

28, 1968

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N:

OGDEN INDUSTRIES PTY. LIMITED Appellants

- and -

HEATHER DOREEN LUCAS Respondent

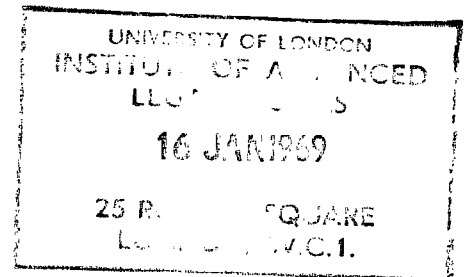
APPELLANT'S CASE

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10 1. This is an appeal by special leave from a judgment of the High Court of Australia (Barwick C.J., Kitto, Taylor Windeyer & Owen JJ.) dated the 20th September 1967 dismissing (by a majority consisting of Taylor, Windeyer & Owen JJ., Barwick C.J. & Kitto J. dissenting) an Appeal from the Full Court of the Supreme Court of Victoria (Winneke C.J., Smith & Pape JJ.) which on the 28th February 1967 had made an Order answering a question of law submitted to it by way of a Case Stated by the Workers Compensation Board of the State of Victoria on the 4th October 1966. p. 109 p.27 pp. 1 - 2

20 2. The Appeal arises out of a claim for compensation under the Workers Compensation legislation of the State of Victoria by the Respondent and her two children under the age of 16 years namely Jennifer Lucas and Raymond Douglas Lucas. The claim was in respect of the death on the 7th July 1965 of Reginald George Lucas the late husband of the Respondent, the late father of Jennifer Lucas and Raymond Douglas Lucas and a worker employed by the Appellants.

30 3. Up to and including the 30th June 1965 the Workers Compensation statute in force in the



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State of Victoria was the Workers Compensation Act 1958 (Act No. 6419). This Act is referred to subsequently in this Case as "the 1958 Act". Its basal provision imposing liability on the employers reads as follows:-

Section 5(1) -

"If in any employment personal injury arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of this Act."

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"Injury" is defined in section 3 as follows:-

"'Injury' means any physical or mental injury or disease and includes the aggravation acceleration or recurrence of any pre-existing injury or disease as aforesaid."

"Disease" is defined in section 3 as follows:-

"'Disease' includes any physical or mental ailment disorder defect or morbid condition whether of sudden or gradual development and also includes the aggravation acceleration or recurrence of any pre-existing disease as aforesaid."

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In the same section 'worker' is defined in terms which exclude a person whose remuneration exceeds \$4000 per annum. In the same section dependant is defined to include inter alia the widow of the worker and the children of the worker under 16 years of age whether actually dependant on the worker or not. On the 1st July 1965 the Workers Compensation (Amendment) Act (Act No. 7292) came into operation. This Act is referred to subsequently in this Case as "the 1965 Act". The 1965 Act (s. 2) substituted for the definition of "injury" which had been in the 1958 Act the following definition:-

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"'Injury' means any physical or mental injury, and without limiting the generality of the foregoing, includes:-

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(a) a disease contracted by a 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; and

(b) the recurrence aggravation or acceleration of any pre-existing injury or disease where the employment was a contributing factor to such recurrence
 10 aggravation or acceleration -

and for the purposes of this interpretation the employment of a worker shall be taken to include any travelling referred to in subsection (2) of section eight of this Act."

The definition of disease was not altered. The 1965 Act (s.2) also substituted a new definition of "worker" which enlarged the class of persons eligible for compensation by raising the limit of remuneration to \$6000 per annum. The 1965 Act
 20 (s.2) also changed the meaning of "Dependant" by requiring proof of actual dependency for widows and children. In addition the 1965 Act (ss.5 and 7) substantially increased the amount of compensation payable generally. The amount payable on the death resulting from a compensable injury of a worker leaving a widow and two children under the age of 16 years was increased from four thousand eight hundred dollars (\$A4800) to nine thousand four hundred dollars (\$A.9400).

30 4. The 1965 Act does not contain any relevant express saving provisions. In the State of Victoria the general saving provisions are contained in the Acts Interpretation Act 1958 as amended. Section 7 (2) provides, so far as material -

"Where any Act ... repeals or amends any other enactment, then unless the contrary intention appears the repeal or amendment shall not -

40 (a) ...
 (b) affect the previous operation of any enactment so repealed or amended or anything duly done or suffered under any enactment so repealed or

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- amended; or
- (c) affect any right privilege obligation or liability acquired, accrued or incurred under any enactment so repealed or amended; or
- (d) ...
- (e) affect ... any remedy in respect of any such right privilege obligation liability ... aforesaid.

And any such ... remedy may be ... enforced ... as if the repealing or amending Act had not been passed." 10

Section 5 (3) of the Acts Interpretation Act (which in its present form was introduced by Section 2 of Act No. 6632 of 1960) which was considered in the High Court by Barwick C.J. and Windeyer J., reads as follows -

pp. 32-34,
39-40, 76, 81

"Any reference in any Act (whenever passed) to that Act or any other Act or to any provision of that Act or any other Act (whenever passed) shall unless the contrary intention appears be read and construed as a reference to the Act or provision in question as re-enacted or amended from time to time; and if the Act or provision in question is repealed and not re-enacted then unless the contrary intention appears the reference thereto shall be read and construed as a reference to that Act or provision as in force immediately before the repeal." 20 30

p. 3-4

p. 4

p. 1 l. 14

p. 9 l. 14

5. The original claim against the Appellant for compensation was made by the Respondent on behalf of herself and the two children on the 28th September 1965. By Notice dated the 28th October 1965 the Appellant, in accordance with the provisions of Section 44 of the Workers Compensation Act, referred the claim to the Workers Compensation Board with an admission of liability to pay such compensation as it was lawfully obliged to pay, such amount to be ascertained by the Workers Compensation Board. The claim came on for hearing before the Workers Compensation Board on the 24th November 1965 and the Workers Compensation Board pursuant to section 29 (2) of the 1958 Act (as amended by section 8 of 40

- the 1965 Act) made an interim award in favour of the Respondent of four thousand eight hundred dollars (\$A.4800) and reserved for argument the question whether the amount of the award should be nine thousand four hundred dollars (\$A.9400). This question subsequently came on for argument and on the 30th June 1966 the Workers Compensation Board made an award in favour of the Respondent of nine thousand four hundred dollars (\$A.9400).
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6. No evidence was called by the Respondent or the Appellant but a statement of agreed facts was filed with the Board and adopted by it. The agreed facts in so far as they related to the issue upon which the majority of the High Court found against the Appellant were as follows - Before July 1965 and therefore during the operation of the 1958 Act the deceased worker, who was suffering from heart disease, sustained a number of compensable injuries. On the 7th July 1965, after the commencement of the 1965 Act, the worker died of pulmonary oedema which was the terminal event in a long history of cardiac disease. Apart from the pulmonary oedema his death in any event resulted from the compensable injuries received before the 1st July 1965. On the view of the agreed facts and the law relating to the meaning of "injury" taken in the High Court of Australia by Barwick C.J., Kitto, Taylor and and Windeyer J.J., the compensable injuries which resulted in the workers death all occurred before the 1st July 1965 and the pulmonary oedema was not itself an injury, - see per Barwick C.J. at p.51; per Kitto J. at p.59; per Taylor J. at p. 72-3, per Windeyer J. at p. 91. Owen J. found that compensable injuries had occurred before the 1st July 1965 but without deciding the point said that he did not wish to be taken as accepting the view that the pulmonary oedema was an injury. The Workers Compensation Board however decided that the pulmonary oedema was an injury within the meaning of "injury" in the 1965 Act, and, because it occurred on the 7th July 1965 after that Act had come into operation, it awarded the Respondent nine thousand four hundred dollars (\$A.9400).
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7. Upon the Appellant so requiring the Workers
- p. 1 l.22
- pp.10-11
- pp. 6-9
p. 1 l.33-34
- p. 51
p. 59
pp.72-3, 91
- p. 107

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- pp. 1, 2 Compensation Board, pursuant to Section 56 (3) of the Workers Compensation Act, stated a case for the determination of the Full Court of the Supreme Court of Victoria. The question of law submitted by the Board for the opinion of the Full Court was whether it was open to the Workers Compensation Board on the material before it to award the Respondent nine thousand four hundred dollars (\$A.9400). The Full Court on the 28th February 1967 upheld the decision of the Workers Compensation Board and ordered that the question be answered "yes". The Full Court arrived at this decision because it held that it was open to the Board on the material before it to hold that, within the meaning of paragraph "b" of the definition of "injury" in the 1965 Act, the worker had suffered a compensable injury on the 7th July 1965, and that in consequence the Appellant became liable to pay compensation in the increased amount provided by the 1965 Act, namely nine thousand four hundred dollars (\$A.9400). 10
- p. 2 ll.6-8
- p.27
- p. 23 ll.37-41
- p.24 l.33 20
- p. 28
8. By Notice of Appeal dated the 20th March 1967 the present Appellant appealed to the High Court against the decision of the Full Court. As already adverted to in paragraph 6 above the High Court took a view of the agreed facts and the law as to what constituted an injury significantly different from the view of the Full Court and the Workers Compensation Board. On the footing that all the compensable injuries were sustained before 1st July 1965 the High Court, by a majority consisting of Taylor, Windeyer, and Owen JJ., decided that the Appellant was liable to pay compensation in the amount specified in the 1965 Act because that was the Act in force when the worker died. Barwick C.J. and Kitto J. on the other hand decided that the amount of compensation that the Appellant was liable to pay was the amount fixed by the 1958 Act because that was the Act in force when the worker received the injuries which resulted in his death. 30
9. The question involved in the present appeal relating to the issue on which the majority of the High Court decided against the Appellant is whether, in the circumstances stated, the amount of compensation payable should be determined by 40

the law in operation when the worker sustained his compensable injuries or by the law in operation when he died.

10. The learned Justices of the High Court gave the following among other reasons for the judgment -

Taylor J. said:-

p. 63
ll. 36-43

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"It is, however, clear enough that in the case of a worker who, later, dies as the result of a compensable injury it is impossible to say at the date of the injury who his "dependants" as defined either by the 1958 Act, or by the amending Act, will be. Indeed, at the date of the injury they may not even be in existence."

Later His Honour said:-

p. 71 ll.1-3

"It seems to me that both the right of the dependants and the liability of the employer arise upon the death of the worker."

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Windeyer J. said that section 5 (1) of the Workers Compensation Act should operate, after the commencement of the 1965 Act, in the manner provided by s. 5 (3) of the Acts Interpretation Act 1958 (Vic.). His Honour said that in reading the Act after 1965 in relation to the liability in respect of death thereafter, s. 5 (1) when it speaks of "compensation in accordance with this Act" ought to be read as speaking of this Act as amended. Consequently after the amendments.

p. 76
ll. 38-40
pp. 80-81

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s. 5 (1) entitled the Respondent to the benefit of the new measure of the actual pecuniary liability of the employer which would arise when a worker died leaving dependants.

p. 81
ll. 9-11

His Honour stated:-

p. 80
ll. 20-24

"The obligation 'to pay compensation in accordance with the Act' arises when incapacity or death ensues from the injury - and, in the case of death, only if the worker leaves dependants."

40 After considering the meaning of the word "liable"

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- p. 31 1.43-46 in s. 5 (1) of the Workers Compensation Act and the word "liability" in s.7 (2) of the Acts Interpretation Act His Honour said that the persons who can claim the benefit of the obligation which the Act imposes in the case of the death of the workers were not ascertainable until the death and in this situation it was not correct to speak of a right having accrued and a liability having been incurred before death. Consequently His Honour considered there were no vested rights or liabilities under the 1958 Act in this case susceptible of preservation by s. 7 (2) of the Acts Interpretation Act 1958. 10
- p. 95 11.26-34 Owen J. said:-
 "I am of opinion that it is when the death of the worker occurs that liability is incurred by the employer to compensate those, if there be any, who are then found to be his dependants and the right to compensation vests and that it is the law in force at the time of the death that is to be applied in measuring the extent of that liability and of the corresponding rights." 20
- p. 35 11s. 1-6 Barwick C.J. in dissenting said:-
 "When received, the injury is an accomplished fact and because any relevant incapacity or death must be causally related to it, the nature and extent of the injury is definitive of the extent of the compensation which may possibly be recovered." 30
- and again:-
- p. 36 11.31-39 "In this context I am of opinion that the word "liable" is used in sec. 5 (1) to impose an immediate obligation to pay compensation when and to those persons whom and in the amounts which the Act specified in relation to incapacity or death which may thereafter occur no matter how remote in point of time from the receipt of the injury so long as the event, whether incapacity or death, is the consequence of the injury." 40

Consequently His Honour held that:-

"the liability which sec. 5 (1) imposed on the appellant was a liability "incurred" within the meaning of sec. 7 of the Acts Interpretation Act and consequently survived and was not affected by the amendment made by the Amendment Act. It extended to the payment of compensation to the dependants of the worker ascertained according to the definition of dependants in the Act as it stood at the date of the receipt of the injury and the amount of compensation payable was the amount which sec. 9 as it stood at the date of the receipt of the injury prescribed."

p. 41
11.5-17

His Honour held that s. 5 (3) of the Acts Interpretation Act 1958 only refers to the particular Act as amended after its amendment and applies only with respect to matters which fall within the operation of the Act after its amendment.

p. 40
11.9-13

Kitto J. who also dissented stated:-

"The event that makes ultimately payable whatever compensation the Act provides in the varying situations that may later arise is the receipt of the injury by the worker. Upon that event "the provisions of this Act" - provisions which regulate the quantum of payments, the periods in respect of which and the time at which they are to be made and the persons to whom they are to be made - fasten upon the employer at that time to create a situation of liability and they proceed, as events thereafter occur, to issue in specific debts presently payable to ascertained persons."

p. 53
11. 5-17

11. The Appellant submits that the judgment of the High Court of Australia should be reversed and the question of law submitted by the Workers Compensation Board to the Full Court should be answered "No" for the following among other

R E A S O N S

1. Because upon receipt of the injury by the worker s. 5 (1) of the Workers Compensation

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- Act 1958, upon its proper construction, made the Appellant liable to pay compensation in accordance with the provisions of the 1958 Act including the provisions which regulate the quantum of payments.
2. Because s. 7 (2) of the Acts Interpretation Act 1958 operates to preserve the liability created by s. 5 (1) of the Workers Compensation Act 1958.
 3. Because there is no intention expressed or implied in the Workers Compensation (Amendment) Act 1965 that the provisions in it as to quantum of compensation should apply to injuries sustained before its commencement even though they result in death after its commencement. 10
 4. Because s. 5 (3) of the Acts Interpretation Act, on its proper construction, does not have the effect of making the quantum provisions contained in the Workers Compensation (Amendment) Act 1965 applicable to the death of a worker after its commencement as a result of an injury sustained before the commencement of the 1965 Act. 20
 5. Because even if the Appellant's liability to pay compensation to the Respondent did not arise until the worker died on the 7th July 1965, as the majority in the High Court held, nevertheless it was not a liability under the 1958 Act as amended by the 1965 Act. 30
 6. For the reasons appearing in the reasons for judgment of Barwick C.J., and Kitto J. in the High Court.

XAVIER CONNOR

FRANK COSTIGAN

IN THE PRIVY COUNCIL No.12 of 1968

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N:

OGDEN INDUSTRIES PTY. LIMITED
Appellant

- and -

HEATHER DOREEN LUCAS
Respondent

APPELLANT'S CASE

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