

IN THE PRIVY COUNCIL

No. 23 of 1971

O N A P P E A L
FROM THE FULL COURT OF THE SUPREME COURT
OF VICTORIA

B E T W E E N

WINIFRED ADELE EGAN
Appellant

- and -

CITY OF NORTHCOTE
Respondent

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CASE FOR THE RESPONDENT

Record

1. This appeal comes before the Judicial Committee of the Privy Council in the following way. On 6th November 1970 the Workers Compensation Board of the State of Victoria stated a case for the determination of the Full Court of the Supreme Court of Victoria. On 11th May 1971 the Full Court (Winneke C.J. Gowans and Menhennit JJ.) made an order answering the questions of law which the Workers Compensation Board had submitted to it. On 31st May 1971 the Full Court granted the appellant leave to appeal to Her Majesty in Her Majesty's Privy Council under Rule 2(a) of the Order in Council dated 23rd January 1911 on the appellant undertaking not to set down her appeal to the High Court of Australia and on condition that the appellant entered into a security to prosecute her appeal. On 13th August 1971 the Full Court, declaring itself to be satisfied that the condition had been complied with ordered that the appellant have final leave to appeal.

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2. The appeal arises out of a claim by the

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appellant for compensation under the Workers Compensation legislation of the State of Victoria. The claim is in respect of the death on 2nd April 1968 of Martin Thomas Egan the late husband of the appellant and at all material times a worker employed by the respondent.

p.1 L.15

3. The original claim against the respondent for compensation was made on behalf of the appellant by her solicitors by letter dated 12th July 1968. Pursuant to s.44 of the Workers Compensation Act 1958 this was referred by the respondent to the Workers Compensation Board by Notice dated 24th September 1968. The claim came on for hearing before the Workers Compensation Board on 7th May 1970 and the Workers Compensation Board made an Award in favour of the appellant of nine thousand dollars (SA9,000). Neither the appellant nor the respondent called evidence but the Workers Compensation Board adopted a Statement of Agreed Facts filed by the parties with the Board.

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4. On 19th June 1964 the deceased Martin Thomas Egan was a worker employed by the respondent. On that date while travelling between his place of employment and his place of residence he suffered a coronary occlusion to which neither his employment nor the travelling was a contributing factor. A coronary occlusion is the blocking, by the formation of a clot, of a coronary vessel affected by atheroma, thereby seriously impairing the supply of blood to the heart muscle. The worker was incapacitated by the coronary occlusion from 19th June 1964 until he resumed his employment with the respondent on or about 11th November 1964 on light duties. The foregoing facts all occurred during the currency of the Workers Compensation Act 1958 (Act No.6419). Its basal provision imposing liability on employers reads as follows:-

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

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The definitions of disease and injury in s.3 of Act No. 6419 are as follows:-

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

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

20 In the case presently under appeal the parties agreed and the Workers Compensation Board found that the coronary occlusion suffered by the deceased on 19th June 1964 was a personal injury within the meaning of Act No. 6419. Any other finding would have been inconsistent with the decision of the Judicial Committee of the Privy Council in James Patrick & Co. Pty.Ltd. v. Sharpe (1955) A.C. 1. which made it clear that an injury consisting of a disease, such as a coronary occlusion, was an injury within the meaning of the above quoted definitions and, if it arose in the course of the employment, it was compensable even though the employment did not contribute to it in any way. This decision of the Privy Council was on an earlier Victorian Workers Compensation statute in which the definitions of injury and disease were the same as quoted above but in which the words "by accident" appeared in s.5 (1) after the expression "personal injury".

40 5. After the deceased worker Martin Thomas Egan had returned to his employment with the respondent and while he was still so employed certain significant amendments were made to Act No. 6419 by the Workers Compensation (Amendment) Act (Act No. 7292). The latter Act commenced on 1st July 1965. It amended, inter alia, the definitions of "dependants", "injury" and "worker" and it substantially raised the rates of compensation payable. The relevant

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changes made by Act No. 7292 are set out here-
under side by side with the corresponding
provisions of Act No. 6419.

Act No.6419 (1958 Act) Act No.7292 (1965 Act)

S.3(1) "DEPENDANTS"
means -

- (a) the widow of the
worker
- (b) the children,
including children
born out of
wedlock, of the
worker who were
under sixteen
years of age at
the time of the
death of the
worker; and
- (c) such other persons
as were wholly or
in part dependent
upon the earnings
of the worker at
the time of his
death or would
but for the
incapacity due to
the injury have
been so dependent.

"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.

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S.3(1) "DISEASE" includes any physical or
mental ailment dis-
order defect or
morbid condition
whether of sudden
or gradual develop-
ment and also
includes the
aggravation
acceleration or
recurrence of any

"DISEASE"- not
amended.

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	<u>In accordance with the provisions of this Act</u>		<u>In accordance with the provisions of this Act</u>	<u>Record</u>
	<u>Selected provisions</u>		<u>Selected provisions</u>	
	S.9(1) Clauses appended - Amounts of Compensation			
	<u>Death</u>	\$4,480.00	<u>Death</u>	\$9,000.00
10	Weekly pay- ment during incapacity		Weekly pay- ment during incapacity	
	Worker	\$ 17.60	Worker	\$ 20.00
	Wife	\$ 4.80	Wife	\$ 6.00
	Each child under 16 years	\$ 1.60	Each child under 16 years	\$ 2.50
20	Subject to maximum weekly pay- ment of	\$ 25.60	Subject to maximum weekly pay- ment of	\$ 31.00
	Total liability of employer not to exceed \$5,600 except at discre- tion of Board		Total liability of employer not to exceed \$10,000 except at discre- tion of Board.	

30 6. The worker Martin Thomas Egan continued in the employment of the respondent until 18th March 1968. He died on 2nd April 1968. His death was materially contributed to by the coronary occlusion which had occurred on 19th June 1964. His death did not result from nor was it materially contributed to by any personal injury arising out of or in the course of the employment with the respondent other than the personal injury consisting of the coronary occlusion which occurred on 19th June 1964.

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The appellant was at the time of her husband's death wholly dependent on his earnings.

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7. The Workers Compensation Board made an award in favour of the appellant ordering inter alia that the employer pay compensation in the sum of nine thousand dollars (~~\$~~A9,000). Upon the respondent so requiring the Workers Compensation Board, pursuant to s.56(3) of the Workers Compensation Act, stated a case for determination by the Full Court of the Supreme Court of Victoria. The questions of law submitted by the Board for the opinion of the Full Court were -

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p.1

(a) Was it open to the Workers Compensation Board on the material before it to make an award in favour of the applicant ordering that the Respondent pay compensation in the sum of \$9,000?

(b) If no to (a) was it open to the Workers Compensation Board on the material before it to make any other and what award in favour of the Applicant against the Respondent?

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pp.14-21

The Full Court in a reserved judgment reversed the decision of the Workers Compensation Board by ordering on the 11th May 1971 that both questions be answered "no".

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8. Under the definition of "injury" introduced by Act No.7292 it has been held that an injury consisting of a disease, such as a coronary occlusion, is not a compensable injury unless the employment contributes to it. This was decided by a unanimous decision of the High Court in the case of Lamson Paragon Ltd. v. Edwards 41 A.L.J.R. 325 upholding a unanimous decision of the Full Court of the Supreme Court of Victoria reported under the title of Edwards v. Lamson Paragon Ltd. (1958) V.R. 374. It is submitted that the Privy Council without finally deciding the point, expressed a similar view in Lucas' Case 1970 A.C. 113 at p.131. In the case presently under appeal it was not contended

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before the Full Court on behalf of the appellant that the injury suffered by the deceased worker satisfied the definition of injury in Act No. 7292. If the appellant seeks to argue this point before the Privy Council and is permitted to do so the respondent will contend that an injury consisting of a disease is not an injury within the meaning of "injury" in Act No. 7292 unless the employment contributes to it; the respondent will so contend for the reasons given by the High Court and the Full Court in Lamson Paragon Ltd. v. Edwards already referred to, for the reasons given by the Privy Council in Lucas' case 1970 A.C. 113 at p.131 and for the reasons given by the High Court in Lucas' case 116 C.L.R. 537 per Barwick C.J. at p. 555, per Taylor J. at pp. 579.80 and per Windeyer J. at pp. 593-4.

9. It is submitted therefore that the question involved in the present appeal is the question to which the Full Court addressed itself, namely whether the appellant's entitlement to compensation should be determined by the law concerning injury which was in operation when the worker sustained his injury or by the law concerning injury which was in operation when he died. There is no doubt that the amount of compensation and the issue of dependency are both to be determined by the law in operation at the date of death - see Ogden Industries Pty. Ltd. v. Lucas (1970) A.C. 113 in which it was held that potential dependants had no right in law before death nor was there any corresponding liability of the employer before death. In Lucas' case, as in the present appeal, the worker sustained injury before but died after the commencement of Act No. 7292. But whereas in Lucas' case the worker suffered an injury which consisted of a disease to which his employment admittedly contributed and which therefore satisfied the definition of injury both in Act No. 6419 (in force at the date of injury) and Act No. 7292 (in force at the date of death), in the present appeal the injury satisfies the definition of injury

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in Act No.6419 (in force at the date of injury) but not the definition of injury in Act No. 7292 (in force at the date of death).

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10. In the present case the Full Court delivered a joint judgment in favour of the respondent. Their Honors fully considered the decision of the Judicial Committee of the Privy Council in Ogden Industries Pty. Ltd. v. Lucas in order to ascertain the applicability of that decision to the situation which arose in the present appellant's claim. In the course of their judgment their Honors said in reference to that decision -

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p.18 LL.22-46

"But their Lordships' statement that the rights of the dependents and the corresponding liability of the employer must be tested and ascertained as at the date of death is not confined to the question of compensation or questions of dependency and contains no limitation or qualification with respect to the element of injury, and we can see no logical reason for drawing a distinction with respect thereto.

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For the applicant it was submitted that the element of injury was complete when the injury occurred and it is sufficient that the fact satisfied the definition of injury at that time. In our view this contention is contrary to their Lordships' decision in Ogden Industries Pty. Ltd. v. Lucas that the rights and liability must be tested and ascertained at the date of death. We think that the decision was not, as was contended for by the Applicant, confined to the quantum of compensation, for the Acts Interpretation Act having been held inapplicable, there was no liability incurred by the employer under the Workers Compensation Act prior to its amendment to support any award of compensation."

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Later their Honors said -

"Our conclusion is that where death occurs after 1st July 1965 in order to give claimants an entitlement to compensation the facts relied upon must be facts which, whenever they occurred, give an entitlement in accordance with the law as it existed at the date of death."

10 In the result therefore their Honors rejected the appellant's claim for the reason that the coronary occlusion had no causal connection with the employment and consequently did not satisfy the definition of injury in Act No. 7292 which was the Act in force at the date of death.

11. The respondent submits that the judgment of the Full Court of the Supreme Court of Victoria should be upheld and the questions of law submitted by the Workers Compensation Board should be answered "no" for the following among other -

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REASONS

- (1) Because the liability of the respondent to pay compensation to the widow of a deceased worker does not arise until the death of that worker and must be tested by reference to the provisions of the legislation in force at the date of death.
- (2) Because the coronary occlusion which occurred on 19th June 1964 did not satisfy the definition of injury contained in Act No.7292 which was the Act in force at the date of death.
- 30 (3) Because the right of a dependent is a right separate from that of the deceased worker and does not arise until the death of the worker and must be treated by the law in force at the date of the death.
- (4) For the reasons appearing in the reasons for judgment of the Full Court of the

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Supreme Court of Victoria.

(XAVIER CONNOR)

(FRANK COSTIGAN)

No.23 of 1971

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COURT OF VICTORIA

B E T W E E N

WINIFRED ADELE EGAN Appellant

- and -

CITY OF NORTHCOTE Respondent

RESPONDENT'S CASE

FRESHFIELDS
1 Bank Buildings,
Princes Street,
London EC2R 8AB
Solicitors for the Respondent

Act No.6419 (1958 Act)

Act No.7292 (1965 Act)

Record

pre-existing
disease as afore-
said.

10 S.3(1) "INJURY" means
any physical or
mental injury or
disease and
includes the
aggravation
acceleration or
recurrence of any
pre-existing
injury or disease
as aforesaid.

"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 and
to which the
employment was a
contributing
factor; and

20 (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 -

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40 and for the purpose
of this interpreta-
tion the employment
of a worker shall be
taken to include any
travelling referred
to in sub-section
(2) of section eight
of this Act.

S.3(1) "WORKER" does

"WORKER" - Same

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Act No.6419 (1958 Act)

Act No.7292 (1965 Act)

not include a person employed whose remuneration exceeds two thousand pounds a year (excluding any payments made for overtime worked by him), or an outworker; but save as aforesaid means any person (including a domestic servant) who has entered into or works under a contract of service or apprenticeship or otherwise with an employer whether by way of manual labour clerical work or otherwise and whether the contract is expressed or implied is oral or in writing.

definition except that "Three thousand pounds a year" is substituted for "Two thousand pounds a year".

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LIABILITY TO PAY
COMPENSATION

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S.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.

No verbal alteration.

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