Judgment 5 of 1972

No. 23 of 1971.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF VICTORIA

BETWEEN

WINIFRED ADELE EGAN — Appellant

AND

CITY OF NORTHCOTE — Respondent

CASE FOR THE APPELLANT

INTRODUCTION

RECORD

1. This is an appeal brought pursuant to the provisions of the Rules Relating to Appeals to the Privy Council made by His Majesty in Council on the 23rd day of January 1911 and pursuant to the leave of the Supreme Court of Victoria by order dated the 13th day of August 1971 from a judgment of the Full Court of the Supreme Court of Victoria delivered on the 11th day of May 1971. The judgment answered in favour of the respondent questions stated for its opinion by the Worker's Compensation Board of the State of Victoria in a case stated pursuant to Section 56 of the Victorian Workers' Compensation Act 1958. p.22 p.14 p. 1

2. The said Board awarded the respondent $9000.00 as compensation for the injury done to her by the death of Martin Thomas Egan a worker within the meaning of the said Act. The said sum of $9000.00 is the amount fixed by the Workers' Compensation Act 1965 (No. 7292) (hereinafter referred to as "the amending Act") as compensation for dependants wholly or mainly p. 5

RECORD

dependent upon a worker whose death results from or is materially contributed to by injury arising out of or in the course of his employment. The worker sustained injury within the meaning of the
p.4 Workers' Compensation Act 1958 on the 19th day of June 1964 and died on the 2nd day of April 1968. The amending Act came into operation on the 1st day of July 1965, that is, before the death of the worker on the 2nd day of April 1968. The said Board did so on the footing that it was irrelevant
p.7 to the entitlement of the dependant that the compensable injury suffered by the said Martin Thomas Egan was an injury to which the employment was not a contributing factor.

3. The respondent contends that the appellant is entitled to no compensation whatever whether under the Workers' Compensation Act 1958 (No. 6419) (hereafter referred to as the Principal Act) or under the amending Act. The respondent contends that this is so because the injury sustained by the said Martin Thomas Egan was an injury to which the employment was not a contributing factor within the meaning of the amending Act.

4. The Workers' Compensation Board decided as
p.5 indicated previously that the appellant was entitled to compensation under the amending Act
p.21 and the Supreme Court of Victoria decided that she was entitled to no compensation.

5. The appellant submits that the Workers' Compensation Board was correct and adopts its reasons for judgment and adopts the reasons for judgment of Taylor, Windeyer and Owen JJ in the High Court of Australia in Ogden Industries Ltd. v. Lucas (116 C.L.R. 537) and the reasons for judgment of their Lordships in Ogden Industries Ltd. v. Lucas (1970) A.C. 113.

STATUTORY PROVISIONS

6. The relevant statutory provisions are:

Workers' Compensation Act

Section 5 (1) If in any employment personal injury arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in

accordance with the provisions of this Act

Section 9 (1) Where the worker's death results from or is materially contributed to by the injury the compensation shall be a sum in accordance with the provisions of the clauses appended to this section.

Clauses to Section 9 (1) (1) (a) (i) If the worker leaves a widow or any children under sixteen years of age at the time of the death or leaves any other dependants wholly dependent upon his earnings, the amount of compensation shall be the sum of Two thousand two hundred and forty pounds together with an additional sum of Eighty pounds in respect of each such child.

Amending Act - Workers' Compensation (Amendment) Act 1965 Section 2 "(a) For the interpretation of 'Dependants' there shall be substituted the following interpretation :-

'"Dependants" means such persons as were wholly mainly or in part dependent upon the earnings of the worker at the time of the death or who would but for the incapacity due to the injury have been so dependent.';

(b) For the interpretation of 'Injury' there shall be substituted the following interpretation :-

'"Injury" means any physical or mental injury, and without limiting the generality of the foregoing, includes (a) a disease contracted by a worker in the course of his employment whether at or away from his place of employment and to which the employment was a contributing factor; and (b) the recurrence aggravation or acceleration of any pre-existing injury or disease where the employment was a contributing

factor to such recurrence aggravation or acceleration - and for the purposes of this interpretation the employment of a worker shall be taken to include any travelling referred to in Section 8 (2) of this Act.'"

RATIO DECIDENDI IN OGDEN INDUSTRIES LTD. v. LUCAS

7. The true ratio decidendi of the decision in Ogden Industries Ltd. v. Lucas (1970) A.C. 113 is
p.16-17 that where an amending Act alters rates and amounts of compensation the rates and amounts fixed by the amending Act are payable to the dependants of a worker who suffers compensable injury before the amending Act but who dies after as the result of that injury. This is so irrespective of a change in the definition of injury.

It so happened that the injury sustained by the worker in Ogden Industries Ltd. v. Lucas was an injury to which the employment was a contributing factor. But that consideration was entirely irrelevant at the time the worker sustained the injury. The then legislation placed work contributed injuries and non work contributed injuries on exactly the same footing. Each of them attracted compensation under the Act: Patrick v. Sharpe (1955) A.C. 1; Collins
p.16 v. Epworth Hospital (1959) V.R. 586.

INJURY

8. That the quality of the injury was irrelevant to the determination of the problem
p.12 was recognised in the High Court in Ogden Industries Ltd. v. Lucas 116 C.L.R. 537. The leading judgment in dissent is that of Barwick CJ. He said at p.557:

> "In the present case the respondent's (sic: worker's) injury would have qualified under both definitions of injury: but this fortuitous circumstance should not be allowed to obscure the statutory position."

VIEWS OF BARWICK C.J. & WINDEYER J.

9. The competing views as to the operation of the amending Act are well exemplified in the judgment of Barwick C.J. on the one hand and that of Windeyer J. on the other. It is clear that these judgments were interchanged before delivery (see for example the judgment of Barwick C.J. p.550, 552 and of Windeyer J. p.584, 589, 591). p.13

10. Apropos of the passage from the judgment of Barwick C.J. quoted above Windeyer J. said at p.585:

> "An alteration of the definition of 'injury' would not alter this (in the absence of an express provision that it should do so)".

11. Compare also these two statements from the learned judges:

Barwick C.J. at 549	Windeyer J. at 585
"When received, the injury is an accomplished fact and because any relevant incapacity or death must be causally related to it, the nature and extent of the injury is definitive of the extent of the compensation which may possibly be recovered."	"The only matter which was past and closed when the 1965 Act came into operation was, it seems to me, that the worker had suffered an injury of a kind which, if death ensued, would entitle his dependants to compensation."

p.13

12. It is therefore clear that the learned judges most certainly were alive to the implications of this problem. Each of them proceeded on the footing that all that was required in considering whether or not the dependants were entitled to the increased amounts was that the death resulted from injury which complied with the definition in the pre-amendment legislation in any of the aspects of that definition. This too is clear from the other judgments in the High Court.

RECORD

REASONS OF YOUR LORDSHIPS

13. In your Lordships Board it was said at p.127

> "Therefore apart altogether from authority their Lordships are of opinion that the Acts Interpretation Act has no application and the rights of the dependants and the corresponding liability of the employer must be tested and ascertained at the date of the death; at that time there was an obligation upon the employer under and by virtue of the Act of 1958 as amended by amendment Act to compensate the dependants in accordance with its provisions. That was the ground of decision of the majority of the High Court in their very careful judgments with which their Lordships agree."

p.17

UNDESIRABILITY OF DIFFERENT RATES

14. It is clear that the learned judges in the High Court were concerned with the undesirability (in the absence of express legislative provision) of two different amounts of compensation being applicable in respect of deaths occurring at the same time in consequence of injuries sustained before the amendment and after the amendment. For example, Taylor J. said at p.571

> "Perhaps it was thought that the matter was too clear for words and that it would never be thought that the dependants of one of two workers dying on the same day as the result of compensable injuries would be entitled to receive the higher amount of compensation whilst the dependants of the other would be entitled to receive only the smaller amount.

15. One can imagine the learned judge's comment had he foreseen that the Supreme Court of Victoria would say that the dependants of one such worker would be entitled to receive nothing. Windeyer J. at 585 spoke of the amending Act being 'enacted to take its place in an existing and continuing system of workers' compensation law'.

p.14

ASPECTS OF OGDEN INDUSTRIES LTD.
v. LUCAS

16. The only grounds whatever for saying that the decision of your Lordships' Board required an injury that complied with the amending Act are that in fact the injury was such an injury (a fortuitous matter) and that in the preliminary recital of facts in your Lordships' judgment it is said: p.18

> "The deceased Reginald George Lucas, an employee of the appellants, suffered from heart disease but it was admitted that this disease was aggravated and accelerated by the nature of the deceased's employment with the appellants and was a contributory factor to his death."

17. By fastening on the words "admitted" and the following words the Respondent has asserted and the Supreme Court has accepted that the decision was confined to injuries either admitted or proved to have an employment contribution. But this passage is quite correct in narrating the facts and how the question arose. Heart disease in itself would not have been compensable but where it was contributed to by work or one of its incidents occurred in a work period it was compensable. Their Lordships use of the word 'admitted' was simply to classify his injury as one that attracted compensation. There is nothing in it to support the proposition that the injury in question must comply with the amending Act. p.18

INJURY IS COMPLETED WHEN IT OCCURS

18. Moreover whether or not an injury is contributed to by employment in circumstances such as in Ogden Industries Ltd. v. Lucas or the present case, the fact is that the injury is never and can never be an injury under the amending Act for the simple reason that it occurred before the amending Act was passed. It was an "accomplished fact" (Barwick C.J.): it was "past and closed when the 1965 Act came into operation" (Windeyer J.). This is in accord with the statement of your Lordships in Ogden Industries Ltd. v. Lucas at p.123 p.18

> "This appeal gives rise to a question of some general importance with regard to the rights of dependants of a worker who was injured before but died after the amendment to the Workers' Compensation legislation in the State of Victoria in 1965."

In addition the matter is touched on by your Lordships when it is said at p.23

> "The amendment Act greatly increased the benefits payable to dependants and also altered a number of definitions but the substantial question is whether in the circumstances the dependants are entitled to be paid compensation at the increased rates under the amendment Act."

Note the virtual putting on one side of alterations other than the increased rates.

NO RETROACTIVE OPERATION

19. To read the definition of "injury" from the amending Act into the clauses to Section 9 of the Act is to misconceive the effect of the reasons for the opinion of your Lordships in Ogden Industries Ltd. v. Lucas. The word injury in those clauses simply means an injury which qualifies under the legislation subsisting at the time the injury occurs. The injury in Ogden Industries Ltd. v. Lucas qualified only under the pre-amendment legislation. To give it the effect the Supreme Court gave it is to attribute a truly retroactive operation to the amendment Act (i.e. it attaches to past events an entirely different quality and effect) an effect rejected by the High Court and rejected by the Privy Council. The amending Act operated only on the prospective event of death i.e. death after the amending Act came into operation (see e.g. Taylor J. at 577, Windeyer J. at 581, Owen J. at 605.) The amending Act in all respects speaks prospectively; in particular it speaks prospectively as to injury; all future injuries must comply with the amending Act before there is entitlement to compensation. Future deaths are quite a different matter.

The reasons for judgment of the Supreme Court overlook the careful discussion both in the High Court and in your Lordships' Board of the effect of the cases of Clement v. Davies (1927) A.C. 126 and Moakes v. Blackwell (1925) 2 K.B. 64. These cases were concerned only with questions of amount and retrospectivity.

INJUSTICE OF DECISION OF SUPREME COURT

20. There is manifest injustice in the instant case where the dependant is deprived of all compensation. To achieve such a result the clearest possible language was required in the Act. Moreover whereas after the amending Act came into operation on July 1, 1965 the worker himself would have been entitled to weekly payments of compensation for incapacity which resulted from or was materially contributed to by the injury right up to death if need be (even though there was no injury under the amending Act) the Supreme Court's reasons create the anomalous position that the worker's widow is not entitled to anything.

WEEKLY PAYMENTS

21. In the instant case the worker was in fact paid weekly payments of compensation pursuant to the Workers' Compensation Act 1958 during incapacity which resulted from the injury and he would have been entitled to such payments at any time up to death had he become incapacitated as a result of the injury or by reason of a material contribution by the injury to the incapacity.

SUMMARY

22. The appellant submits that the dependant is entitled to compensation because the injury in fact occurred and attracted to it the provisions of the Workers' Compensation Act 1958 and the appropriate rate of compensation was fixed by the amending Act.

E. F. HILL

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