Privy Council Appeal No. 35 of 1970

Maria Staska – – – – – – – – – *Appellant*

v.

General Motors-Holden's Proprietary Limited – – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH MARCH 1972

Present at the Hearing:
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON
LORD CROSS OF CHELSEA
LORD SALMON

[*Delivered by* LORD PEARSON]

The present appellant, Maria Staska, has been substituted for the deceased workman, Jan Staska, who instituted this appeal. He was employed by the respondents, and on 21st May 1956 while carrying a heavy weight he suffered a low back strain. This was a personal injury by accident arising out of and in the course of his employment. From time to time it caused incapacity and he received from the respondents weekly payments as compensation under the Workmen's Compensation Act of South Australia. He was given clerical work from 13th January 1962 onwards but on 13th November 1966 he had to cease work again. He returned to work with a lumbo-sacral support on 13th January 1967, but was forced by back pain to give up work again on 7th February 1967. From then onwards he was totally and permanently incapacitated, and he received from the respondents weekly payments as compensation on that basis.

The respondents on 27th March 1968 applied for an arbitration for the redemption of their liability to make weekly payments to the workman. The workman did not file an answer and at the hearing supported the application. But a dispute arose with regard to the basis for assessment of the redemption price. There are statutory provisions limiting the employer's total liability in respect of weekly payments. Naturally this figure of total liability is taken as the basis for the assessment of the redemption price, some allowances being made for

acceleration of payment and other matters. But which is the relevant figure of total liability? Is it the figure of £2,600 for which the Act provided at the time of the injury in 1956? Or is it the figure of £6,000 introduced by an amending Act of 1965? There were intermediate figures introduced by other amending Acts between 1956 and 1965, but the respondents have contended for the figure of £2,600 and the workman and the present appellant have contended for the figure of £6,000, and neither side has contended for any other figure as being the relevant figure of total liability to form the basis for the assessment of the redemption price.

That is the question in this appeal, and the answer to it must be found in the relevant statutory provisions, which are contained in the Workmen's Compensation Act 1932–63, the Workmen's Compensation Amendment Act 1965 and the Workmen's Compensation Amendment Act 1966. There are two general considerations affecting the construction of these provisions, and the statutory history must be taken into account.

(1) There is a *prima facie* presumption or canon of construction that an enactment is not intended to affect rights which have already been acquired or liabilities which have already been incurred before the enactment has come into operation. This is sometimes spoken of as a presumption against retrospective operation of a statute, but this use of the word "retrospective", though it may be convenient as a label, is not accurate as a description of an enactment which interferes only with the future existence or operation of a previously acquired right or a previously incurred liability. A truly retrospective enactment would be one, such as an Indemnity Act, making lawful a past action which was unlawful when committed, or one making unlawful a past action which was lawful when committed. *West v. Gwynne* [1911] 2 Ch. 1, 11, 12 per Cozens-Hardy M.R. and Buckley L.J. At p. 16 of that case Kennedy L.J. referred to the Latin maxim "*Nova constitutio futuris formam imponere debet, non praeteritis*", but that is only a broad statement of the principle. The presumption was given statutory force in South Australia by section 16(1) of the Acts Interpretation Act 1915–36, providing that

> "Where any Act, whenever passed, repeals or has repealed a former Act or any provision or words thereof, or where any Act or enactment, whenever passed, expired or has expired, then, unless the contrary intention appears, such repeal or expiry shall not—
>
> . . .
>
> III. affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable . . . prior to such repeal or expiry: or
>
> IV. affect any duty, obligation, liability or burden of proof imposed, created or incurred . . . prior to such repeal or expiry".

The presumption has been recognised and applied in the sphere of Workmen's Compensation legislation in a number of cases both in the United Kingdom and in Australia. *United Collieries Ltd. v. Simpson* [1909] A.C. 383 at p. 393 per Lord Macnaghten: *King v. Port of London Authority* [1920] A.C. 1: *Moakes v. Blackwell Colliery Co. Ltd.* [1925] 2 K.B. 64, 69, 70, 71: *Clement v. D. Davis and Sons Ltd.* [1927] A.C. 126, 131, 132–3, 134; *Sunshine Porcelain Potteries Pty. Ltd. v. Nash* [1961] A.C. 927 J.C. at p. 938 per Lord Reid. *Stevens v. Railway Commissioner for New South Wales* (1931) 31 N.S.W. (S.R.) 138: *Gammage v. Metropolitan Meat Industry Commissioner* (1948) 48 N.S.W. (S.R.) 99: *Kraljevich v. Lake View and Star Ltd.* (1945) 70 C.L.R. 647: *Fisher v. Hebburn Ltd.* (1960) 105 C.L.R. 188, 193–5, 202. The presumption,

however, is only a *prima facie* presumption. The Acts Interpretation Act in section 16 has the words " unless the contrary intention appears ". In some cases a contrary intention has been found in statutory provisions relating to Workmen's Compensation. *Hall v. Metropolitan Abattoirs Board* (1945) S.A. (S.R.) 193: *Sunshine Porcelain Potteries Pty. Ltd. v. Nash* (supra). In *Fisher v. Hebburn Ltd.* (supra) at p. 194 Fullagar J. said " There can be no doubt that the general rule is that an amending enactment—or, for that matter, any enactment—is *prima facie* to be construed as having a prospective operation only. That is to say, it is *prima facie* to be construed as not attaching new legal consequences to facts or events which occurred before its commencement. The rule has been frequently applied to amending statutes relating to workers' 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 and 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-s (2A) begins with incapacity and not with injury ".

(2) Inflation has created awkward problems in the sphere of workmen's compensation as well as in many other spheres. On the one hand, if the scale of compensation remains fixed as it was at the time of the injury, the compensation will become less and less adequate for the maintenance of the workman and his family. On the other hand, if the compensation is increased from time to time to keep pace with the diminishing real value of money, the calculations of the financial risks to be insured against, which were made when the premiums were settled in years long past, must be falsified. This may be offset to some extent by increasing monetary value of investments but probably not entirely. The accounting difficulty was referred to by Lord Shaw of Dunfermline in *Clement v. D. Davis and Sons Ltd.* (supra) at pp. 132-3. He said—" If the appellant's view were correct, it is clear that the financial results of accidents would be so far and, it might be, seriously altered. The business advantage and sound principle of accounting, of being able to understand the scope and, so far as may be, the extent of liability dependent on past occurrences, and to frame accounts and estimates accordingly, would be *pro tanto* destroyed. Of course this may be upset by ex post facto legislation. The presumption against that is well known and approved. That presumption may of course be overridden by express statutory provision ". Having regard to the obvious difficulties caused by inflation, one would not be surprised to find legislation containing from time to time anomalies or discrepancies attributable to political compromise or " tempering the wind to the shorn lamb ".

The previous statutory history is important, because legislative patterns had been developed.

In 1947 there was a Workmen's Compensation Amendment Act. Section 1 (2) and (3) and section 2 were as follows:

> " (2) The Workmen's Compensation Act 1932–1944 as amended by this Act, may be cited as the ' Workmen's Compensation Act 1932–1947 '.
>
> (3) The Workmen's Compensation Act 1932–1944 is hereinafter called ' the principal Act '.

2. This Act is incorporated with the principal Act and that Act and this Act shall be read as one Act."

Sections 4–11 contained amendments increasing the amounts of compensation. In particular section 6 amended section 18 of the principal Act so as to increase the amounts payable for incapacity, the total liability of the employer under this section being increased from £800 to £1,150.

Section 13 provided that—

"Sections 4 to 11 inclusive of this Act shall apply only in relation to injury or death caused by an accident occurring after the commencement of this Act. Where injury or death was caused by an accident occurring before the commencement of this Act, the provisions of the principal Act, as in force immediately before the passing of this Act, shall apply."

The Workmen's Compensation Amendment Act 1950 did not contain any saving clause similar to section 13 of the 1947 Act.

The Workmen's Compensation Amendment Act 1951 contained in sections 1 and 2 provisions similar to those of the corresponding provisions of the Act of 1947. Sections 3 to 8 contained provisions increasing amounts of compensation, and in particular section 18 raised the employer's total liability under that section from £1,150 to £1,750. Section 9 contained provisions similar to those of section 13 of the Act of 1947 with the addition of a proviso as follows:—

"Provided that where a workman is at the time of the commencement of this Act in receipt of or entitled to a weekly payment for total or partial incapacity resulting from injury caused by an accident occurring before the said commencement, such weekly payment shall, on and after the said commencement, be at the rate which would be payable if this Act had been in force when the accident occurred; but the total liability of the employer in respect of weekly payments for any such incapacity shall not exceed one thousand one hundred and fifty pounds".

This section is interesting in two respects. (1) It follows section 13 of the Act of 1947 in providing that the general rule is for compensation to be at the rate provided by the Act which was in force when the accident occurred, but it modifies the operation of the general rule by an "as if" provision. (2) There is an obvious compromise, creating a discrepancy, in respect of the total liability: it is not brought up to the current figure of £1,750, but it is brought up from the figure in force at the date of the accident to the figure of £1,150, which was in force under the preceding Act: it is therefore not in step with the provisions relating to the weekly payments.

The Workmen's Compensation Amendment Act 1953 was on the same lines as the Act of 1951, including in its saving clause a similar proviso. The figure of total liability in section 18 of the principal Act was raised from £1,750 to £2,250, but the figure in the saving clause (section 10 of the Act of 1953) was only £1,750.

There were Acts of 1954 and 1955 containing similar provisions. These Acts raised the total liability under section 18 of the principal Act from £2,250 to £2,500 and from £2,500 to £2,600. The saving clauses did not have a proviso: they were similar to the saving clause in the Act of 1947 with small differences of wording which seem not material for the present purpose.

The figure of £2,600 for total liability under section 18 was the figure in force in 1956 when the deceased workman, Jan Staska, suffered his accident.

There were Workmen's Compensation Amendment Acts of 1956, 1958, 1960 and 1961, containing saving clauses substantially similar to the saving clause in the Act of 1955. The Workmen's Compensation Act Amendment Act 1963 had a different saving clause:

> " Sections 3, 4, 5, 6, 7, 9 and 10 and the amendments made by paragraphs (*a*) and (*c*) of section 8 of this Act shall apply only in relation to injury or death caused by an accident occurring after the commencement of this Act. In cases of injury or death caused by an accident occurring before the commencement of this Act the provisions of the principal Act as in force immediately before the commencement of this Act as amended by paragraph (*b*) of section 8 shall apply but not so as to affect any case in which the amount of compensation has been settled and paid prior to such commencement ".

The Workmen's Compensation Act 1932–1963, as reprinted pursuant to the Amendments Incorporation Act 1937 and incorporating all amendments made prior to 1st June 1964, had to deal with the long series of saving clauses incorporated in whatever was the principal Act from time to time because each amending Act was incorporated with the principal Act and the principal Act and the amending Act were to be read as one Act. The saving clauses, so far as they related to section 18, were dealt with in a massive footnote, which shows the complexity of the situation which had arisen:

> " The amendments made to this section by section 6 of the Workmen's Compensation Act Amendment Act 1947, by section 6 of the " (Act of 1951) " by section 7 of the " (Act of 1953) " by section 5 of the " (Act of 1954) " by section 7 of the " (Act of 1955) " by section 5 of the " (Act of 1958) " by section 6 of the " (Act of 1960) " by section 5 of the " (Act of 1961) " and by section 7 of the " (Act of 1963) " apply only in relation to injury or death caused by an accident occurring, respectively, after 11th December 1947, 25th October 1951, 17th December 1953, 23rd December 1954, 8th December 1955, 27th November 1958, 19th May 1960, 16th November 1961 and 28th November 1963. See section 13 of the 1947 Act, section 9 of the 1951 Act, section 10 of the 1953 Act, section 10 of the 1954 Act, section 10 of the 1955 Act, section 8 of the 1958 Act, section 10 of the 1960 Act, section 9 of the 1961 Act and section 11 of the 1963 Act."

Evidently there were many different levels of compensation depending on the dates at which the accidents had occurred. Up to this point of time the basic assumption, in agreement with the presumption referred to above, was that the rates and amounts of compensation provided by the legislation in force at the time of the accident would continue to apply to the consequences of the accident unless later legislation otherwise provided.

In construing the crucial provisions of the Act of 1965 (the Workmen's Compensation Amendment Act 1965) it is necessary to bear in mind the previous statutory history and the resulting situation in relation to which the Act of 1965 was passed.

The Act of 1965 was amending the principal Act which was then the 1932–1963 Act. In the principal Act section 16 provided compensation for dependants on the death of a workman in consequence of a compensable injury; section 18 provided compensation by weekly payments in respect of incapacity resulting from a compensable injury, and by subsection (3) limited the employer's total liability for such compensation; and section 26 provided fixed sums of compensation for certain injuries. Under section 16 the maximum compensation for

dependants was £3,250 plus £110 for each dependent child; under section 18 (3) the employer's total liability in respect of payments under that section was £3,500; and under section 26 the workman could not receive fixed sums in excess of £3,500. Section 5 of the Act of 1965 amended section 16 of the principal Act by substituting £6,000 for £3,500; section 6 (*b*) of the Act of 1965 amended section 18 (3) of the principal Act by substituting £6,000 for £3,500; section 8 of the Act of 1965 amended section 26 (5) of the principal Act by substituting £4,500 for £3,500.

Bearing in mind the presumption which has been mentioned, the previous statutory history and the complex situation existing immediately before the Act of 1965, one would not expect these changes to apply to compensation for past accidents. That would have been a revolutionary innovation requiring express words or very clear implication to bring it about.

There is no saving clause of any of the patterns to be found in the previous legislation, but there is instead of a saving clause a new section making a tentative and partial modification of the previous system. The new section (section 28*a* of the principal Act, inserted by section 9 of the Act of 1965) is as follows:

> "28*a*. Notwithstanding anything in this or any other Act contained, where—
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> (*a*) compensation has been paid to a workman pursuant to this Part,
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> (*b*) the workman has returned to work, and
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> (*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,
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> 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 new section 28*a* effects a partial innovation, a limited modification of the previous system, applicable only to the special class of workmen, namely those who had been injured, had returned to work and then had been incapacitated or had died as a result of the injury. They were to have the benefit of the current rates of weekly payments for incapacity, or their dependants were to have the benefit of current rates of compensation for death resulting from the injury. The implication must be that the previous system, involving a distinction between compensation for past injuries and compensation for future injuries, was not being swept away but was being retained subject only to the limited exception introduced by section 28*a*. If the previous system was being wholly swept away, section 28*a* would be unnecessary and meaningless. Any argument to the effect that by implication the previous system was being wholly swept away must be rejected.

The other argument for the appellant is that under section 28*a* the total liability for weekly payments is increased for any workman to whom section 28*a* applies. Undoubtedly section 28*a* did apply to Jan Staska because he was injured, he did return to work and he was afterwards incapacitated as a result of the injury. Does section 28*a* increase the

total liability under section 18 of the principal Act? In support of the argument that it does, reliance was placed upon the decision and reasoning of the High Court of Australia in the case of *Wattle Gully Mines v. Clementi* 94 C.L.R. 353, especially the passage at p. 363 where it was said "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 that was said in relation to an Act which referred to "rates or amounts of compensation", and that phrase might well include the total liability. In the present case section 28*a* provides 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." In their Lordships' opinion, the specification of the weekly character of the compensation referred to should have its due effect and should be understood as excluding the total liability. The appellant does not succeed under the Act of 1965.

There remains to be considered the Act of 1966. This introduced a new section 28*a* as follows:

> "28*a*. 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."

This section brought about a very extensive modification of the previous system. It abolished the distinction between compensation for past injuries and compensation for future injuries, so far as concerned (1) compensation to dependants for death of the workman (2) the amount of the weekly payment for incapacity. But in their Lordship's opinion the amount of the total liability under section 18 (3) remained unaffected because (*a*) the substantive provisions of section 28*a* refer only to the amount of the weekly payment (the weekly rate of payment) and not to the total liability, (*b*) the proviso was intended to make it plain that the amount of the total liability was to remain unaffected by this section, and (*c*) the framework of earlier legislation shows that there is no invariable correlation between the amount of the weekly payment and the amount of the total liability (the one being often changed without, or differently from, the other).

Accordingly the total liability which is to be taken as the basis for redemption is £2,600 ($5,200) and not £6,000 ($12,000).

For the reasons which have been stated their Lordships will humbly advise Her Majesty that the decision of the majority of the High Court of Australia should be affirmed and the appeal should be dismissed. The appellant must pay the respondents' costs of the appeal.

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In the Privy Council

MARIA STASKA

v.

GENERAL MOTORS-HOLDEN'S PROPRIETARY LIMITED

DELIVERED BY
LORD PEARSON

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