Judgment 4 of 1972

(4)

IN THE PRIVY COUNCIL No. 35 of 1970

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN :

(substituted for MARIA STASKA JAN STASKA one deceased) Appellant

- and -

GENERAL MOTORS-HOLDEN'S PROPRIETARY LIMITED Respondent

RECORD OF PROCEEDINGS

BLYTH DUTTON & CO.,
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Appellant

FRESHFIELDS,
1 Bank Buildings,
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Solicitors for the
Respondent.

IN THE PRIVY COUNCIL No. 35 of 1970

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN :

(substituted for JAN STASKA since deceased) MARIA STASKA Appellant

- and -

GENERAL MOTORS-HOLDEN'S PROPRIETARY LIMITED Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

DOCUMENTS IN TRANSCRIPT RECORD OMITTED FROM PRINTED RECORD BY CONSENT OF SOLICITORS

Transcript of evidence taken before Arbitrator Temporary Judge Williams in the Local Court of Adelaide together with exhibits tendered on the hearing of the application.

IN THE PRIVY COUNCIL No. 35 of 1970

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN :

(substituted for JAN STASKA since deceased) MARIA STASKA Appellant

- and -

GENERAL MOTORS-HOLDEN'S PROPRIETARY LIMITED Respondent

RECORD OF PROCEEDINGS

No. 1

In the Local Court

No.1

Notice of Application by Respondent for Arbitration

27th March 1968

NOTICE OF APPLICATION BY RESPONDENT FOR ARBITRATION

AN ARBITRATION under the Workmen's Compensation Act 1932-1966 is hereby requested between GENERAL MOTORS-HOLDEN'S PROPRIETARY LIMITED and JAN STASKA with respect to the review and redemption of the weekly payment payable to the said Jan Staska under the said Act in respect of personal injury caused to him by accident arising out of and in the course of his employment. Particulars are hereto appended.

PARTICULARS

1. Name and address of injured workman:	Jan Staska of 12a Belmont Terrace, Woodville.
2. Name and place of business of employer by whom compensation is payable:	General Motors-Holden's Proprietary Limited of Woodville.
3. Date and nature of accident:	On 21st May 1956, when carrying a weight, the respondent slipped and suffered a strain to the lower back.

In the Local Court

No. 1

Notice of Application by Respondent for Arbitration

27th March 1968 (continued)

4.	Date when weekly payment commenced and amount of such payment:	The respondent was paid compensation for various periods between 13th December 1956 and 23rd January 1967. He was absent again on 8th February 1967 and since then has been receiving weekly payments at the rate of $32.50.
5.	Relief sought by applicant:	Redemption of the applicant's liability to make weekly payments to the respondent.
6.	Grounds on which redemption is claimed:	The liability of the applicant to make weekly payments to the respondent is stabilized in the sense that it is likely to remain constant or is, at the least, capable of being estimated with a reasonable degree of confidence.
7.	Names and addresses of the applicant and its solicitors are:	
	Of the Applicant:	General Motors-Holden's Proprietary Limited of Woodville
	Of its Solicitors:	Messrs. Alderman, Clark, Ligertwood & Rice of 13 Grenfell Street, Adelaide.
	Name and address of the respondent to be served with this Application:	Jan Staska of 12a Belmont Terrace, Woodville.

DATED this 27th day of March 1968.

(Signed) ALDERMAN, CLARK, LIGERTWOOD & RICE
13 Grenfell Street,
ADELAIDE.
Solicitors for the Applicant.

No. 2

In the Local Court

No.2

Reasons for Award given by Temporary Judge Williams

8th July 1968

REASONS FOR AWARD GIVEN BY TEMPORARY JUDGE WILLIAMS

REASONS FOR AWARD given by His Honour Temporary Judge Williams on the 8th day of JULY, 1968.

It is common ground that on the 21st May, 1956, personal injury by accident, arising out of and in the course of his employment with the applicant company was caused to the respondent workman when he slipped while carrying a weight at work and suffered a low back strain as a result. He was unable to work for a few days but then continued on at his old job until the end of the year when he had to have an operation for a bilateral hernia, which apparently was also a result of the abovementioned injury by accident. He was away from work as a result of this from the 13th December 1956 to 21st January, 1957; he was paid Workmen's Compensation during that period. In 1959 he had to undergo another operation for recurrence of the right-sided hernia and at the same time because he was having pain in his right leg and his backache was getting worse he was given traction treatment. On this occasion he was absent from work on compensation from the 23rd October, 1959 to the 11th January, 1960. He was again away from work on compensation from 21st July, 1960 to 5th August, 1960, because of a recurrence of low back pain and right sciatica. The low back pain and sciatica persisted and he was once more forced to stop away from work: on this occasion he was absent on compensation from the 12th October, 1961 to the 12th January, 1962. On November, 15th 1961, Mr. Rodney White removed a large disc prolapse from the L4-L5 disc of the respondent's spine, thus relieving pressure on the right 5th lumbar nerve root. I find on the medical evidence that this disc prolapse was caused by the abovementioned accident. This operation apparently relieved the respondent's pain to some extent but made him unfit for his old job. The applicant company therefore gave him a clerical job on his return to work on the 13th January, 1962. He continued to do this job until the autumn of 1966 when he was transferred to another lighter job sorting correspondence. This job involved more twisting of the respondent's back whilst in a sitting position. In November, 1966 to use the

In the Local Court

No.2

Reasons for Award given by Temporary Judge Williams

8th July 1968 (continued)

respondent's own words, he "started to be sick". He in fact ceased work again on the 13th November, 1966 and was away on compensation until the 13th January 1967. During this period he was examined by Mr. Rodney White who sent him back to work with a lumbo-sacral support. He was unable to carry on and was forced by back pain to stop work once more on the 7th February, 1967. He has not worked since. On the 8th June, 1967 Mr. Rodney White successfully carried out an anterior interbody fusion of the respondent's L.4-5 disc. This was done in order to try and improve his low back pain which I find was due to the damage done to that disc by the abovementioned accident. In a letter dated 19th October, 1967 Mr. Rodney White expressed the opinion that the respondent was permanently incapacitated for any work except that of a very light nature. But in a subsequent report dated 28th November, 1967 he said that he agreed with the respondent's own estimate of his situation which was that he was 100% unemployable.

The respondent was examined by Sir Leonard Lindon on the 26th February, 1968 and the 20th May, 1968. On the first occasion the respondent told him that since his last operation he was never out of pain in his back and had developed a new pain in the region of the left hip and buttock and left groin, which was steadily becoming worse. On examination movements of his spine were very limited even allowing for the spinal fusion. An X-ray revealed that the cause of the pain in the left hip, buttock and groin was bone formation just above the left hip joint, in fact just above the site from which Mr. Rodney White had taken bone for the fusion, extending into adjacent muscles. Sir Leonard had no doubt that this was causing the respondent a great deal of pain. As a result of this examination Sir Leonard considered that the respondent was extremely limited in doing any work and felt that only light sedentary work was within his capacity. At the second examination Sir Leonard found that the disability in the region of the left hip was even more marked than it had been in February and then felt that it was extremely doubtful whether the respondent could then carry out a regular sedentary occupation. There were other factors apart from the back injury and its sequelae which in Sir Leonard's opinion contributed to this incapacity for work but he said that even

without these other factors the back pain and the left hip pain were for all practical purposes causing a total incapacity for work, because even without the lesser disabilities the respondent's choice of occupation would be extremely limited and he would not be in the race to obtain an ordinary job, even a light one. A special job would have to be created especially for him and he would have to be given very generous treatment while working at it. On the basis of this evidence and the abovementioned report of Mr. Rodney White I find that since at least the 28th March, 1968, the respondent has been an "odd lot" within the meaning of that phrase as laid down by Fletcher Moulton L.J. in Cardiff Corporation v. Hall 4 B.W.C.C. 159 and for that reason totally incapacitated for work. It is clear from Sir Leonard's evidence that the respondent's condition will never improve, and, if anything, it will get worse. I therefore hold the respondent's total incapacity for work is permanent.

The applicant company applies by an application for arbitration dated the 27th March, 1968 and filed either that day or the next for redemption of the applicant's liability to make weekly payments of compensation to the respondent. The respondent did not file any answer and at the hearing supported the application. The respondent has not worked since the 7th February, 1967, and the applicant company had been paying him workmen's compenation on the basis of total incapacity at the appropriate rate, i.e. $32.50 per week from the 8th February, 1967, until the filing of the application for redemption, a period of more than six months, so that the condition precedent to the operation of section 28, the redemption section, has been satisfied for that section only authorizes an application for redemption of the liability for a weekly payment, "Where any weekly payment has been continued for not less than six months". In addition the applicant company has proved that a condition of stability has been attained which is a necessary foundation for a fair assessment of the capital value of the liability without which an arbitrator ought to refuse an application for redemption: Anstey v. A.E.S. Co. Ltd. 1938 S.A.S.R. 338. I am of the opinion that this is a proper case for redemption.

In the Local Court

No.2

Reasons for Award given by Temporary Judge Williams

8th July 1968 (continued)

The only matter in dispute is what is the proper figure to take on the basis from which to start the computation. The problem arises in this way. The amount of compensation payable to a workman in respect of an incapacity for work resulting from an injury is specified in section 18 of the Act. As already mentioned the appropriate weekly payment of compensation for the respondent's incapacity is $32.50. That amount is fixed by sub-section (2) of section 18, which reads as follows:

(2) The weekly payment to a workman having a wife or a child under the age of sixteen years totally or mainly dependent on his earnings shall not exceed thirty two dollars fifty cents or his average weekly earnings during the period aforesaid, whichever is lower.

The amount fixed by that section has been amended from time to time but it has stood at thirty two dollars fifty cents since 1963.

Sub-section (3) has since the 16th December, 1965, the date of the coming into operation of the Workmen's Compensation Amendment Act 1965 (i.e. subsequent to the date of the respondent's accident) read as follows:

(3) The total liability of the employer in respect of payments under this section shall not exceed in the case of total incapacity twelve thousand dollars and in the case of partial incapacity the sum of nine thousand dollars.

(See section 6 (b) and (c) of that amending Act.) At the date of the respondent's accident sub-section (3) read as follows:

(3) The total liability of the employer in respect of payments under this section shall not exceed two thousand six hundred pounds.

The applicant's counsel Mr. Lee contended that the 1965 amendments were not retrospective and had no application to an accident which like the respondent's occurred before then, so that the maximum total liability of the applicant employer under sub-section (3) was not $12000 but $5200 which was the maximum of that liability at the time when the

accident occurred. Respondent's counsel submitted that they were retrospective so that the maxima applicable with respect to incapacity for work resulting from an injury which happened prior to the amendments were the higher amounts introduced by those amendments. Alternatively he argued that even if the amendments were to be regarded as operating prospectively the higher amounts introduced by them were the relevant ones in this case because the permanent total incapacity for work from which the applicant now suffers did not commence until after the amendments came into operation, i.e. until November, 1966, or later, which my findings show to be the fact.

Respondent's counsel Mr. Ahern asked me to follow a decision on this matter of my then colleague, Mr. Johnston, S.M. (as he then was) given on the 10th June, 1966, in the matter of an arbitration between Cyclone Division v. Len Schlachtych (Pt. Adelaide Action No. 13497/65). My learned colleague started off by calling attention to the fact that amendments to section 18 had been made in the amending Acts of 1958 (which I point out was the first amendment of this section passed after the date of the respondent's accident) 1961, and 1963 increasing the amounts payable, and that in each amending Act a section was included dealing with the operation of the amendment. He pointed out in the 1958 Act there was a section which read, "Sections - and - of this Act shall apply in relation to injury or death caused by an accident occurring after the commencement of this Act. In cases of injury or death occurring before the commencement of this Act the provisions of the principal Act as in force immediately before the commencement of the Act shall apply." and that the 1961 and 1963 amending Acts each contained a section in almost identical terms. He then continued as follows:-

"However, no such section or provision appears in the 1965 amendment. The inference may thus be drawn that in this instance Parliament intended that the amending legislation should apply to injuries or accidents which occurred earlier than the date of amendment. The maxim "expressio unius est exclusio alterius" must of course be applied with care (see Dean v. Wiesengrund 1955 2 All E.R. 432 Morris L.J. at 439) but it would be

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Reasons for Award given by Temporary Judge Williams

8th July 1968 (continued)

difficult to hold that the operation of the amending Act was omitted through inadvertence.

"In Hall v. Metropolitan Abattoirs Board 1945 S.A.S.R. 193 the Full Court considered the question of whether section 18a which had been enacted in 1944 applied in the case where the injury to the workman had occurred prior to the enactment of the section. At p. 201 Richards J. said, 'It is true that the general rule is that unless there is a clear indication either from the subject matter or from the wording of the statute it is not to receive a retrospective construction ..... but it appears to me that the meaning of the retrospective operation or to use a term which is perhaps more accurate, a retroactive operation, has been misunderstood.' Speaking of a certain Act of Parliament, Lord Denman C.J. delivering the judgment of the Court in R. v. St. Mary etc. said - 'It is not properly called a retrospective statute because part of the requisites for its action is drawn from time antecedent to its passing.'

One of the requisites for the operation of section 18a in the present case is the accident and that occurred before the section became law: but what gives the claimant the right to recover medical and hospital expenses is that they were incurred by him and that happened wholly after the section became law.' "..... The Court was unanimous that the section applied.

"It seems to me that the same reasoning applies in the present case. The accident occurred long before the Amending Act was passed but the present application is made after the amendment became effective and that is after the Act has been amended to provide that the total liability of the employer shall not exceed £6,000.

"In my opinion if redemption is to be ordered it must be on the basis that the maximum liability of the employer is £6,000 and not £3,250."

I should perhaps point out that one marked difference between the facts of that case and this is that the application for redemption was made in respect of a total incapacity which had commenced in November, 1964, that is prior to the amendment, whereas in this case it commenced after it.

I am of course not bound to follow my colleague's decision in the Cyclone case on the question whether the 1965 amendments to section 18 are retrospective but since he was exercising the same jurisdiction I do not think I ought lightly to differ from it. Mr. Lee invited me not to follow the Cyclone decision on this question, for the following reasons:

1. It was obiter dicta because the application for redemption was refused and there was no need to deal with the question of retrospectivity. I agree, but this only means that I need have less hesitation in differing from it if I think it is not correct than would be the case if it had been part of the ratio decidendi.

2. It was given before section 28a in its present form was passed.

3. Hall's case (supra) can be distinguished.

4. It ignores the well-known principle that where a statute alters the rights of persons, or creates fresh liabilities with regard to persons or imposes obligations on persons, it ought not to be held to be retroactive in its operation unless the words are clear, precise and quite free from ambiguity.

As to 2:

Section 28a as it stood at the time of the Cyclone decision was introduced into the Act by section 9 of the 1965 amending Act which also increased the total liability of an employer under section 18(3) as already explained. Section 28a then read as follows:-

"28a. 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

In the Local Court

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Reasons for Award given by Temporary Judge Williams

8th July 1968 (continued)

result of the injury in respect of which the compensation was paid,

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 at the time of the death of the workman, or, as the case may require, the amount of weekly compensation payable in respect of the 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 this Act."

This section is not referred to in the Cyclone judgment, which suggests that the Court's attention was not drawn to it, which I find difficult to understand, for it seems to me that it was introduced into the Act by the 1965 amending Act for the very purpose of dealing with the operation of any amendments (including the 1965 amendments) raising compensation amounts. If this is so, my colleague was not correct, I think, in saying that there was no section or provision in the 1965 Act dealing with this subject. I would think, therefore, that his application of the maxim expressio unius est exclusio alterius, and the inference which he drew from that application, were based on a false premise. But it seems to me that this maxim was applicable to section 28a itself as it stood when first introduced by the 1965 amending Act. In enacting section 28a in its original form the legislation chose to provide specifically that the increased amounts provided by that Act for death and weekly compensation should be payable in respect of deaths or incapacities which occurred after the passing of the amending Act only in the circumstances stated therein. The inference which I draw from this fact is that the 1965 increases were not to be payable in respect of deaths or incapacities resulting from an injury which occurred before the passing of the amending Act unless the workman had returned to work after being paid compensation in respect of that injury and then after the passing of the 1965 amending Act had died or suffered

further incapacity. So that I think that, excepting in these circumstances, no death or incapacity occurring after the passing of the 1965 amending Act as a result of an injury sustained before it, was to be compensatable on the basis of the increased 1965 amounts. But of course section 28a as it then stood made no provision as to the operation of the 1965 amendments of section 18 (3). If any inference as to Parliament's intention as to the operation of the 1965 amendments of section 18 (3) can be drawn from section 28a in its first form, which I doubt, it is that they were not to apply to any incapacity arising after the passing of those amendments as a result of injury which occurred prior to the passing of those amendments. I feel sure, however, that the opposite inference, that is, that they were to apply, definitely cannot be drawn. But I think that the problem of the operation of the amendments as at the date of the Cyclone decision must be solved by the ordinary canons of construction.

Section 28a was amended on the 1st December, 1966 by Section 6 of the Amending Act No. 86 of 1966 to read as follows:

> "28a. 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."

I read the provision that the section should not apply to the total liability of an employer under

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No.2

Reasons for Award given by Temporary Judge Williams

8th July 1968 (continued)

section 18 (3) as a legislative declaration that the appropriate amount to be taken as limiting the total liability of the employer in any particular case shall be the amount payable as at the date of the injury not as at the date of the incapacity. If this conclusion is correct redemption in this case must be granted on the basis of a maximum liability of $5,200 and not $12000.

With all respect to Mr. Johnston, S.M. I do not think the principles applied in Hall's case were applicable in the Cyclone case. I feel that in that case the Court did not give sufficient weight to the principles usually applied when dealing with the question whether legislation is retrospective or not. These principles are summed up in the following authorities which are of course only a few of the many dealing with this branch of the law:

Cockburn C.J. in The Queen v. Ipswich Union (1877) 2 Q.B. 269 at p. 270 -

"It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken to be intended to apply to a state of facts coming into existence after the Act."

Wright J. in In re Athlumey 1898 2 Q.B. 547 at p. 55 -

"perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment".

Dixon C.J. in Maxwell v. Murphy 96 C.L.R.261 at p. 267-

"The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise

affect rights or liability which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts matters or events, the law appointing or regulating the manner in which they are to be enforced or their engagement is to be secured by judicial remedy is not within the application of such a presumption."

The provisions of section 16 of the Acts Interpretation Act must also be borne in mind; that section provides as far as is material as follows:-

> (1) Where any Act, whenever passed, repeals or has repealed a former Act, or any provision or words thereof ... then, unless the contrary intention appears, such repeal ... shall not -
>
> I .....
>
> II .....
>
> III affect any right, interest, title, power or privilege created, acquired, accrued, established, or exercisable ... prior to such repeal .....;
>
> IV affect any duty, obligation, liability, or burden of proof imposed created or incurred ... prior to such repeal .....

I consider that Hall's case can be distinguished because by virtue of the express words in which section 18a was couched there was no room for the doctrines as to retrospective effect. As the Chief Justice said at p 197, section 18a is expressed in clear precise and unambiguous terms, and all that needed to be done was to apply them to the facts of the case. Ligertwood J. said at p 206, "The section applies to a workman who is 'entitled to compensation' under the Act. The appellant answers that description. It makes the employer liable for hospital expenses which are incurred by the workman as the result of his injury. The appellant's hospital expenses amounting to £21 were all incurred after 14th December, 1944, and they clearly come within the express words of the section."

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Reasons for Award given by Temporary Judge Williams

8th July 1968 (continued)

To the same effect is the passage from the judgment of Richards J. at p. 201: "The case falls clearly within the language of the section; the claimant is 'a workman.....entitled.....to compensation under this Act' and the expenses were incurred after section 18a passed. The effect of the learned magistrate's decision on this question is to make the decision read:- "Where after the passing of this section, a workman becomes entitled to compensation"; whereas it reads "where a workman is entitled"."

In my opinion there is no clear indication in the 1965 Amending Act, either from the subject matter or the wording of the Act, that the amendments to section 18(3) are to have a retrospective operation. The amending Act is silent on the subject: therefore the amendments to section 18(3) cannot be treated as having a retrospective operation.

In support of his submissions that the Cyclone decision was wrong even in the wording of the relevant sections as they then stood Mr. Lee strongly relied upon the High Court decision of Kraljevich v. Lake View and Star Ltd. 70 C.L.R. 647, the ratio decidendi of which in my opinion is correctly summed up in the head note which reads as follows:-

> "The First Schedule to the Worker's Compensation Act 1912-1941, (W.A.) provided, by clause 17, for redemption of weekly payments by payment of a lump sum and, by clause 18, for assessment of the lump sum in accordance with an actuarial calculation. An amending Act altered the method of assessment so as to increase the lump sum to which a worker was entitled by way of redemption."

Held, that the amendment did not apply to a case in which the accident in respect of which weekly payments were being made had occurred before, but an application was heard after, the date of the amendment.

In his judgment Latham C.J. said at p. 650, after referring to the extract from the judgment of Cockburn C.J. in R. v. Ipswich Union cited above: "In the present case there is no language "expressly to the contrary" and therefore prima

facie the amending Act applies only in the case of accidents which happen after the Act. If the new Act had merely altered procedure the case would have been different, but it is impossible to regard that Act as merely affecting procedure." I agree with Mr. Lee, counsel for the applicant, that that passage exactly fits this case. There is a similar passage in the judgment of Stark J. at p. 652 which also is applicable, in my opinion, to this case. After referring to the passage from Athlumney's case cited above that learned Judge said "Clearly the Act of 1945 was not a procedural Act; it increased the lump sum to which a worker was entitled on redemption of the weekly payments and the obligation of the employer, and there is no provision in the Act which expressly or by necessary implication makes s. 4 sub.-s.g. of the Act retrospective in operation." At p. 652 Dixon J. said, inter alia.. "This presumptive rule of construction is against reading a statute in such a way as to change accrued rights the title to which consists in transactions passed and closed or in facts or events that have already occurred. In other words, liabilities that are fixed, or rights that have been obtained, by the operation of the law upon facts or events for, or perhaps it should be said against, which the existing law provided are not to be disturbed by a general law governing future rights and liabilities unless the law so intends, appears with reasonable certainty.... In the present case, we have an example of a provision which at first sight looks to be expressed in terms more appropriate to procedure, but one, in substance, measuring liability. For to prescribe the basis of calculating redemption is in reality to express the measure of liability. But, when the statute is examined in detail, the form also of the amended clause is seen less as a statement about proceedings for the realization of rights than as a delimitation of their measure. For s.6(1) of the principal Act provides that upon personal injury being caused in conditions involving liability the worker's "employer shall be liable to pay compensation in accordance with the First Schedule". At p. 653 he also said, "The existing First Schedule therefore stated the extent and limits of the liability and how to ascertain it.... Both the structure and the substance of the enactments consisting of s. 6(1) and the First Schedule, clause 18, in the unamended and amended form,

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Reasons for Award given by Temporary Judge Williams

8th July 1968 (continued)

appear to me to bring the case within the rule of construction, and, in my opinion, there are no indications at all of a contrary intention." Likewise under the South Australian Workmen's Compensation Act section 4 (1) provides that upon personal injury being caused in conditions involving liability the worker's "employer shall, subject, as hereinafter mentioned, be liable to pay compensation in accordance with this Act". Part III of that Act states the extent and limits of the liability and how to ascertain it. One of the provisions of this Part of the Act is section 18 (3) which both at the time of the injury provided and still provides that the total liability of the employer in respect of payments under the section should be limited to a total amount of a stated sum. Before the 1965 amending Act it was $5200 and after it $12000 for total incapacity and $9000 for partial incapacity. I adopt the language of Dixon J. in this way:- "Both the structure and the substance of the enactments consisting of Section 4(1) and section 18 sub-section (3) in the unamended and the amended form, appear to me to bring the case within the rule of construction, and, in my opinion, there are no indications at all of a contrary intention". Further, as I have already pointed out, section 28a as amended in 1966, in my opinion, contains a legislative declaration that the 1965 amendments to section 18(3) should not apply to an injury occurring before the date of the 1966 Act, i.e. 1st December, 1966. And of course the injury in this case occurred before then. I am unable to accept Mr. Ahern's argument for the respondent that the intent and meaning of the 1965 amendments to section 18(3) were that the increased amounts were to apply to incapacities for work which occurred after the passing thereof, so that since the respondent's permanent incapacity for work did not commence until late 1966, he was entitled to receive in all $12000, the amount provided for by those amendments in respect of total incapacity. The short answer to that contention is this passage from the judgment of Latham C.J. in Kraljevich's case (supra) at p. 650 "The right of the worker who suffers from an accident for which compensation is payable under a Worker's Compensation accrues immediately on the happening of the injury". Looked at from another point of view that means, I apprehend, that the employer's liability also becomes crystallised at that moment:

see also Clement v. D. Davies & Sons Ltd. 1927 A.C. 126 particularly per Viscount Dunedin at p.131. So that in this case the applicant's total liability as at the time when the accident occurred was fixed by section 18(3) at $5200. And the 1965 amendments did not for the reasons which I have given retrospectively alter that amount. Therefore in my view at the date of the application the applicant's total liability for compensation for any incapacity of the respondent worker was still $5200.

In my opinion there is nothing in the recent High Court decision of Ogden Industries Pty. Ltd. v. Lucas 41 A.L.J.R. 147 which throws any doubt upon the correctness of the decision in Kraljevich's case although the majority view in Ogden's case seems to have been that perhaps the doctrine that the moment an employment injury occurs the employer incurs a liability to pay compensation to the worker and the latter is vested with a corresponding right is only correct where incapacity is immediately caused by the injury. In Kraljevich's case immediate incapacity was apparently caused by the injury. But so it was in the case of the respondent although the initial incapacity did not last for long. The respondent had had a number of periods of incapacity from work before the passing of the 1965 amending Act for which he had been paid compensation on the basis of total incapacity and it appears to me that for that reason the applicant employer had at that time already acquired a vested right to limit his total payments of compensation for total incapacity to $5200, of which he could not be deprived except by legislation which because of its subject matter or express words clearly increased that limit retrospectively, that is, so as to apply even to incapacities occurring after its passing although resulting from an injury by accident preceding it. And, in my opinion, the 1965 amendments of section 18 (3) were not retrospective in that sense because there was no clear indication in the 1965 amending Act that they were intended to have retrospective effect on already accrued rights.

An actuary's certificate which was put in by consent shows that at 5½% interest (which both counsel agree is the correct rate to take) the value of payments of $32.50 per week (which is the current rate of compensation for the respondent's

In the Local Court

No.2

Reasons for award given by Temporary Judge Williams

8th July 1968 (continued)

total incapacity for work) continuing until a total of $5200 has been paid on the death of a man aged 55 (the respondent's present age) whichever occurs first, is $4,694. Mr. Lee stated that his client did not suggest there should be any deduction from this figure for contingencies. Payments of compensation made before the date of the filing of this application for redemption are not deductible: Perry Engineering Co. Ltd. v. Meringis 39 A.L.J.R. 245, but those made after that date, must be credited as part payment of the amount awarded by way of redemption. I award that the applicant's liability to make weekly payments of compensation to the respondent be redeemed by the payment of the lump sum of $4,694.

(signed) D.C. WILLIAMS.

In the Supreme Court

No. 3

Notice of Appeal

29th July 1968

No. 3

NOTICE OF APPEAL

TAKE NOTICE that the Full Court will be moved on Monday the seventh day of October 1968 at 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard by counsel on behalf of the abovenamed appellant JAN STASKA on appeal from the decision delivered on the 8th day of July 1968 of His Honour Temporary Judge D.C. WILLIAMS ESQUIRE the Special Magistrate presiding at the Local Court of Adelaide WHEREBY he ordered that the respondent's liability to make weekly payments of compensation to the appellant be redeemed by the payment of the lump sum of $4,694.00 FOR AN ORDER that the said decision be set aside and the amount of compensation for which the appellant is entitled under the said Act be reassessed AND THAT the costs of and incidental to this appeal and the said arbitration be paid by the respondent to the appellant AND for such further and other orders as to the Full Court may seem just and proper AND FURTHER TAKE NOTICE that the whole of the said decision of the learned Temporary Judge is complained of AND FURTHER TAKE NOTICE the grounds of this appeal are:-

1. The learned Temporary Judge was wrong in finding that the weekly compensation paid to the appellant in respect of which the respondent made application to redeem was in respect of injury to the appellant on the 21st May 1956.

2. The learned Temporary Judge should have found that the injury to the appellant for which the said weekly compensation was being paid by the respondent occurred on the 7th day of February 1967 or alternatively on the 14th day of November 1966.

3. Alternatively the learned Temporary Judge was wrong in finding that the provisions of the Workmen's Compensation Act Amendment Act 1965 and/or the provisions of the Workmen's Compensation Act Amendment Act 1966 were not retrospective so far as the said Acts increased the amount of compensation payable by an employer to a workman for permanent total incapacity.

4. Alternatively the learned Temporary Judge was wrong in finding that the proviso to section 28a of the said Act as enacted by Amending Act of 1966 limited the amount payable to the appellant by the respondent on redemption to the total maximum liability which under section 18(3) of the said Act an employer was liable to pay as weekly compensation.

5. The learned Temporary Judge should have assessed the amount of compensation payable to the appellant at $12,000.00.

DATED this 29th day of July 1968.

REILLY AHERN & KERIN
Per: (Signed) M.L. Reilly
23 Grenfell Street,
ADELAIDE.
Solicitors for the Appellant.

In the Supreme Court

No. 4

Reasons for Judgment of Dr. J.J. Bray C.J.

22nd November 1968

No. 4

REASONS FOR JUDGMENT OF DR. J.J. BRAY C.J.

delivered 22nd November 1968

I have had the advantage of reading the reasons for judgment prepared by Mitchell J. in this matter, and it is unnecessary for me to repeat the recapitulation of the facts set out therein.

I entirely agree with what Her Honour has said concerning the argument that the period of the previous twelve months, referred to in sec. 18 (1) as the period over which the average weekly earnings of the workman are to be calculated, is the period immediately before the incapacity, not the period immediately before the injury. In my view the language of secs. 18 (5), 20, 21, 24 and 25 (2) is incompatible with that argument. Nor can I usefully add anything to what Mitchell J. has said about the contention that "injury" in sec. 18 (1) means the completed physical condition from which the incapacity results, and not the event which produced the phenomena from which the physical condition later develops, or the further contention that on the evidence in this case the appellant had a series of injuries in the relevant sense, the last of which occurred on the 14th November 1966, or alternatively the 7th February 1967.

However, with respect to Her Honour, I find myself in disagreement with her concerning the construction and effect of sec. 28a as incorporated in the legislation by the amending Act of 1965. I think it best to consider first the Act of 1965 by itself, and the position of the appellant after its commencement. The effect of the further amendment in 1966 can then be discussed. In limine I would, at a respectful distance, echo the regrets expressed by the learned Judges of the High Court in Ogden Industries Pty. Ltd. v. Lucas 41 A.L.J.R. 146, that the legislature has not seen fit to define with precision the temporal application of these amending Acts.

Sec. 28a as contained in the Act of 1965 is set out in Her Honour's judgment and I will not repeat it. It is to my mind apparent that in some respects at least the section contemplated that its

benefits should be available to a workman, even though some of the several events necessary to constitute his entitlement took place before its commencement. It seems to me that its very words contemplate the case where the workman has received compensation before the 16th December 1965, the date of commencement of the 1965 Act, and has subsequently returned to work, and then either died or suffered incapacity as a result of the original injury in respect of which the compensation was paid. And I see no reason to doubt that even if the return to work occurred before the 16th December 1965 the result would be the same if the death or incapacity were subsequent. I point to the use of the perfect tense in sec. 28a, sub-secs.(a) and (b), as opposed to the use of the present tense in sub-sec. (c). Clearly, it seems to me, that in these cases "the amount of weekly compensation payable in respect of the subsequent incapacity" must be "computed and based upon the rates" prevailing at the time of that incapacity. This seems to have been recognised by all parties here. The appellant was paid after the 13th November 1966, the first time he was incapacitated for work after the commencement of the Act of 1965, and again after the 7th February 1967 when he was finally and permanently so incapacitated, and the redemption was calculated at the rate of $32.50 a week, the rate in force under sec. 18 (2) on those dates by reason of the amending Act of 1963, and not at the rate of $25.20, the rate in force at the date of the original injury in 1956. But the maximum fixed by sec. 18 (3) is no more than the total liability of the employer in respect of the weekly payments referred to in sec. 18 (2). It seems to me that a statute making applicable the weekly rate under sec. 18 (2) at any particular time automatically, in the absence of some provision to the contrary, express or implied, makes applicable also the maximum in force under sec. 18 (3) of that Part. As the High Court said in Wattle Gully Mines v. Clementi 94 C.L.R. 353 at p. 363:

> "But however this may be, the provisions of the principal Act which relates to 'rates' of compensation must comprise the whole of the provisions of that Act which, in a case for which weekly payments are provided, regulate the extent of the employer's liability to make such payments. The rate of payments in such

In the Supreme Court

No. 4

Reasons for Judgment of Dr. J.J. Bray C.J.

22nd November 1968 (continued)

> a case is not fully or accurately described by saying that it is so much a week; it is so much a week subject to the statutory limit upon the total amount to be paid."

Hence, in my view, when the appellant's total incapacity began on the 13th November 1966 he acquired a right under the 1965 Act to weekly payments at the rate in force at that time and up to the total maximum in force at that time, namely $12,000.

I do not think that this conclusion contravenes the presumption against the retrospective operation of statutes or the rules relating to repealing statutes contained in the Acts Interpretation Act. In Reg. v. The Inhabitants of St.Mary, Whitechapel 12 Q.B. 120, a case relating to the removal of paupers under the poor law, Lord Denman C.J. said at p. 127:

> "The statute is in its direct operation prospective, as it relates to future removals only, and ... it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

I think those words apply directly here with the substitution of "future incapacity" for "future removals". If this is right, the case falls into the same category as Hall v. Metropolitan Abattoirs Board (1945) S.A.S.R. 193; Fisher v. Hebburn Ltd. 105 C.L.R. 188; and Ogden Industries v. Lucas, previously referred to, rather than into the category of Kraljevich v. Lake View and Star Ltd. 70 C.L.R. 647, on which so much reliance was placed by the respondent. In Kraljevich's case there was nothing in the amending section to show that it contemplated, as in my view sec. 28a in its 1965 form clearly contemplated, that part of the requisites for its action was or could be drawn from time antecedent to its passing. In that case, Dixon J., as he then was, referred at p.652 to "the presumptive rule of construction ... against reading a statute in such a way as to change accrued rights the title to which consists in transactions passed and closed, or in facts or events that have already occurred".

But in this case the appellant's title does not so consist in its entirety. Part of it comes from an event which had not occurred before the 1965 Act, namely his subsequent total incapacity. As Fullagar J. said in Fisher v. Hebburn above at p. 194:

> "The rule (i.e. against retrospectivity) has been frequently applied to amending statutes relating to workmen's compensation, and it has often been held that such amendments apply only in respect of 'accidents' or 'injuries' occurring after their coming into force: the cases of Moakes v. Blackwell Colliery Co. Ltd. and Kraljevich v. Lake View & Star Ltd. are familiar examples. But there is no rule of law that such statutes must be so construed and it would not be true to say that a retrospective effect can only be avoided by confining the operation of such a statute to subsequently occurring 'accidents' or 'injuries'. It may truly be said to operate prospectively only, although its prospect begins, so to speak, with some other event than accident or injury. This is, I think, the case here. I think the prospect of sub-sec (2A) begins with incapacity and not with injury."

So I think does the prospect of sec. 28a in its 1965 form. And I would respectfully adapt the words of Taylor J. in Ogden Industries v. Lucas above at p. 157, and say that presumably Parliament did not intend that where two workmen in the same industry both become totally incapacitated on the same day and therefore each entitled to receive the same rate of weekly payment, one of them will nevertheless recover a much smaller total maximum than the other, merely because his original injury occurred at an earlier date, even though the first manifestation of both injuries occurred at the same time.

If this is right then at the date of the passing of the further amending Act on the 1st December 1966 the appellant had acquired a vested right to weekly payments at the rate of $32.50 a week during total incapacity up to a maximum of $12,000. On that day he was still totally incapacitated for work. I find it very difficult to construe the last limb of the proviso to the amended section 28a as it

In the Supreme Court

No. 4

Reasons for Judgment of Dr. J.J. Bray C.J.

22nd November 1968 (continued)

appears in the 1966 Act. Whatever its correct meaning, it certainly has no counterpart in the 1965 Act, and I do not think it ought to be construed so as to deprive the appellant of the rights which in my view he possessed at the date of its commencement. Here all the respondent's arguments based on the presumption against retrospectivity and the provisions of sec. 16 of the Acts Interpretation Act 1915-1936, can be turned against him. And if I am right the total liability of the respondent to the appellant under sec. 18(3) at the date of the commencement of the 1966 Act was already $12,000. It may be that the words "nor shall it apply to the total liability of an employer under sub-sec. (3) of sec. 18 of this Act" only apply to future amendments of sec. 18 (3). Or it may be that the appellant, by becoming totally incapacitated between the date of the 1965 Act and the 1966 Act, has obtained some advantage over those who became so totally incapacitated before the first or after the second of those Acts. If so, this would not be the first time this legislation has produced anomalous consequences. At any rate I do not think the language of the 1966 Act can be read back into the 1965 Act so as to afford a guide to its construction, any more than the absence in the 1965 Act of any provision corresponding to the provisions in previous amendments confining their operation to subsequent accidents can be used as such a guide.

Nor again, if I am right, does it in my view make any difference that the appellant returned again to work in January 1967 before ceasing for the last time on 7th February 1967. The same arguments against depriving him of rights which he had already acquired would in my view apply.

In my view the appeal should be allowed. I think the consequence of that is that the case must be sent back for a re-assessment of the compensation on the basis that the maximum amount for which the respondent can be liable is $12,000, unless the parties can agree on the necessary calculations.

No. 5

In the Supreme Court

No. 5

Reasons for Judgment of Mitchell J.

22nd November 1968

REASONS FOR JUDGMENT OF MITCHELL J.

delivered 22nd November 1968

This is an appeal from an award by Temporary Judge Williams of a sum of $4694 to be paid by the respondent to the appellant in redemption of the respondent's liability to pay compensation to the appellant under the Workmen's Compensation Act. The appellant claims that the compensation should have been assessed at the sum of $12,000.

It is common ground that on the 21st day of May 1956, the appellant, in the course of his employment with the respondent, slipped and suffered a strain in the lower back. Sec. 4(1) of the Act then in force made an employer liable to pay compensation where personal injury by accident arising out of and in the course of the employment had been caused to a workman. The accident to the appellant was accepted by the respondent as appropriate for the payment of compensation. Subsequently the appellant underwent two separate operations for hernia, which, it was acknowledged, had developed as a result of the injury, and he was paid compensation during the periods that he was absent from work. He received compensation during further absences from work owing to a recurrence of low back pain and sciatica. On the 15th November 1961 Mr. Rodney White, an orthopaedic surgeon, removed a large disc prolapse from the L4-L5 disc of the spine. The Judge found that the disc prolapse was caused by the abovementioned accident. The appellant returned to work on the 13th January 1962, but was unfit to perform the work which he had previously done. He undertook clerical work and in the autumn of 1966 was transferred to light work in sorting of correspondence. On the 13th November 1966 he ceased work, being unable to perform his duties on account of low back pain, and was absent on compensation until the 23rd January 1967. Mr. Rodney White permitted him to resume work on the latter date with the assistance of a lumbo-sacral support. On the 7th February 1967 pain in his back again caused the appellant to stop work, and he has not since been employed. The Judge found that the respondent had a permanent total incapacity for work and this finding is not disputed. He

In the Supreme Court

No. 5

Reasons for Judgment of Mitchell J.

22nd November 1968 (continued)

decided that the total liability of the respondent was limited to the amount specified in sec. 18(3) of the Workmen's Compensation Act Amendment Act 1955, namely £2600. The appellant claims that he is entitled to the benefit of the 1965 amendment to sec. 18(3) of the Workmen's Compensation Act whereby total liability of the employer was fixed at £6000.

Mr. Reilly based his argument on a number of grounds. His first submission was that sec. 18 of the principal Act provides for the computation of weekly payments at the time of the resulting incapacity and not at the date of the accident. Sec. 18(1) provides for the rate of weekly payments of compensation "where total or partial incapacity for work results from the injury". The compensation is not to exceed "a sum equal to three quarters of the average weekly earnings of the workman during the previous twelve months if the workman has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer". Mr. Reilly contended that the "previous twelve months" are the twelve months prior to the incapacity and not the injury. The method of computation of average weekly earnings is specified in sec. 20 of the Act and prior to the 1965 Amendment that section referred to the date of the accident, as being the date at which the rate of remuneration was to be computed. Since the 1965 amendment the workman has been required to show only that personal injury arising out of or in the course of his employment had been caused to him, the words "by accident" being excluded by amendment to sec. 4 of the Act, and as a consequential amendment sec. 20 requires the remuneration to be computed as at the date of the injury. In my view this does not mean that it is to be computed as at the date of the total or partial incapacity for work. Nor do I think that sec. 18 (5) relates to the date of incapacity as distinct from the date of injury. Until the 1961 amendment to the Act a weekly payment for a wife was provided for only if the workman at the time of the accident had a wife totally or mainly dependent upon his earnings: That amendment provided for an allowance for the wife dependent at the time of the accident or during incapacity. Since the 1965 amendment there is provision for a wife dependent at the time of the injury or during

incapacity, the distinction between the date of the injury and the date of the incapacity being preserved. In my view the weekly payment is to be assessed upon the average weekly earnings of the workman during the twelve months prior to the accident or (since the 1965 amendment) prior to the injury.

Mr. Reilly submitted further that where sec. 18(1) refers to incapacity resulting "from the injury", it refers to the completed physical condition from which incapacity results but does not necessarily relate to the event or accident which produces the condition from which the physical disability develops. This argument appears to me consonant with that argument for the appellant which did not find favour in Ogden Industries Pty. Ltd. v. Lucas 41 A.L.J.R. 146. Prior to the 1965 amendment it was not sufficient for the workman to prove injury. He had to establish injury by accident with consequential total or partial incapacity for work in order to qualify for the payment of compensation. It was that type of injury to which sec. 18 referred. Now it is sufficient for the workman to establish an injury, but while each separate injury is the subject of compensation during incapacity from that injury, it seems to me that the progressive degeneration of a physical condition which may in itself be an injury, does not amount to a further injury. It may be, of course, in any given case that a workman can establish that he has suffered a series of injuries arising out of or in the course of his employment, that each such injury has to some extent incapacitated him and to the extent to which it has incapacitated him is separately a subject of compensation. Mr. Reilly has submitted that in this case the appellant has suffered injury on 14th November 1966, alternatively on the 7th February 1967. The Judge found that the low back pain from which the appellant suffered, and which caused him to cease work, was due to the damage done to the disc by the accident on 21st May 1956. The appellant in evidence said: "I actually started to be sick in the middle of November 1966". Referring to the work he had been then doing he said:

> "It was one of sorting the paper. Thousands of movements every day of my spine from left to right and slight bending."

In the Supreme Court

No. 5

Reasons for Judgment of Mitchell J.

22nd November 1968 (continued)

Sir Leonard Lindon who was the only other witness, said that he knew nothing to break the chain of causation between the injury in May 1956 and the appellant's condition when he was examined by Sir Leonard Lindon on the 26th February 1968. He was questioned as to whether movements of twisting from side to side on a chair would be inclined to bring on pain in the back, and he said that quite trifling movements are liable to increase the pain, but he had made it clear that the pain was related to the original injury. The medical reports from Mr. Rodney White which were admitted in evidence, were consistent with the evidence of Sir Leonard Lindon. I can see no reason to disagree with the finding of the Judge that the injury occurred on the 21st May 1956.

Mr. Reilly's final submission was that the 1965 amendment to sec. 18, whereby total liability of the employer has been increased to $12000 operates in favour of the appellant. After the 21st May 1956 the total liability of the employer was increased in each of the amending Acts passed respectively in the years 1958, 1960, 1961, 1963 and 1965. With the exception of the amending Act of 1965 all Acts contained a provision that the amendments increasing payments of compensation should apply only in relation to injury or death caused by an accident occurring after the commencement of the amending Act. The 1965 Act contains no such provision. Sec. 28a was by that Act inserted in the principal Act after sec. 28. Sec. 28a read:-

> "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 in respect of which the compensation was paid,
>
> 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 at the time of the death of the workman or, as the case may require, the amount of weekly compensation payable in respect of the 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 this Act."

Sec. 26 provides for fixed rates of compensation for what are frequently referred to as scheduled injuries.

Sec. 28a was amended by the Act 1966 and now reads:-

"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."

It is to be seen that the circumstances in which the amount of compensation payable was to be that prevailing at the time of the death of the workman or at the time of the payment to him of weekly compensation as the case may be, have been enlarged by the 1966 Act. It is no longer necessary, in order that the amended rates of compensation shall apply, that the workman shall have returned to work

In the Supreme Court

No. 5

Reasons for Judgment of Mitchell J.

22nd November 1968 (continued)

after the payment of compensation and prior to the death or subsequent incapacity in respect of which the compensation is to be paid. The amount of compensation for death occurring after the passing of the 1966 Act is regulated by that Act whenever the injury occurred, and the amount of weekly payment for total or partial incapacity after the commencement of the Act is that fixed by the Act whenever the injury occurred. Two provisos which were not contained in the 1965 Act are included in the 1966 Act, namely:-

1. That sec. 28a shall not apply where compensation has been made to the workman by way of a lump sum payment in redemption of weekly payments; nor

2. shall it affect the total liability of an employer under sec. 18 (3) of the Act.

The 1966 Act came into operation on 1st December 1966 before the appellant finally ceased work. It is, however, necessary to consider the amendments to the principal Act made by the 1965 Act including the addition of sec. 28a as it was there enacted, in order to ascertain whether the amendment to sec. 18 (3) of the principal Act increasing the total liability of the employer to $12,000 was applicable to the appellant. The general rule is that an enactment has a prospective and not a retrospective operation, and this applies to an amending statute in the same manner as to the principal statute. This rule has frequently been applied in the construction of statutes relating to workmen's compensation but, as Fullagar J. pointed out in Fisher v. Hebburn Ltd. 105 C.L.R. 188 at 194, there is no rule of law whereby a prospective effect must necessarily be given to such statutes. In Ogden Industries Pty. Ltd. v. Lucas (supra) the majority of the Court who decided that the amendment in question to the Workmen's Compensation Act (Victoria) applied retrospectively, did so because they held that the amending Act operated to quantify the amount of compensation payable to the dependants of the deceased workman at the date of his death and not at the date of the injury suffered by the workman, the death of the workman having occurred after, and the injury before, the operation of the amending Act.

Reliance was placed upon the fact that the

dependants to receive compensation were to be ascertained as at the date of the death of the deceased.

I am unable to distinguish the amendment to sec. 18 (3) of the South Australian Act from the amendment which the Court considered in Kraljevich v. Lake View & Star Ltd. 70 C.L.R. 647. Sec. 4 of the principal South Australian Act made the respondent liable to pay compensation to the appellant in accordance with the Act as soon as the injury by accident had occurred to the appellant, namely, on the 21st May 1956, and the total liability of the employer was, in my view, then fixed at the amount specified in sec. 18 (3) of the Act then in operation. Neither the fact that the 1965 Act omitted the exclusion of past accidents which was contained in previous amending Acts, nor the fact that the amended sec.28a inserted by the 1966 Act expressly excludes the operation of that section to the total liability of the employer under sub-sec. 3 of sec. 18 of the Act, affects the matter. Unless there is something in the amendment to enable a statute providing for compensation to be construed as relating to an injury suffered prior to the amendment, then any statutory provision that it shall not apply to injury occurring prior to the amendment is otiose. Nor do I find any ambiguity in the statute of 1965 which would enable the Court to look at the amendment of 1966 to decide what was the ambit of the operation of sec. 18 (3) of the Act as at the time of the 1965 amendment (cf. Ormond Investment Co. v. Betts (1928) A.C. 143 at 1956). In my opinion the 1965 amendment to sec. 18 (3) of the Act applies only to injury occurring after the date of the amendment, and the appellant is therefore not entitled to receive more than the amount of compensation fixed at the date of his injury by accident in May 1956.

The appeal should be dismissed.

In the Supreme Court

No. 6

Reasons for Judgment of Walters J.

22nd November 1968

No. 6

REASONS FOR JUDGMENT OF WALTERS J.

delivered 22nd November 1968

I shall not traverse the objections which counsel for the appellant has raised to the award of the learned Arbitrator, nor shall I deal with the relevant facts, as they have been covered by what Mitchell J. has said in her judgment.

I agree with Mitchell J. that the basis upon which compensation for the incapacity of the workman is to be founded is his average weekly earnings during the period of twelve months prior to the date on which he sustained the accidental injury, and not the period of twelve months prior to the occurrence of the incapacity resulting from that injury. It seems to me that the liability of the employer to pay compensation in accordance with the Act comes into existence when the accidental injury happens; that the liability is imposed on the employer at that time and not when the incapacity arises.

Further, I share Her Honour's view that the statute does not create a separate liability for a completed physical condition which does not manifest itself until after the elapse of a considerable period of time from the happening of the accidental injury. Any complete disablement which then arises is still to be treated as directly related to the happening of the injury and it is that injury which gives the entitlement to compensation. As Barwick C.J. said in Ogden Industries Pty. Ltd. v. Lucas 41 A.L.J.R. 146, 148, "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 possible be recovered". The injury may produce an incapacity which is purely temporary or it may cause partial incapacity. Thereafter the injury may bring on an increased incapacity until the stage is reached where there is a total incapacity. However, in my opinion, that total incapacity is still attributable to the original injury and must be compensated on the basis of the average weekly earnings of the workman during the

period of twelve months prior to the injury being sustained.

But with respect to my learned colleague, I dissent from her on the question whether sec. 28a of the Workmen's Compensation Act Amendment Act 1965 is to be construed as having retrospective operation so as to give the appellant a maximum entitlement of $12,000 compensation, and I agree with what the learned Chief Justice has said on this point. Although it is a well-established rule of construction that a statute is not to be construed as to be retrospective unless it so declares in express terms, or it is to be gathered from the context of the enactment that the legislature intended it to be retrospective, nevertheless, if upon examination of the general scope and purview of the enactment and the remedy sought to be applied upon consideration of the former state of the law, it can be seen that the provision calling for interpretation was intended to be retrospective, then it must be held to be so, no matter what its effect may be on any right or liability previously acquired or accrued (Wilson v. Moss (1909) 8 C.L.R. 146, per O'Connor J. at pp.161-162). It is hardly necessary to say that workmen's compensation legislation is remedial and should be construed beneficially to the workman (Bist v. London and South Western Railway Co. (1907) A.C. 209, per Lord Loreburn L.C. at p. 211), and on that account, I think that the provisions of sec. 28a as the section appeared in the 1965 amendment of the statute must be construed so as to afford the utmost relief which its language will allow. For the reasons which the Chief Justice has mentioned in his judgment, I also think that anomalous consequences would arise and injustice would be done if sec. 28a in its 1965 form were to be construed in the manner contended for by the respondent. In my opinion, the design of the legislature in enacting sec. 28a in the 1965 amendment was to relate the compensation of a workman, who had already been paid compensation but who had returned to his work and had subsequently died or suffered an incapacity causally connected with the original accidental happening, to the rates payable at the date of the supervening death or incapacity, but that in enacting the proviso to the section, Parliament intended to make it clear that a workman who had already received compensation at the rate prescribed by sec. 26 for an injury specified in

In the Supreme Court

No. 6

Reasons for Judgment of Walters J.

22nd November 1968 (continued)

that section had been compensated once and for all.

With deference to Mitchell J., it is my opinion that a construction opposite to that which Her Honour has placed on sec. 28a should be given to this remedial provision, as I think it is, even though that construction is attended by the consequence that it gives the provision a retrospective operation. It seems to me that such a construction creates no interference with the right vested in the appellant and the liability imposed upon the employer which have arisen out of the accidental injury which occurred on 21st May 1956. As I see it, the purpose of the enactment of sec. 28a was to regulate the extent of the employer's obligation to make payments of compensation in respect of a right already acquired by the workman.

I agree with the Chief Justice that the appeal should be allowed. The award of the learned Arbitrator was based on an actuarial calculation of the present value of payments at the current rates of compensation for a total incapacity continuing until a total compensation of $5200 had been paid, or on the death of a workman aged 55 years, whichever should first happen. In the absence of a fresh actuarial calculation made upon the footing that there is a maximum liability of $12000, it seems to me that the matter must be remitted to the Arbitrator for a fresh assessment of compensation.

No. 7

Order

22nd November 1968

No. 7

ORDER

THIS APPEAL from the decision and award of His Honour Temporary Judge Williams given and made in the Local Court of Adelaide on the 8th day of July 1968 in the matter of the abovementioned arbitration coming on for hearing before the Full Court on the 7th and 8th days of October 1968 UPON READING the Notice of Appeal herein dated the 29th day of July 1968 AND UPON HEARING Mr. M.L. Reilly of counsel for the appellant and Mr. Ligertwood Q.C. and Mr. C. Lee of counsel for the respondent the Court did reserve judgment and the same standing

In the Supreme Court

No. 7

Order

22nd November 1968 (continued)

for judgment this day THIS COURT DOTH ORDER that the appeal be allowed that the said award be set aside and that the matter be remitted to the said Temporary Judge of the Local Court of Adelaide for re-assessment of the compensation payable to the appellant on the basis that the maximum amount for which the respondent can be liable is $12,000.00 unless the parties to the said arbitration can agree on the necessary calculations AND IT IS FURTHER ORDERED that the respondent do pay to the appellant the appellant's costs of the said appeal to be taxed and that the question of costs of the hearing before the said Temporary Judge of the Local Court of Adelaide be remitted to him to make such order in relation thereto as is just in light of the reasons published this day herein by this Court. The above costs of the said appeal have been taxed and allowed at $ as appears by the Taxing Officer's Certificate dated the day of 19 .

BY THE COURT

L.S. DEPUTY MASTER

In the High Court

No. 8

Notice of Appeal

6th December 1968

No. 8

NOTICE OF APPEAL

TAKE NOTICE that the Full Court of the High Court of Australia will be moved by way of appeal at the first sittings of the Full Court of the High Court of Australia for hearing of appeals at Adelaide in the State of South Australia to be held after the expiration of six weeks from the institution of this appeal or so soon thereafter as Counsel may be heard by Counsel on behalf of the abovenamed Appellant for an order that the judgment or order of the Full Court of the Supreme Court of South Australia made and pronounced on the 22nd day of November 1968 in action No. 1244 of 1968 wherein the abovenamed appellant was respondent and the abovenamed respondent was appellant in an appeal against the award of Temporary Local Court Judge Williams sitting as an arbitrator pursuant to the provisions of the Workmen's Compensation Act 1932-1966 be set aside varied or reversed and that judgment be given in favour of the appellant. The whole of the judgment or order is complained of and appealed against on the grounds:

In the High Court

No. 8

Notice of Appeal

6th December 1968 (continued)

1. That the said judgment or order is erroneous in point of law.

2. That the majority of the Full Court of the Supreme Court of South Australia was in error in their interpretation of the 1965 amendment of the Workmen's Compensation Act 1932-1965.

3. That the majority of the said Full Court were in error in their view that when the respondent's total incapacity began on the 13th November 1966 he acquired a right under the said Act to weekly payments up to the total maximum in force at that time, namely $12,000.

4. That the said Full Court should have held that the Respondent's right to weekly payments of compensation and the appellant's liability to make such payments were limited to the maximum total sum of $5200 fixed by Section 18(3) of the said Act as it stood at the time of the Respondent's personal injury by accident arising out of and in the course of his employment on the 21st day of May 1956.

5. That the said Full Court should have held that the 1965 Amendment to Section 18(3) of the said Act applies only to injury occurring after the date of the said amendment and that the respondent is therefore not entitled to receive more by way of a lump sum in redemption of the Appellant's liability to make weekly payments of compensation than the amount of compensation fixed under Section 18(3) of the said Act at the date of the Respondent's injury by accident on the 21st day of May 1956.

6. That the said Full Court should have dismissed the appeal and confirmed redemption at the sum of $4694 fixed by the said Arbitrator.

7. The said Full Court should have held that the said 1965 amendment had no application to and did not alter or affect the appellant's liability to pay compensation to the respondent.

DATED the 6th day of December 1968.

(Signed) C.R. LEE
13 Grenfell Street
ADELAIDE.

Solicitor for the Appellant.

No. 9

In the High Court

No.9

Reasons for Judgment of Barwick C.J. 18th April 1969

REASONS FOR JUDGMENT OF HIS HONOUR THE CHIEF JUSTICE BARWICK C. J.

This appeal arises out of amendments made in 1965 and 1966 to the Workmen's Compensation Act 1932 of the State of South Australia (the Act).

The respondent workman was compensably injured on 21st May, 1956. Between that date and the 12th January 1962 he had periods of incapacity in respect of which he was paid compensation according to the rates of weekly compensation applicable to an injury sustained in 1956. However after the 12th January 1962 he returned to work and was not paid any compensation until the 14th November 1966. On that date he suffered incapacity again and was paid compensation between the 14th November 1966 and the 23rd January 1967. Apparently incapacity supervened again on 8th February 1967 and payments of compensation were resumed on that date and continued until 31st May 1968. Payments of weekly compensation made to him from the 14th November 1966 until the 31st May 1968 were at the rates obtaining on 13th November 1966 being in fact the rates fixed by the amendment made to the Act in 1963, which remained unaltered during the period of those payments.

On the 27th March 1968 the appellant employer applied to redeem its liability to make weekly payments of compensation to the respondent whose incapacity by that time had become permanent. This application came on to be heard on 3rd June, 1968. On the 8th July 1968 the arbitrator made an award that the appellant's liability to make such weekly payments be redeemed by the payment of the lump sum of $4,694. This sum the arbitrator fixed on the footing that the total liability of the appellant in respect of weekly payments of compensation payable to the respondent was $5,200, i.e. the amount fixed by the 1955 amendment of s. 18 (3) of the Act which was

In the High Court

No.9

Reasons for Judgment of Barwick C.J. 18th April 1969 (continued)

current on the date of the respondent's injury. Against this award the respondent appealed to the Supreme Court of South Australia which by majority set aside the award and remitted the matter to the arbitrator to re-assess the lump sum to be paid in redemption of the appellant's liability upon the basis that the total liability of the appellant in respect of weekly payments of compensation payable to the respondent was $12,000, the amount fixed by the amendment of s. 18 (3) made in 1965.

By the time of the appellant's application to redeem its liability to make weekly payments of compensation to the respondent the Act had lastly been amended by Act No. 86 of 1966, which commenced on 1st December 1966. The relevant amendment was made by S. 6 which amended S. 28a of the Act so as to read:

> "28a. 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 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 sub-section (3) of section 18 of this Act."

Section 28a ha been inserted in the Act by s. 9 of No. 52 of 1965 which commenced on 16th December 1965 as follows:

"28a. 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 in respect of which the compensation was paid,

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 at the time of the death of the workman or, as the case may require, the amount of weekly compensation payable in respect of the 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 this Act."

No question arises in this case as to the proper weekly payment of compensation to be made to the respondent after the passing of s. 9 of the amending Act of 1965. Theretofor the rate of weekly payments of compensation payable to the respondent was that current at the time of his injury, namely, the rate worked out in accordance with the Act as it stood in 1956. But s. 28a effected a considerable change in the law. In the case of those workmen whose circumstances satisfied the requirements of the section, the rate of weekly payments of compensation was thereafter to be that which was current at the time incapacity supervened upon a return to work. Whether or not the change only operated with

In the High Court

No.9

Reasons for Judgment of Barwick C.J. 18th April 1969 (continued)

respect to workmen suffering such an incapacity after the commencement of this amending Act need not be considered for the respondent did suffer incapacity after its commencement, the incapacity stemming from an injury in respect of which compensation had been paid under Part III of the Act and supervening upon a return to work. The result of the application of s. 28a in its 1965 form to the respondent's circumstances was that he became entitled to the rate of weekly payments of compensation set by the combined effect of ss. 18 (1) and 19 (2) of the Act as amended up to the year 1963.

When s. 28a was amended to its 1966 form a further substantial change was made in the relevant law. It was now provided that for the future the amount of weekly payments of compensation payable to a workman for incapacity should be the weekly rates of compensation in force from time to time, irrespective of when the injury, out of which the incapacity arose, occurred. Again there is no need to determine whether or not this amendment only applied to those cases in which incapacity occurred after the commencement of the amendment: for not only did the respondent suffer his ultimate incapacity after the commencement of the Act, but the weekly rate of compensation in force after that date was the same as that in force before that date.

The question in the case is what is the amount of the total liability of the appellant in respect of weekly payments of compensation payable to the respondent which should be taken by the arbitrator as the basis of his computation of a lump sum to be paid in redemption of the appellant's liability to make such weekly payments. Apart from the amendements made to the Act in 1965 and 1966, it is clear that the liability of an employer to make weekly payments of compensation is to be determined as at the date of the injury. Thus to apply s. 18 (3) of the Act prior to the amendments it would be necessary to know the date of the receipt of the injury. Putting on one side, for the moment, the effect of the insertion of s. 28a in the Act, alterations to the figure set out in that

s.18 (3) only apply to the case of an injury received subsequent to the commencement of the amending Act.

The resolution of this case thus turns on the meaning and application of the two amending Acts, and particularly of the 1966 amendment. I have already indicated the difference between the 1965 and the 1966 form of s. 28a in so far as that section affects the rate of weekly payments of compensation. Neither increased the ceiling of a weekly payment set by s. 18 (2). The only other significant difference between the two Acts is that whereas the 1965 Act by s. 6 increased the amount of total liability as expressed in s. 18 (3), the 1966 Act did not. The critical question is what change, if any, did either Act make in the then current law as regards the total liability of an employer whose employee had suffered an injury on some date prior to the commencement of the amending provision.

The majority of the Full Court decided that the increase of the rate of weekly compensation payable, in the absence of a contrary intention to be found in the statute, automatically made "the maximum in force under s. 18 (3)" as then current, i.e. $12,000, applicable to the employer who was bound to make the increased weekly payments of compensation. Support was thought to be found for this conclusion in a passage from the judgment of this Court in Wattle Gully Mines v. Clementi (1956) 94 C.L.R. 353 at 363. The majority of the Full Court proceeded to hold that upon the respondent becoming entitled to the increased rate of weekly payments of compensation by reason of s. 28a in its 1965 form, he acquired a vested right under the 1965 Act to weekly payments "up to the total maximum in force at that time, namely, $12,000", a right which s. 28a in its 1966 form left untouched.

But it should be observed that s. 18 (3) does not give any rights: it sets a ceiling to a liability. Sections 18 (1) and (2) give a right to weekly payments of compensation in

In the High Court

No.9

Reasons for Judgment of Barwick C.J. 18th April 1969 (continued)

respect of incapacity arising from a compensable injury. It is not accurate, in my opinion, to say of the incapacitated workman that he has a vested right to such payments up to a total sum. The amount he is entitled to will be determined by the nature and extent of his incapacity, which may never warrant the payment to him of any sum approaching the sum set as the total liability of the employer. If his circumstances do warrant weekly payments up to that sum, the employer's liability to make any further weekly payment ceases. The passage cited from the judgment in Wattle Gully Mines v. Clementi (supra) does not, in my opinion, support the conclusion of the majority of the Full Court. It was addressed to a different matter altogether. In terms the reasons for judgment do not say that the workman's right is a right to weekly payments up to a total sum. It merely says that a reference in an amending Act to "rates or amounts of compensation" is large enough to include the amount of the total liability of an employer to pay compensation. Had the statutory words then under consideration been "rates or amounts of weekly payments of compensation", I cannot think that the same conclusion as was reached in that case would have been drawn or that it would have been said that the rates of weekly payments of compensation included the figure for the total liability of the employer to make such weekly payments. In my opinion, the proposition that an increase in the rate of weekly payments of compensation under this Act necessarily involves and carries with it an increase in the total liability of the employer to make such weekly payments cannot be sustained. Earlier amendments made to the Act in 1951 and 1953 indicate that weekly payments can be increased without thereby increasing the total liability of the employer and, as I shall mention, so does part of the proviso in s. 28a in its 1966 form. Indeed, counsel for the respondent with commendable frankness said he was unable to support the decision of the majority on this ground.

At the date of the appellant's application, of its hearing and of its disposal, s. 28a had

reached the form I first quoted. It was the Act amended to 1966 which the arbitrator had to apply. He had then to determine what was the total liability of the appellant in respect of weekly payments of compensation under the Act. If s. 28a had not already wrought a change, it was the amount set in 1955, namely, $5,200. Clearly the 1966 Act itself made no such change. The final words of s. 28a are "nor shall it (i.e. s. 28a) apply to the total liability of an employer under subsection (3) of section 18 of this Act". These words do not support the proposition that an increase in the rate of weekly payments of compensation automatically increased that total liability. Quite apart from the proviso, no part of s. 28a, in my opinion, does apply to the total liability of an employer in respect of weekly payments of compensation payable to an incapacitated workman. It is limited in relevant respects to the weekly payments themselves. The proviso emphasises the lack of connection between the increase of the rate of the weekly payments and the total liability in respect of them.

The matter therefore ultimately turns, in my opinion, on the question whether the 1965 amendment increased the total liability of the appellant in respect of weekly payments of compensation to the respondent.

I have already adverted to the view of the majority of the Full Court that s. 28a in its 1965 form gave to the respondent a vested right to receive weekly payments up to the figure then expressed in s. 18 (3) of the Act. The respondent's counsel sought to reach the conclusion that the total liability of the appellant for the purpose of the application of s. 28a in its 1966 form was the amount fixed by s. 6 of the 1965 amendment by the submission that, although it is textually silent on the matter, the proper interpretation of the 1965 amending Act as a whole, including as it does both s. 6, which raises the figure in s. 18 (3) for total liability and s. 28a, is that the total liability of all

In the High Court

No. 9

Reasons for Judgment of Barwick C.J. 18th April 1969 (continued)

all employers in respect of all injuries whenever received was thereby set at $12,000; that is to say, the increase in total liability did not depend on the workmen fulfilling the requirements of s. 28a: it operated in respect of all employers in respect of all compensable injuries, at least where incapacity occurred after the commencement of the amending Act. I am quite unable to accept this construction: indeed I can find no justification whatever for it. Section 28a in its 1965 form had at best a limited operation - a matter which no doubt excited its early amendment in the following year. I have already said that I cannot accept the view that there is a necessary relationship between the increase in the rate of weekly payments and the total liability of the employer so that an increase in the ceiling set by s. 18 (2) automatically results in an increase in the employer's total liability. Still less can I accept the submission that the mere presence of s. 28a in its 1965 form in the amending Act caused such a radical alteration as it is said to have worked in the normal application of amendments increasing the sum set in s. 18 (3) for total liability in respect of weekly payments of compensation. The change effected by the amending Act of 1965 was limited at best, in my opinion, to changing the rate of weekly payments of compensation in the case of injuries received before the commencement of the 1963 amendment of the Act, namely, 28th November 1963, from the rate prevailing at the time of the receipt of the injury to the rate prevailing at the date of the incapacity which supervened upon a return to work. The 1966 amendment increased that rate at least to the rate current at the date of incapacity.

As the 1965 amendment, in my opinion, made no change in the appellant's total liability, the clear effect of the proviso to s. 28a in its 1966 form is to ensure that the total liability of the employer remains as it was at the date of the receipt of the injury.

In my opinion, the total liability of the appellant in respect of weekly payments payable to the respondent, in fact and within the meaning

of the proviso to s. 28a in its 1966 form, is the sum set as the limit of total liability by the Act as it was at the date of the injury, namely, $5,200. In my opinion, the arbitrator adopted the correct basis for the computation of a lump sum to be paid in redemption of the weekly payments of compensation payable to the respondent. His award ought not to have been disturbed. This appeal should, in my opinion, be allowed.

No.10

REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE McTIERNAN

This appeal is from an order of the Full Court of the Supreme Court of South Australia directing, in an appeal by the workman from an award made in proceedings under s. 28 of the Workmen's Compensation Act, re-assessment of the liability of the employer for a weekly payment of compensation in respect of the incapacity of the workman for work - the incapacity is total and permanent. It results from an injury sustained by the workman in 1956 in relation to which the employer is liable under s. 4 of the Act. Rates of compensation for incapacity for work and the total liability of the employer in respect of weekly payments of such compensation have been increased by successive amending Acts passed since the injury occurred. There was a recurrence of the incapacity from the injury in November 1966 - "subsequent incapacity", within the meaning of s. 28a, as enacted and inserted in Part III of the 1932-1963 Act, by s. 9 of the 1965 Act. The workman has been receiving from the employer weekly payments in respect of the incapacity at the rate, in force, under s. 18(2). The rate of payment

In the High Court

No.10

Reasons for Judgment of McTiernan J. 18th April 1969 (continued)

is higher than when the injury occurred. The 1963 Act raised the rate of compensation under s. 18 to its present standard. The "total liability" specified in s. 18(3) is $12,000, in the case of a workman who is totally incapacitated. The limit of total liability in such a case was raised to this figure by s. 6 of the 1965 Act. At the time of the injury the limit of "total liability" provided by s. 18(3) for incapacity for work was $5,200.

Since November 1966, the workman has received from the employer a weekly payment of $32.50, the amount of compensation payable under s. 18(2). This is the weekly payment, the subject of the employer's application under s. 28 for redemption of liability. The question at issue is whether $5,200 or $12,000 is the highest limit of the employer's liability. The factors used by the arbitrator in the calculation of the lump sum payable in redemption of the liability, are $32.50 (weekly payment) and $5,200 (contingent total liability). The amount of the assessment in dispute is $4,694. The award in question provides for the payment of this amount by the employer to the workman.

The majority of the Full Court were of the opinion that the figure, $5,200, is irrelevant and that the relevant figure is $12,000. In my opinion this decision is right.

Section 28a provides partly as follows :

"the amount of weekly compensation payable in respect of the subsequent incapacity shall be computed and based upon the rates of weekly compensation payable at the time of the subsequent incapacity".

The section itself does not expressly impose a limit on total liability; it does not make an express reference to the provision of the Act under which the rates of weekly compensation for which it provides are payable. These matters are obviously left to be fixed by implication from s. 18. Section 28a and s. 18 are in Part III of the Act. The two sections

constitute a context in which s. 28a has to be construed. The latter is not a complete enactment without s. 18. The weekly compensation payable pursuant to s. 28a must be a weekly payment computed and based on s. 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 s. 28a is not beholden to s. 18 it is a mere declaration without operative effect.

It is said that s. 18(3) is not apt, because of the difference of verbiage between it and s. 28a, to apply to payments pursuant to s. 28a. The verbiage of s. 18(3) relating to its application to payments under the section has not since the date of the injury suffered any amendment. If s. 18(3) is not apt in the respect mentioned it would follow that neither $5,200 nor $12,000 is relevant to the matter. It is not said that there is no limit on the total liability of an employer under s. 28a. The words of the section dealing with rates of compensation have the effect that the compensation payable has to be in accordance with some subsection of s. 18 applying to the particular workman. The rates have virtually to be computed and based on s. 18 not s. 28a. According to a permissible construction of the words "under this section" in s. 18 (3), the compensation payable, pursuant to s. 28a, is really "under" s. 18(3). It follows that $12,000 is the limit above which the employer is not obliged to make any further payment in respect of the current incapacity. For the purposes of s. 28 (the redemption section) the employer's liability for the weekly payment of $32.50 should be assessed on that basis.

The object of s. 28a is to bring the rates of compensation for "subsequent incapacity" up to the level of the rates then in force under s. 18(2), thereby giving the full benefit of the section in respect of both weekly payments and total liability to the workman - thus rendering inapplicable the limits on weekly payments and total liability in s. 18 existing at the time of the injury.

In the High Court

No.10

Reasons for Judgment of McTiernan J. 18th April 1969 (continued)

If s. 28a does not attain that result, because on its true construction it does not relate to an injury which occurred before the commencement of the 1965 Act, the result is clearly attained by s. 28a as amended by the 1966 Act. The section assimilates the compensation, for which it provides, to weekly payments under s. 18. A weekly payment made pursuant to s. 28a is, as formerly, one of a series of payments due to terminate by virtue of s. 18(3) when, in the case of total incapacity, the sum total paid would be $12,000. The last part of the proviso to s. 28a as amended is obscure. There is an indication of its meaning from the context. The context seems to indicate that the meaning of the last part of the proviso is that the provisions of the section relating to payment of compensation should not apply in the case of a workman to whom the employer had paid the total amount of his liability under s. 18(3), if thereafter incapacity due to the injury recurs.

In my opinion the appeal should be dismissed.

No.11

Reasons for Judgment of Kitto J. 18th April 1969

No.11

REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE KITTO

In my opinion the appeal should be allowed for the reasons appearing in the judgments of the Chief Justice and Owen J. which I have had the advantage of reading.

No.12

In the High Court

No.12

Reasons for Judgment of Windeyer J. 18th April 1969

REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE WINDEYER

I think that this appeal should be dismissed. I have come to that opinion after some initial misgiving, because it differs from the view which other members of this Court take, and because I arrive at it by a path which is not the same as that taken by those members of the Supreme Court who reached the same conclusion as I do. I regret that I therefore only add a futile idiosyncrasy to existing discordance. I realise too that my opinion is naive. Nevertheless, I am unable to see that any question of the retrospective operation of statutes is involved in this case: and I do not think that we need be troubled by the antecedents of the present provisions of the Workmen's Compensation Act 1932-1966 (S.A.). The question seems to me to depend simply on the application of the provisions of that Act, read as a whole, read literally, and read prospectively as from 1st December 1966, ignoring earlier enactments.

The respondent suffered a compensable injury in May 1956. He returned to work and worked, off and on, until February 1967. He then, as a result of his injury, became permanently and wholly incapacitated for work. His right to compensation is not questioned. The only question is the amount for which the liability of his employer can be redeemed by payment of a lump sum. This depends upon what is the total liability of an employer under s. 18(3).

In February 1967, when the respondent's existing state of incapacity began, the Act was in the form resulting from s. 2 of the 1966 amending Act, which reads: "This Act is incorporated with the principal Act and that Act and this Act shall be read as one Act". It was in that form when in 1968 the appellant applied in the Local Court of Adelaide to have the amount payable in redemption of its future

In the High Court

No.12

Reasons for Judgment of Windeyer J. 18th April 1969 (continued)

liability settled by arbitration pursuant to s. 28 of the Act.

Section 28a, as enacted in 1966, stands in the Act in substitution for s. 28a in its earlier form as enacted and inserted in the Act by s. 9 of the amending Act of 1965. The 1965 provision seems to me to have entirely disappeared and ceased to operate after it was supplanted by the new form of s. 28a on 1st December 1966. I need not set out s. 28a in full. So far as relevant to this case, it is as follows :

> "Notwithstanding anything in this or any other Act contained,. . . the amount of the weekly payment of compensation payable to a workman for total or partial incapacity pursuant to this Part (scil. Part III of the Principal Act) after the said commencement (scil. the date, 1st December 1966, when the 1966 amending Act commenced) 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 . . . to the total liability of an employer under subsection (3) of section 18 of this Act."

The words "this Act" here refer to the Act as amended.

The judge of the Local Court, in a learned and careful judgment giving reasons for his award, said of s. 28a: "I read the provision that the section should not apply to the total liability of an employer under s. 18(3) as a legislative declaration that the appropriate amount to be taken as limiting the total liability of the employer in any particular case shall be the amount payable as at the date of the injury not as at the date of the incapacity". But, with respect to his Honour and to those who take the same view, I am unable to get that out of s. 28a.

It seems to me that the statement, in s. 28a, that it, that section, shall not apply

to the total liability of an employer under s. 18(3) means that it is to be entirely ignored in reading s. 18(3) to ascertain what that total liability is. Section 18(3) must I consider be read in its context in the Workmen's Compensation Act 1932-1966, and as part of that Act, the statute by which this case is governed. The words of s. 18(3) are clear: "The total liability of the employer in respect of payments under this section shall not exceed in the case of total incapacity six thousand pounds". That fixes the total liability of the appellant in this case at $12,000. That, in my view, was the amount to be taken into consideration in the application for redemption, which came on for adjudication when that provision was in force. The liability then sought to be redeemed was a liability arising from a total incapacity which arose after the provision had come into force. I think therefore that the order the Supreme Court made should stand.

No.13

REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE OWEN

In May 1956 the respondent workman suffered personal injury by accident arising out of and in the course of his employment by the appellant and, by virtue of s. 4 of the Workmen's Compensation Act 1932-1963, the appellant thereupon came under a liability to pay him compensation in accordance with the provisions of the Act. As a result of the injury the respondent was incapacitated for work for various periods from December 1956 onwards and in February 1967 he became totally and permanently incapacitated. Section 18 (1), (2) and (2a) of the Act specify the amounts of weekly payments of compensation to be made

In the High Court

No.13

Reasons for Judgment of Owen J. 18th April 1969 (continued)

where a workman suffers incapacity as the result of an employment injury and sub-s. (3) of that section sets a limit to the total liability of the employer in respect of payments under the section. During the various periods when the respondent was incapacitated weekly payments of compensation were made to him and, in March 1968, the appellant applied under s. 28 of the Act for an order that its liability to make further payments be redeemed by the payment of a lump sum. The application came on for hearing in June 1968 and the learned arbitrator was called upon to decide what, at that date, was the statutory limit to the total amount which the appellant might be called upon to make by way of weekly payments, that being a matter which had necessarily to be decided in determining the amount of the lump sum to be paid in redemption of liability to make further payments.

The arbitrator held that the limit of the appellant's liability in respect of weekly payments to the respondent was the sum of £2,600, that being the figure specified in s. 18(3) as it stood in May 1956 when the accident to the respondent occurred. The question is whether he was right in so deciding or whether, as the majority of the Supreme Court of South Australia held, the limit of the appellant's liability to the respondent in respect of weekly payments was a much larger figure, namely £6,000, fixed by an amending Act of 1965.

To clarify the position it is, I think, desirable to give an outline of a number of amendments made, between 1958 and 1966, to s. 18 and to a new section (s.28a) which was introduced in 1965 and amended in 1966.

In 1958 s. 18 was amended by Act No. 42 of 1958. The amending Act increased the amounts of weekly payments for which s. 18 provided and increased the maximum liability fixed by sub-s. (3) to £2,750. It went on to provide that the increased figures should apply only in cases in which the workman's injury was

caused by an accident occurring after the commencement of the amending Act. In 1960 a further amending Act (No. 11 of 1960) was passed which again amended s. 18 of the principal Act by increasing the amounts of weekly payments and increasing the maximum liability from £2,750 to £3,000. Here again the amending Act provided that these increases should apply only in cases in which the injury was caused by an accident occurring after the commencement of the amending Act. In 1961 s. 18 was further amended by Act No. 47 of 1961 under which the weekly payments were increased and the maximum liability was increased from £3,000 to £3,250. This Act contained a provision similar to those in the two amending Acts which had preceded it declaring that the increases were to apply only in cases in which the injury was caused by an accident occurring after the commencement of the Act. A similar course was followed in 1963 when Act No. 55 of that year was passed. It increased the weekly payments under s. 18 and increased the maximum liability under s. 18(3) to £3,500 and declared that these amendments should operate only in cases in which the injury was caused by an accident occuring after the commencement of the amending Act. Up to this stage the legislative pattern is plain enough. From time to time the amounts of weekly payments were increased as was the limit of liability and it was expressly provided in each amending Act that the increased figures should apply only in cases in which the accident causing injury occurred after the enactment of the amendment. But I think it is plain that, applying the ordinary rules of statutory interpretation, the various amended rates and maximum limits would have only applied to such cases had there been no express provision to that effect. The draftsman, however, very wisely decided to leave no possible doubt as to the legislative intention.

In the result these alterations to the original s.18 had no effect on the maximum liability of the appellant to the respondent in respect of weekly payments. The limit of its liability continued to stand at the 1956 figure

In the High Court

No.13

Reasons for Judgment of Owen J. 18th April 1969 (continued)

of £2,600. On 16th December 1965, however, further amendments to s. 18(3) were made by Act No. 52 of 1965. Their effect was to make £6,000 the limit of liability in respect of weekly payments where the workman was totally incapacitated and to make £4,500 the limit in cases of partial incapacity. This amending Act did not contain, however, a provision such as had appeared in the earlier amending Acts declaring that the new figures setting a limit on the liability of an employer in respect of weekly payments should only apply in cases in which the injury was caused by an accident occurring after the coming into force of the amendment nor did it follow the course taken in the earlier amending Acts of increasing the weekly payments by stated amounts. What it did in this respect was to add a new section (s. 28a) to the principal Act which provided that

> "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 . . . suffers incapacity as a result of the injury in respect of which the compensation was paid,
>
> . . . the amount of weekly compensation payable in respect of the subsequent incapacity shall be computed and based upon the rates of weekly compensation payable at the time of the subsequent incapacity."

The respondent came within the terms of this section. He was a person to whom compensation had been paid before 16th December 1965, he had returned to work and after 16th December 1965 he had suffered incapacity as a result of the injury in respect of which the compensation had been paid. He was therefore entitled to be paid and, as I understand it, was in fact paid weekly amounts of compensation at the rate payable at the time of

that incapacity. I cannot, however find anything in the Act of 1965 to rebut the presumptive rule of construction under which the amendments which it made to s. 18(3) would apply only to cases in which the employment injury occurred after the amendments came into operation. Accordingly I am of opinion that the maximum liability of the appellant to the respondent in respect of weekly payments remained at the 1956 figure of £2,600. On 1st December 1966 yet a further amending Act came into operation (Act No. 86 of 1966) and its provisions were in force when the appellant's application for redemption was made and heard. It made no alteration in the maximum liability of an employer in respect of weekly payments and the only provision relevant to the present case was one which altered s. 28a - which had been introduced in 1965 - so as to read:

> "Notwithstanding anything in this or any other Act contained, . . . 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"

- that is after 1st December 1966 -

> "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 . . . nor shall it apply to the total liability of an employer under subsection (3) of section 18 of this Act."

If then, as I think was the case, the appellant's maximum liability to the respondent in respect of weekly payments was, up to 1st December 1966, that which was in force when the accident to the respondent occurred in 1956, the amending Act of 1966 contained nothing which would alter that position, a conclusion which, it seems to me, is reinforced by the concluding words of the new s. 28a.

In the Full Court it was held that the

In the High Court

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Reasons for Judgment of Owen J. 18th April 1969 (continued)

effect of s. 28a as introduced by the Act of 1965 was to entitle the respondent, during incapacity occurring after the commencement of the Act, to be paid weekly amounts of compensation at the rates payable at the time of that incapacity. With this I agree and no suggestion was made in argument that in this respect their Honours fell into error. The majority of the Court (Bray C.J. and Walters J.) considered, however, that in a case such as the present one, which fulfilled the requirements of s. 28a as introduced by the Act of 1965 the provision in that section that "the amount of weekly compensation payable in respect of the subsequent incapacity shall be computed and based upon the rates of weekly compensation payable at the time of the subsequent incapacity" automatically made applicable the increased maximum liability provisions for which the Act of 1965 provided. They were accordingly of opinion that the effect of s. 28a was to entitle the respondent, should he thereafter become, as he did, totally incapacitated, to a right to receive weekly payments at the rates in force at the time of his incapacity up to the maximum figure, namely £6,000, set by the Act of 1965. They went on to consider the terms of the amending Act of 1966 and found nothing in it which would operate to divest the respondent of the accrued right which they regarded as having become vested in him as the result of the Act of 1965. The line of reasoning which led their Honours to construe s. 28a as they did was based upon a passage from the judgment of this Court in Wattle Gully Mines v. Clementi (1956) 94 C.L.R. 353. The Court was there considering the meaning of the words "rates or amounts of compensation" used in a section of an Act amending the Victorian Workers' Compensation Act which amending Act provided that the provisions of the Principal Act, so far as they "relate to rates or amounts of compensation", should apply to every payment of compensation after the commencement of the amending Act irrespective of the date of occurrence or origin of the injury or disease giving rise to the right to compensation. The Court held that the words in the amending Act, "the provisions of the Principal Act so far as

they relate to rates or amounts of compensation", were wide enough to include provisions in the Principal Act which placed a limit upon the total liability of the employer. It had been argued that the words in question did not include provisions of that kind and, in dealing with that argument, the Court, at p. 363, said:

> "This argument gives too narrow a meaning to the phrase 'rates or amounts of compensation'. It may be, as the appellants submit, that the word 'amounts' refers, in this context, to lump sum payments of compensation and does not include the aggregate amounts of weekly payments . . . But however this may be, the provisions of the Principal Act which relate to 'rates' of compensation must comprise the whole of the provisions of that Act which, in a case for which weekly payments are provided, regulate the extent of the employer's liability to make such payments. The rate of payments in such a case is not fully or accurately described by saying that it is so much a week; it is so much a week subject to the statutory limit upon the total amount to be paid."

But, with all respect, when regard is had to the question with which the Court was dealing in the Wattle Gully Mines Case, I do not think that that passage justifies the construction which the majority of the Full Court in the present case placed upon s. 28a. I agree with Mitchell J., who dissented in the Full Court, that s. 18(3) as amended in 1965 applies only to cases in which the employment injury occurs after the date of the amendment and has therefore no application to the present case.

For these reasons I would allow the appeal and restore the order of the learned arbitrator.

In the High Court

No.14

Order
18th April
1969

No.14

ORDER OF THE HIGH COURT OF AUSTRALIA
ALLOWING APPEAL

BEFORE THEIR HONOURS THE CHIEF JUSTICE, MR. JUSTICE McTIERNAN, MR. JUSTICE KITTO, MR. JUSTICE WINDEYER and MR. JUSTICE OWEN

FRIDAY THE 18TH DAY OF APRIL 1969

THIS APPEAL from the judgment and order of the Full Court of the Supreme Court of South Australia made and pronounced on the 22nd day of November 1968 coming on for hearing at Melbourne on the 28th day of February 1969 and the 3rd day of March 1969 UPON READING the notice of appeal dated the 6th day of December 1968 AND UPON HEARING Mr. Ligertwood of Queen's Counsel and Mr. C.R. Lee of Counsel for the appellant and Mr. Sangster of Queen's Counsel and Mr. Ahern of counsel for the respondent the Court did reserve judgment AND the same standing for judgment this day at Sydney THIS COURT DOTH ORDER

1. That the appeal of the appellant herein be allowed.

2. That the said judgment and order of the Full Court of the Supreme Court of South Australia be set aside and that in lieu thereof the appeal to that Court be dismissed with costs.

3. That the respondent pay to the appellant the appellant's costs of the appeal to be taxed.

BY THE COURT

(SEAL) W.E.S. FORSTER

DISTRICT REGISTRAR

No.15

In the Privy Council

No.15

Order granting final leave to appeal to Her Majesty in Council 4th February 1970

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT BUCKINGHAM PALACE

The 4th day of February 1970

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT	MR. MELLISH
LORD BROWN	MR. DELL
MR. SECRETARY THOMAS	SIR ARTHUR IRVINE
MR. SILKIN	SIR LESLIE O'BRIEN

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 26th day of January 1970 in the words following viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Jan Staska in the matter of an Appeal from the High Court of Australia between the Petitioner and General Motors-Holden's Proprietary Limited Respondent setting forth that the Petitioner seeks special leave to appeal from a Judgment of the High Court of Australia dated the 18th April 1969 which allowed with costs an Appeal by the Respondent against the Judgment of the Full Court of the Supreme Court of South Australia allowing an Appeal by the Petitioner from an Award of the Local Court of Adelaide made on the 8th July 1968: And humbly praying Your Majesty in Council to grant him special leave to appeal against the Judgment of the High Court of Australia dated the 18th April 1969 or for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order

In the Privy Council

No.15

Order granting final leave to appeal to Her Majesty in Council 4th February 1970 (continued)

in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the High Court of Australia dated the 18th April 1969 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW

IN THE PRIVY COUNCIL No. 35 of 1970

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN :

(Substituted for MARIA STASKA JAN STASKA since deceased) Appellant

- and -

GENERAL MOTORS-HOLDEN'S PROPRIETARY LIMITED Respondent

RECORD OF PROCEEDINGS

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