Privy Council Appeal No. 1 *of* 1949

Slazengers (Australia) Pty. Limited – – – – – *Appellant*

v.

Ivy Phyllis Eileen Burnett – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH JULY, 1950

Present at the Hearing:

LORD SIMONDS
LORD NORMAND
LORD MORTON OF HENRYTON
LORD MACDERMOTT
LORD REID

[*Delivered by* LORD SIMONDS]

This appeal which is brought from a Judgment and Order of the Supreme Court of New South Wales raises a question of difficulty and importance as to the meaning and effect of certain provisions of the N.S.W. Workers' Compensation Act 1926-47 which will be called "the Act".

The respondent is the administratrix of the estate of Minnie Gertrude Milligan who was an applicant for compensation under the Act in respect of the death on the 29th May, 1947, of her husband, John Samuel Milligan, a worker employed by the appellants.

The relevant provisions of the Act which must be stated are as follows:—

"Section 6 (1). In this Act, unless the context or subject matter otherwise indicates or requires

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'Injury' means personal injury arising out of or in the course of employment and includes a disease which is contracted by the worker in the course of his employment whether at or away from his place of employment and to which the employment was a contributing factor but does not save in the case of a worker employed in or about a mine to which the Coal Mines Regulation Act 1912-41 applies include a disease caused by sicila dust.

Section 7 (1) (*a*). A worker who has received an injury whether at or away from his place of employment and in the case of the death of the worker his dependants shall receive compensation from his employer in accordance with this Act.

(*b*) Where a worker has received injury without his own default or wilful act on any of the daily or other periodic journeys referred to in paragraph (*c*) of this sub-section, and the injury be not received:—

(i) during or after any substantial interruption of, or substantial deviation from, any such journey, made for a reason unconnected with the worker's employment, or unconnected with his attendance at the trade, technical or other school, as the case may be; or

(ii) during or after any other break in any such journey, which the Commission, having regard to all the circumstances, deems not to have been reasonably incidental to any such journey; the worker (and in the case of the death of the worker, his dependants), shall receive compensation from the employer in accordance with this Act.

(*c*) The daily or other periodic journeys referred to in paragraph (*b*) of this subsection shall be—

(i) between the worker's place of abode and place of employment, and

(ii) between the worker's place of abode, or place of employment, and any trade, technical, or other training school, which he is required by the terms of his employment, or is expected by his employer, to attend.

(*d*) The provisions of paragraphs (*b*) and (*c*) of this subsection shall not apply to or in respect of an injury received after the expiration of six months after the termination of the war, which commenced on the third day of September, one thousand nine hundred and thirty-nine.

(4) Where the injury is a disease which is of such a nature as to be contracted by a gradual process compensation shall be payable by the employer in whose employment the worker is or who last employed the worker.

(5) For the purposes of subsection four of this section and of sections fourty-four and fifty-three of this Act the injury shall be deemed to have happened at the time of the worker's incapacity."

Certain other provisions are relevant to a plea to jurisdiction raised by the respondent but a reference to them can be conveniently deferred to a later stage in this opinion.

The material facts, upon which an award of £800 was made in favour of the applicant, are thus stated by way of summary in a case stated by the Chairman of the Workers' Compensation Commission of New South Wales under section 37 (4) of the Act:

"(1) The deceased was employed by the appellant Slazengers (Australia) Property Ltd. and the respondent Minnie Gertrude Milligan was totally dependant on the deceased's earnings at the time of his death.

(2) On the twenty-ninth day of May One thousand nine hundred and forty-seven the deceased was journeying by tram on his daily journey between his place of abode at 23 Townes Gardens Pagewood and his place of employment with the Appellant at Alexandria when he suffered a coronary occlusion from which he died at his place of abode on the same day.

(3) The physical effort of the deceased arising out of the journey did not play any part in the happening of the occlusion.

(4) For some months prior to his death the deceased had been receiving medical treatment for hypertension and myocardial degeneration. It was common ground that the hypertension, myocardial degeneration and coronary occlusion were not contracted by the deceased in the course of his employment with the Appellant nor was the employment a contributing factor thereto; neither was an injury which arose out of or in the course of deceased's employment.

(5) The coronary occlusion was solely due to autogenous causes and had no causal connection whatsoever with the journey."

Upon these facts the question of law referred at the request of the appellant for the decision of the Supreme Court was as follows :—

"On the Commission's findings of fact did the Commission err in law in holding that the deceased John Samuel Milligan 'received injury' within the meaning of section 7 (1) (*b*) of the Workmen's Compensation Act 1926-47?"

This question was answered by the Supreme Court (Jordan C.J. and Davidson and Street J.J.) in the negative. The learned Chief Justice was of the opinion, in which the other members of the Court concurred, that the case was completely covered by the reasons given by that Court in the earlier case of *Peart* v. *Hume Steel Ltd.* (47 S.R. N.S.W. 384) which had been approved by the High Court of Australia on appeal (75 C.L.R. 242).

The facts in *Peart's* case in most respects bore a remarkable resemblance to those of the case under appeal, the points of difference being, first, that in *Peart's* case the actual cause of the coronary occlusion was detected, viz., the fact that a small piece of the lining of the artery had been loosened and had blocked the artery, and, secondly, that this physiological change had taken place as the result of a physical effort made during the journey, viz., that of pedalling a bicycle uphill. These points of difference, which at least established a causal connection between the injury and the journey, were regarded as material by some at least of the learned Judges of the High Court who took part in the decision of *Peart's* case. But it will in any case be necessary to examine the reasoning which led to that decision. Before doing so their Lordships must once more turn to the Act itself.

The Act, as is commonly conceded, makes a substantial departure from former legislation in this field, and in particular deals not, as had previous Acts, with "injury by accident" but with "injury" simpliciter, a change which made it necessary to define what had previously been undefined. The difficulty of such definition is shown in the several alterations which were made in Amending Acts between 1926 and 1947, and is perhaps further illustrated by the fact that in the end the definition still contains the word which is itself to be defined. But this at least is clear that in the Act the word "injury" (unless the context or subject matter otherwise indicates or requires) must bear a very artificial meaning in that it is to include a disease which satisfies certain conditions and must therefore according to ordinary rules of construction exclude any other disease. It is not disputed that it is this artificial meaning which the word "injury" bears in section 7 (1) (*a*) of the Act. The question is what it means in the immediately following sub-paragraph, section 7 (1) (*b*). In *Peart's* case the learned Chief Justice (Latham C.J.) thus expresses his view : "This definition is inapplicable to section 7 (1) (*b*). If 'injury' in section 7 (1) (*b*) were given the meaning which is ascribed to the word in section 6, then the periodic journey provisions in section 7 (1) (*b*) would apply only in cases where there was an injury within the meaning of section 6, that is, where the injury arose out of or in the course of the employment, etc., or was a disease of the kind mentioned in the definition. If these conditions were satisfied, then the worker would be entitled to compensation under section 7 (1) (*a*) of the Act and it would never be necessary for any worker to have recourse to section 7 (1) (*b*) which would have no possible field of operation. Accordingly the context and the subject matter of section 7 (1) (*b*) exclude the application of the definition of injury to the word where it appears in that section." The definition being thus excluded from section 7 (1) (*b*), the question would follow what the expression "receive injury" means in its new context which may for this purpose be treated as the receipt of injury by a worker on his daily journey between his place of abode and place of employment. The appellant, upon the assumption that the statutory definition is excluded, says boldly that all disease falls outside the expression ; the respondent on the other hand contends that it is apt to

cover any physiological change which happens during the journey, adopting the reasoning of the learned Chief Justice in *Peart's* case when he says, "it appears to me to be difficult to draw any satisfactory distinction between the breaking of a limb and the breaking of an artery or the lining of an artery. One is as much an injury to the body, that is, something which involves a harmful effect on the body, as the other. Each is a disturbance of the normal physiological state which may produce physical incapacity and sufferings or death. Accordingly in my opinion the detachment of a piece of lining of the artery in the present case should be held to be an injury. The death of the worker resulted from that injury." It is to be observed that the learned Chief Justice repudiated the idea that any causal connection between the injury and the journey was necessary. In his view a temporal relation was sufficient, namely, that the injury happened while the worker was on the journey. It is not clear that all the members of the High Court took the same view on this point.

This decision leads to the remarkable consequences upon which the learned Chief Justice himself observes. A worker who, having reached his place of employment, dies of a coronary occlusion, being the result of a disease to which the employment was not a contributing factor, is not entitled to compensation: see *Kellaway* v. *Broken Hill South Ltd.*, 1944 S.R. (N.S.W.) 210, a case clearly decided correctly, though some of the reasoning may be open to criticism. On the other hand the same worker, if he dies of the same disease, in the course of his journey to or from his place of employment, is entitled to compensation.

The fact that a particular interpretation of an Act may lead to strange consequences does not make it an impossible interpretation. But it should not be adopted if a more reasonable one can be found. It appears to their Lordships that without doing violence to its language a satisfactory construction of the section may be found. The clue to it, as they think, is to be found in an observation of Mr. Justice Dixon in *Peart's* case. "In a general way", said that learned Judge, "the intention doubtless was to extend the course of the employment to the journeys of the workman between his home and his work. Injury received in the course of his journey is to stand in the same position as injury in the course of his employment." It appears to their Lordships that the implication of this intention is irresistible. The improbability of the word "injury" bearing a different meaning in successive paragraphs of the same subsection is so great that any legitimate interpretation which avoids this result would appear preferable. It must be conceded that the opening words of section 6 admit the possibility of the defined meaning being excluded, but this is a general provision covering all the definitions. As a matter of construction it covers the definition of "injury" but the improbability is great that the draftsman should have left the most important word in the whole Act to the hazard of the statutory definition being excluded and some other meaning or meanings, to which no clue is given, being substituted. Moreover, to accord a different and a higher measure of protection to a worker who receives injury during his journey from that accorded to one who receives it in his place of employment is clearly illogical and out of harmony with the whole scheme of workmen's compensation as developed in the relevant legislation. On the other hand to treat an injury received by a workman in the course of a journey of the limited character covered by section 7 (1) (*b*) as if it were an injury received by him in the course of his employment, or (to put it somewhat differently) to treat the worker as being in the course of his employment, while he is in the course of certain journeys, and to give the same measure of protection if he receives the same kind of injury, is a provision both rational and consistent with the general scheme of the Act. It is, in their Lordships' opinion, legitimate so to construe the subsection. This involves, no doubt, that after the words "the worker" where they occur immediately after sub-clause (ii), some such words as "shall be deemed to have received such injury in the course of his employment and he" are by implication to be read into the subsection. The result of this construction

is to displace the reasoning upon which the decision in *Peart's* case was largely founded. The word "injury" will retain its statutory meaning but the subsection (1) (*b*) of section 7 will afford a valuable measure of relief in cases not covered by subsection (1) (*a*). If the injury received by the worker during his journey is some injury other than a disease, e.g., a broken limb resulting from a collision, it will be an injury received in the course of his employment and he will be entitled to compensation: if the injury is a disease "received" (a difficult word in this connection to give effect to) during the journey and if it is a disease to which the employment, including the journey, was a contributing factor, then equally he will be entitled to compensation. Their Lordships are conscious that in thus interpreting the relevant subsection they do not fully adopt the arguments of either the appellant or the respondent, but it appears to them that thus alone can a reasonable and consistent meaning be given to it in its context.

As has already been mentioned, the respondent took a preliminary objection to jurisdiction, submitting that in sections 36 and 37 of the Act the legislature was clearly providing that the Commission established under the Act should not be subject to control by way of appeal or otherwise by any Court or by His Majesty in Council save only for the control exercised by way of case stated, and that on case stated the decision of the Supreme Court was final and conclusive and was not subject to review by His Majesty in Council. This objection was not taken when application was made to the Supreme Court for leave to appeal to His Majesty in Council, nor, so far as can be ascertained, was it taken upon the appeal in *Peart's* case from the Supreme Court of New South Wales to the High Court of Australia. The plea is, in their Lordships' opinion, without validity. It is true that it is provided by section 36 that the Commission shall have exclusive jurisdiction and that its action or decision shall be final and further that its decisions shall be upon the real merits and justice of the case and that it shall not be bound to follow strict legal precedent. But whatever might ensue from these provisions and from those of the first three subsections of section 37, the fourth subsection of that section provides that, when any question of law arises in any proceeding before the Commission, not only may the Commission of its own motion but it must, if any party as therein prescribed requests, state a case for the decision of the Supreme Court thereon. This procedure is commonly and properly described as an appeal by way of case stated and is in all respects, formal and substantial, an appeal in a legal proceeding to an appellate Court of Law. It is further provided by subsection (7) of section 37 that the decision of the Supreme Court shall be binding upon the Commission and upon all the parties to the proceedings. The circumstances in which the decisions of Courts of Law in His Majesty's Dominions and Colonies are not subject to review by His Majesty in Council have recently been again considered in *De Silva* v. *The Attorney General of Ceylon* (1949 W.N. 248). Their Lordships think it unnecessary to say more than that in the present case no plausible argument was advanced in favour of the view that under the Workers' Compensation Act the Supreme Court is established as a tribunal from whose decisions upon a case stated by the Commission no appeal lies to His Majesty in Council.

In the result their Lordships will humbly advise His Majesty that this appeal should be allowed and the question stated for the decision of the Supreme Court should be answered in the affirmative. The respondent must pay the costs of the appellant in the Supreme Court and of this appeal.

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In the Privy Council

SLAZENGERS (AUSTRALIA) PTY. LIMITED

v.

IVY PHYLLIS EILEEN BURNETT

DELIVERED BY LORD SIMONDS

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