Judgment 4 of 1972

IN THE PRIVY COUNCIL No. 35 of 1970

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

MARIA STASKA (substituted for Jan Staska since deceased) — Appellant

AND

GENERAL MOTORS-HOLDEN'S PROPRIETARY LIMITED — Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal, by special leave ordered upon the 4th February 1970, from an order of the High Court of Australia (Barwick C.J., Kitto and Owen J.J. assenting and McTiernan and Windeyer J.J. dissenting) dated the 18th day of April 1969 which allowed with costs an appeal by the Respondent against the order of the Full Court of the Supreme Court of South Australia allowing an appeal by the Appellant from the award of a Temporary Judge of the Local Court of Adelaide whereby it was held that the liability of the Respondent to make further weekly payments of workmen's compensation to the Appellant was redeemed by the payment by the Respondent to the Appellant of a lump sum of $4,694. p. 59 p. 58 p.34 p.3

2. The facts are not in dispute. The Appellant was at all material times an employee within the meaning of section 7 of the Workmen's Compensation Act (South Australia) 1932-1966 (hereinafter referred to as "the Act") The Respondent was at all material times his employer within the meaning of section 3 of the Act. On the 21st day of May 1956 the Appellant sustained personal injury by accident arising p.3

out of and in the course of his employment by the Respondent within the meaning of section 4 of the Act. The injury consisted of a low back strain. As a result of the injury the Appellant was initially incapacitated for a few days before returning to work. Thereafter he suffered at intervals several periods of incapacity, on occasions involving operative treatment at the end of each of which he returned to work. The last period of incapacity after which he returned to work was between the 13th November 1966 and the 13th January 1967. On the 7th February 1967 the Appellant became totally incapacitated for work. It is accepted that all the periods of incapacity and the ultimate total incapacity were caused by reason of the injury.

3. The Appellant was until the 31st May 1968 paid compensation during his periods of incapacity in accordance with the provisions of section 18 of the Act as amended from time to time. Between 13th November 1966 and 13th January 1967 and also between 7th February 1967 and 31st May 1968 the Appellant received weekly payments at the rate as provided by amendment to
p. 1 section 18 in 1963. On the 27th March 1968 the Respondent applied to the Local Court of Adelaide to redeem its liability to make weekly payments to the Appellant by payment to him of a lump sum pursuant to section 28 of the Act.

4. Section 18 (2) of the Act provides the maximum weekly payments to be made thereunder. Section 18 (3) provides the amount which the total liability of the employer shall not exceed. Section 28 of the Act entitles application to be made by either workman or employer for redemption by payment of a lump sum which, in the case of permanent disability, is in addition to weekly payments received prior to the application. At the date of the injury to the Appellant the total liability of the employer did not exceed £2,600. Amendments were enacted in 1958, 1960, 1961 and 1963 increasing the amount of the maximum weekly payments under section 18 (2) and the maximum total liability of the employer under section 18 (3). Each of the said amendments contained

an express provision that it should only operate in cases in which the injury was caused by an accident occurring after the commencement of the amending legislation. In 1965, however, section 18 (3) was amended by Act No. 52/65 whereby the liability of the employer to make payments was increased in case of total incapacity to a maximum of £6,000. This amendment contained no provision restricting its application to cases in which the injury was caused by an accident occurring after the amendment came into force.

5. The amending Act of 1965 (No. 52/65) introduced an entirely new section 28 (a) which provided :-

> Notwithstanding anything in this or any other Act contained, where -
>
> (a) compensation has been paid to a workman pursuant to this Part;
>
> (b) the workman has returned to work; and
>
> (c) the workman subsequent to his return to work dies or suffers incapacity as a result of the injury for which the compensation was paid, then the amount of compensation payable in respect of the death of the workman shall be computed and based upon the amount of compensation payable under this Act as at the time of the death of the workman or as the case may require the amount of weekly compensation payable in respect of subsequent incapacity shall be computed and based upon the rates of weekly compensation payable at the time of the subsequent incapacity. Provided however that this section shall not apply where compensation has been paid to the workman in respect of the injury pursuant to section 26 of the Act.

Section 26 of the Act was concerned with fixed payments for particular injuries.

6. By a further amendment (86/66) the provisions of section 28 (a) were amended so as to read as follows :-

> "Notwithstanding anything in this or any other Act contained, the amount of compensation payable in respect of the death of a workman after the commencement of the Workmen's Compensation Act Amendment Act, 1966, shall be the amount of compensation payable under this Act at the time of the death of the workman whether the injury resulting in the death occurred before or after such commencement and the amount of the weekly payment of compensation payable to a workman for total or partial incapacity pursuant to this Part after the said commencement shall be the weekly rates of compensation in force from time to time, irrespective of when the injury occurred: Provided that this section shall not apply where compensation has been paid to the workman in respect of the injury pursuant to section 26 or section 28 of this Act nor shall it apply to the total liability of an employer under subsection (3) of section 18 of this Act."

p.18 7. The Temporary Judge of the Local Court of Adelaide determined that the total liability of the employer to make weekly payments was the amount specified in section 18 (3) as at the date of injury in May 1956, namely £2,600. He pp.18,19 then assessed a lump sum award of £2,347. On appeal by the Appellant from this award the Full Court of the Supreme Court of South Australia by a majority (Bray C.J. and Walters J. assenting and Mitchell J. dissenting) allowed the appeal pp. 34,35 and ordered that the case be remitted to the Local Court of Adelaide for re-assessment on the basis that the maximum amount for which the Respondent could be liable is £6,000

p.35 8. The Respondent appealed to the High Court of Australia against the judgment of the said Full Court. The said appeal was heard by the Full Court of the High Court of Australia consisting of Barwick C.J., McTiernan, Kitto, Owen and

Windeyer, J.J. on the 28th day of February and the 3rd day of March 1969 and in a reserved judgment dated the 18th day of April 1969 the Court, by a majority of three Judges to two allowed the appeal with costs. The assenting judgments of the High Court decided in effect that neither section 28 (a) of Act No. 52/65 nor section 28(a) of Act No. 86/66 operated so as to apply the amendment to section 18 (3) effected in 1965 to the Appellant. Accordingly the limits of the compensation payable to the Appellant were to be assessed upon the maximum current at the date of his injury in 1956. p. 58

9. The first submission of the Appellant is that upon the ordinary construction of the amendments effected by Acts No. 52/65 and 86/66 it was clearly the intention of the legislature that the new maximum of £6,000 should apply to the ultimate total incapacity of the Appellant at the date on which such incapacity occurred. This construction should be adopted for the following reasons :-

(a) Until 1965 the legislature in South Australia had consistently linked any increase in figures in section 18 (2) governing maximum liability to an express provision that such increases should only apply to workmen whose injury and death was caused by an accident subsequent to the amending legislation. It was contended for the Respondent upon the hearing of the petition for special leave to appeal that such provision was initially (although unnecessarily) enacted in consequence of the decision of the Full Court of the Supreme Court of South Australia in Hall v. Metropolitan Abbatoirs Board (1945) South Australian State Reports, 193. The effect of that case was to provide that a new benefit of hospital and medical expenses introduced by amending legislation could be obtained by workmen injured before the commencement of the amendment. The Appellant submits that, in the light of this decision, it was necessary for the legislature to implement any intention to prevent amending legislation applying to injuries occurring before the commencement of the amendment by including in subsequent

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legislation a provision of the type consistently included until its omission in 1965. There is no logical distinction between the conferment of a new benefit of hospital expenses and the increase of an existing benefit. Further, whether or not the excluding provision was necessary, its omission from an amending act in pari materia with former amending acts is a clear indication of change of intention on the part of the legislature.

(b) The intention of the introduction in 1965 of section 28 (a) of the Act was that workmen were in respect of a second or subsequent period of incapacity to receive compensation at the weekly rate prevailing at the date of such period of incapacity. It was accepted by the majority
p.40 in the High Court of Australia that the Appellant was entitled to weekly compensation in accordance with the provisions of section 28 (a) in respect of incapacity occurring subsequently to the said amending act. It would be illogical if, on the one hand, weekly rates were to be determined by the date of incapacity and, on the other, the maximum limit of liability was to be assessed by reference to the date of injury. The employer could in some cases of permanent and total incapacity partially negate the intention of the legislature to grant higher weekly payments by redeeming pursuant to section 28 by reference to the lower maximum. It can reasonably be inferred that the legislature did not intend the maximum to be "out of step" with the weekly rate.

(c) Section 28 (a) specifically provided that payments in the event of death should be by reference to the amended maximum of £6,000. It would be odd if payment in respect of total incapacity short of death should be made by reference to a different and lower maximum.

(d) The objection of section 28 (a) of Act No. 52/65 and the new section 28 (a) contained in Act 86/66 was to amend so as to increase the benefits available to workmen. The amendment should be construed so as to have regard to the fact that workmen's compensation legislation is "remedial" (see Bist v. London and South Western

Railway Co. (1907) A.C. 209 per Lord Loreburn L.C. at p.211) and an example of "the paternal benevolence of the legislature towards workmen ..." (see Blatchford v. Staddon & Founds (1927) A.C. 461). The Appellant relies upon the reasoning of Mr. Justice Windeyer in Ogden Industries Pty. Ltd. v. Lucas (1941) A.L.J.R. 146; (the decision in which was, as subsequently indicated, affirmed by the Privy Council, 1969, 3 W.L.R. 75) that Australian legislators have not been deterred from time to time in increasing benefits for workers and their dependents. This is of particular force in an inflationary age, and this could be a relevant factor in assessing the intention of the legislature: see Clement v. Davis (1927) A.C. 126, per Lord Sumner at p.134

(e) The proviso to section 28 (a) of Act No. 52/65 was not expressed to apply to an application for redemption under section 28. If the view of Barwick C.J. as to the meaning of the proviso to Act No. 83/66, which expressly applied to section 28, is right, then the omission of any reference to the section from the proviso to section 28 (a) of the 1965 Act is a pointer to the fact that the legislature intended redemption to be by reference to the increased maximum. p.43

(f) As McTiernan J. reasoned in his dissenting judgment, the weekly compensation referred to in section 28 (a) was "... obviously left to be fixed by implication from section 18 ... Section 28 (a) and 18 are in Part III of the Act. The two sections constitute a context in which section 28 (a) has to be construed. The latter is not a complete enactment without section 18. The weekly compensation payable pursuant to section 28 (a) must be a weekly amount computed and based on section 18. It is therefore a payment in a series of payments, the sum total of which cannot exceed $12,000 in case of total incapacity. If section 28 (a) is not beholden to section 18 it is a mere declaration without operative effect." He further stated, "According to a permissible construction of the words 'under this section' in section 18 (3), the compensation payable, pursuant to section 28 (a), is really 'under' pp.46,47 p.47

section 18 (3)".

(g) If, upon its proper construction, section 28(a) of Act No. 52/65 did not have the effect of raising the maximum of that current in 1965, then this effect was achieved by Act No. 86/66. As Windeyer J. observed, the 1966 Act was
p.49 incorporated with the principal Act. Accordingly compensation is to be assessed as provided by
p.50 section 28 (a) of the 1966 Act. The proviso to section 28 (a) either means that the provisions of the section should not apply in the case of
p.48 a workman to whom the employer has paid the total amount of his liability under section 18 (3) if thereafter incapacity recurred (as McTiernan J. thought) or simply that section 28 (a) was to be
p.51 entirely ignored in construing section 18 (3) (as Windeyer J. thought); in the event of either of these constructions of the proviso, the current maximum becomes payable by reason of section 28 (a) of the 1966 Act.

10. The Appellant submits that upon the wording of the amending Acts this conclusion is to be reached whether or not a presumption against retrospectivity arises. The Appellant submits, however, that the ordinary meaning of the words can be looked at without regard to any presumption against retrospectivity. In so far as Clement v. Davis (1927) A.C. 126, per Lord Dunedin at p.131 suggests the contrary, it is submitted :-

(i) That the effect of the general words should be confined to the particular facts under consideration in that case : see Ogden Industries Pty. Ltd. v. Lucas (1969 3 W.L.R. 75 at pages 85 and 87 and the reservations of Taylor J. as to Lord Dunedin's general proposition and Mr. Justice Windeyer's comments on the "probabilities" in Australia today as opposed to those in England at the time of Clement v. Davis (supra) (both expressed in Ogden's case in the High Court of Australia, 41 A.L.J.R.146).

(ii) Such general words were unnecessary to the decision in Clement v. Davis, which could have been decided simply as a construction point by

the application of section 30 to section 24 (2) of the Workmen's Compensation Act, 1923 (see per Lord Blanesburgh at p.138).

11. The Appellant further submits that there is a further reason why his claim does not entail any reliance upon a retrospective construction of the 1965 legislation. By section 18 (1) the employee is not entitled to any payment until he suffers a partial or total incapacity. In the submission of the Appellant the right to compensation occurred, albeit not for the first time, on the occurrence of his permanent total disablement in 1967. He then acquired a right to compensation up to the maximum then prevailing of £6,000. It is submitted that support can be found for this submission from the reasoning of the majority of the High Court of Australia in Ogden Industries Pty. Ltd. v. Lucas (1941) A.L.J.R. 146. In Ogden's case a workman sustained a compensatable injury in 1964 and early 1965. He subsequently died as a result of the injury during the month of July 1965. At the date of the receipt of the injury the amount of compensation payable to the dependants of the worker was £2,240. However, on the 1st July 1965 that amount was increased by an amendment to the Workmen's Compensation Act (Victoria) to £4,700. The amendment did not outline whether the increased amount should be payable to the dependants of a worker whose death had resulted on or after the 1st July 1965 from an injury sustained before the passing of the amending Act. Whilst the Privy Council affirmed the decision (1969 3 W.L.R. 75) upon the ground that the dependants could not be identified until death, some members of the High Court of Australia reasoned upon broader grounds. Windeyer J. discussed the meaning of "liability" at some length. He said (at p.163) "The obligation to pay compensation in accordance with the Act arises when incapacity or death ensues from the injury". Owen J. at p.169 states: "It may be that some of the authorities here and in England seem to say that the moment an employment injury occurs the employer incurs a liability to pay compensation to the workman

and the latter is vested with a corresponding right to receive it should the injury result in incapacity. With all respect I doubt whether this is a correct statement of the position except perhaps where incapacity is immediately caused by the injury." Taylor J. and Owen J. approved the following statement by Fullager J. in Fisher v. Hepburn Ltd. (1960) 105 C.L.R. 188 at p. 194:" ... It would not be true to say that a retrospective effect can only be avoided by confining the operation of the statute to subsequently occurring 'accidents' or 'injuries'. It may truly be said to operate prospectively although this prospect begins, so to speak, with some other event than accident or injury". The Appellant submits that in law as well as in logic, his subsequent total incapacity is an event giving rise to liability similar to the death in Ogden's case.

12. The Appellant therefore submits that this Appeal should be allowed for the following, among other, :

R E A S O N S

(i) BECAUSE upon the ordinary natural construction of the amending legislation the maximum liability for compensation is to be assessed by reference to the sum of £6,000 as specified by the amending Act No. 52/65.

(ii) BECAUSE no retrospective construction of the said amending Act is required in order to reach this conclusion since the presumption against retrospectivity does not apply.

(iii) BECAUSE the event giving rise to the liability which the Respondent applied to redeem was the subsequent incapacity of the Appellant which occurred after the commencement of the amending Act No. 52/65

(iv) BECAUSE the reasoning of the dissenting minority in the High Court of Australia was right

(v) BECAUSE the Order made by the Full Court of the Supreme Court of South Australia ought to be restored. p. 34

ROBERT ALEXANDER

No. 35 of 1970

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N

MARIA
~~JAN~~ STASKA Appellant

AND

GENERAL MOTORS-HOLDEN'S
PROPRIETARY LIMITED Respondent

CASE FOR THE APPELLANT

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