injury. (As noted by the appeal division in its reasons, “The risk in treatment is part of the original compensable injury for purposes of compensation under s. 5(1) of the *Act*.”) On this theory, if Mrs. Kovach had gone to a foreign country and received similar surgery there, all the consequential effects would still be compensable. Had she attempted to sue her employer for the additional pain and suffering occasioned by the surgery, the “historic trade-off” which underlies the workers’ compensation scheme would have dictated that her action be barred, just as the estate of the worker in Pasiachnyk was barred from suing his employer for alleged negligence. The bar to legal action against the plaintiff’s employer is in these situations a necessary corollary of the scheme’s purpose to cover all injuries including all the consequences thereof suffered by workers when acting in the course of their employment.

[17] The appeal division in Mrs. Kovach’s case went on in its analysis, however, to identify a second issue — “whether [Dr. Singh] was a worker under the Act” and “whether any negligence [on his part] in treating [Mrs. Kovach] arose out of and in the course of *his* employment” (my emphasis). The division found he was a “worker” and was engaged in his “employment” when he operated on Mrs. Kovach. From there the division made the leap to the conclusion that an action for negligence against him must be barred. Although stating (see para. 5 above) that it was for the court and not the appeal division to determine the effect of the parties’ status under s. 11 of the *Act*, the division said at pp. 10-11 of its reasons:

... Therefore, if a doctor applies for registration under section 3(1) of the *Act* and is accepted, either as an independent operator or as part of an incorporated medical practice, and pays assessments on its wages, then he will be a “worker” within Part 1 of the Act. Further, any service he performs as part of that medical practice will come within his employment. Thus, *if a doctor is injured while providing*

*medical services, he will be entitled to compensation benefits. If he is sued or sues someone else as a result of an injury that arises in the course of that employment, he will be a “worker” under section 11 of the Act, and, whether he is a Plaintiff or Defendant, his injuries and conduct will have arisen out of and in the course of his employment.*

We appreciate the Plaintiff’s argument that this appears to allow a doctor to hide behind the Act. That is, by registering with the Board, a doctor is protected from legal actions, such as this one, from injured workers. However, the doctor’s position is no different than any other worker or employer under the Act. Anyone who is registered with the Board or who works for a firm registered with the Board is entitled to the protection of section 10(1) of the Act in the appropriate circumstances. . . .

[Emphasis added]

With respect, one must question this connection between Dr. Singh’s status under the Act, the compensability of Mrs. Kovach’s injuries under s-s. 5(1) and the bar to legal action in this case. It is clear from the previous analysis that the *injury being compensated* for was the injury that arose “out of and in the course of” Mrs. Kovach’s employment — her original injury and all its complications. She would not have received compensation for the effects of Dr. Singh’s alleged negligence had the surgery not been a “direct consequence” of her initial injury — or so the division’s earlier reasoning seemed to say. (The analogy of the woman giving birth is again apposite.) This point is made at no. 22.11 of the Board’s Claims Manual, which states that “The Board accepts no responsibility for the cost of surgery or any resulting disability where surgery was not a consequence of the injury.” It follows that the cause of action barred by s. 10 was in relation to the “employer” or “any worker” that caused *the compensable injury* — the one that occurred at her workplace. Dr. Singh’s status under the *Act* was irrelevant to the compensability of that injury and the consequences thereof.

[18] Why, then, was the doctor’s status regarded as an important issue by the appeal division? This requires an examination of s. 10, the statutory bar provision, which states in part:

10. (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any

worker, *in respect of any personal injury, disablement or death arising out of and in the course of employment* and no action in respect of it lies. This provision applies *only when the action or conduct of the employer, his servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment* within the scope of this Part.

(2) Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of this Part, the worker or dependant may claim compensation or may bring an action. If the worker or dependant elects to claim compensation, he shall do so within 3 months of the occurrence of the injury or any longer period that the board allows. [Emphasis added]

As I read it, the bar to legal action applies where (a) the injury arose out of or in the course of (the worker's) employment, as required by s-s. 5(1), and (b) the "action or conduct of the . . . worker, which caused the breach of duty, arose out of and in the course of employment within the scope of this Part." Reading s-s. (1) in conjunction with s-s. 2, it appears that the status of the alleged tortfeasor under the Act is relevant to the injured worker's options: if the injury took place in the course of the injured person's employment, but she was injured by a tortfeasor not in the course of the tortfeasor's employment, then s-s. (2) applies to allow the injured worker either to claim compensation or bring her action in the courts. But if both the injured person and the tortfeasor were acting in the course of their respective employments, then the election is not available, compensation will be paid by the Board, and the statutory bar applies to any action. Thus if Dr. Singh in the case at bar was the worker whose "action or conduct . . . caused the breach of duty" the fact that he was acting in the course of his "employment" is relevant to s. 10.

[19] It was not Dr. Singh's "action or conduct", however, that "caused the breach of duty" that led to Ms. Kovach's original work-related injury being compensable under s. 5(1). Her treatment-related injury was compensable only on the basis of its connection to her workplace accident. The injury compensated under s. 5(1) must, it seems to me, be the same injury referred to in s. 10(1); and the action for breach of duty that is barred by the first sentence of s. 10(1) must refer to the same breach as is mentioned in the second sentence thereof. In other words, s. 10 states that a cause of action is barred where a worker would ordinarily be entitled to sue based on a breach of duty of care in respect of an injury that arose out of the worker's employment *and* where the alleged tortfeasor caused *that* breach of duty in the course of his or employment. In this case, the breach of duty allegedly committed by Dr. Singh was

obviously not the same “breach” as that which gave rise to the (compensable) injury Mrs. Kovach suffered in the course of her employment.

[20] The effect of the Board’s issuance of a certificate under s. 11 in this case, then, was to bar the cause of action in respect of a breach that could not give rise independently to compensation under s-s. 5(1). This effect is not contemplated by the workers’ compensation scheme — and indeed frustrates it. By means of a mechanical application of the terminology used in s. 10, the appeal division turned the historic trade-off on its head, raising the statutory bar in respect of an injury that was not the same injury as that for which compensation was extended.

[21] Having said this, I acknowledge the possibility that the appeal division was not aware that its issuance of a certificate would be treated as automatically raising a bar to an action against Dr. Singh under s. 11 — here I refer to the comment that “it is for the courts to determine the effect of the section 11 certificate on the legal action.” (As noted earlier, this was also the position of Mr. Lepp, counsel for Dr. Singh, at the original hearing of this appeal.) The division’s comment constitutes, however, all the more reason for referring the matter back to the Board for reconsideration, at least insofar as the bar to action against Dr. Singh is concerned.

[22] I would set aside the certificate issued by the Board on the ground that its decision was patently unreasonable, both in its reasoning and its result. The matter should be remitted to the Board for reconsideration accordingly.

### **Reasons for Judgment of the Honourable Mr. Justice Donald (dissenting):**

[23] I have reached a different conclusion from that expressed by Madam Justice Newbury in her reasons for judgment which I have had the privilege of reading in draft form.

[24] In my opinion, our previous decision in this case cannot stand in light of *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890.

[25] I agree with Madam Justice Newbury that whether the action is barred is determined by the Board’s answer to questions exclusively assigned to it. One of those questions is causation. In this case it is whether the injury alleged at the hands of Dr. Singh arose out of, or in the course of, her employment. I respectfully differ with her view that the result reached by the Board was patently unreasonable.

[26] Madam Justice Newbury identified serious flaws in the Board’s reasoning but I think that the review test must be applied to the result not to the reasons leading to the

result. In other words, if a rational basis can be found for the decision it should not be disturbed simply because of defects in the tribunal's reasoning.

[27] Was the result illogical? If the plaintiff had not been injured at work she would not have been treated by Dr. Singh. That fact forms a causal link connecting the employment related injury to the negligence alleged against Dr. Singh. In my view, the causation finding would only be illogical if there were no connection. Whether the law should treat the connection as remote or proximate is a separate issue.

[28] The Board was not bound to apply common law principles of causation, such as *novus actus interveniens*, in deciding the matter. No single theory of causation can be said to be infallible or universally applicable. What works for a tort based system may be unsuitable for a no fault scheme. It all depends on the policy goals of the system. The Board may decide that in order to encourage workers to undergo treatment for their industrial injuries, it must cover mistakes made during treatment. It may decide that it is unfair to deny coverage in such circumstances or inconsistent with a broadly inclusive policy of worker protection.

[29] Different considerations arise when, instead of a collective fund, the purse of an individual defendant is put at risk. There it is important to determine whether an intervening act has broken the chain of causation. That is not an exercise of pure logic but a matter of justice in allocating responsibility between initial and subsequent tortfeasors.

[30] The onus of proof in each system is different. Under the WCB scheme if the probabilities are evenly balanced the claimant succeeds in obtaining compensation. In tort law, the defendant wins.

[31] Requiring the Board to apply the doctrine of *novus actus interveniens* creates the potential of confusion and delay for the injured worker. This is the consequence of mixing incompatible systems of compensation. For example, assume that the WCB ruled that the chain of causation was broken by medical negligence and a court later found that all or most of the worker's problems were caused by the industrial injury. Neither the Board nor the court is bound by the findings of the other. The worker falls between two systems.

[32] What if the worker lacks the resources to pursue a medical malpractice claim or is unwilling to take the financial risk of losing? Even if he or she proceeds with an action, the time required in bringing the litigation to a conclusion and the uncertainties involved are potential deterrents.

[33] These difficulties are inconsistent with the principles of the model WCB scheme identified by Mr. Justice Sopinka in *Pasiechnyk*, supra, at 909:

Montgomery J. also commented on the purposes of workers compensation in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that the scheme is based on four fundamental principles:

- (a) compensation paid to injured workers without regard to fault;
- (b) injured workers should enjoy security of payment;
- (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
- (d) compensation to injured workers provided quickly without court proceedings.

I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number issues that must be adjudicated. The bar to actions is not ancillary to this scheme but central to it.

[34] The truly vexing aspect of this case is that a doctor secures immunity from action through participation in the scheme as an employer or worker. We are not accustomed to such a result. But as anomalous as it may seem, the choice of including professionals in the scheme was made by the legislature, and the structure of the scheme must not be altered to defeat the immunity. The plaintiff must forgo the prospect of a large tort judgment for the prompt and certain payment of compensation without having to prove fault. The trade-off may seem disadvantageous in the circumstances involving a doctor but it is highly advantageous in the vast majority of claims.

[35] For these reasons I would dismiss the appeal.

