(5)

IN THE PRIVY COUNCIL

No.23 of 1971

ON APPEAL 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

R E C O R D O F P R O C E E D I N G S

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IN THE PRIVY COUNCIL No.23 of 1971

ON APPEAL 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

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

LIST OF DOCUMENTS OMITTED FROM PRINTED RECORD BY CONSENT OF SOLICITORS

Document Omitted	Date
Affidavit of Peter Joseph Redlich	9th August 1971
Certificate of Percival Stanley Malbon Prothonotary for the Supreme Court of the State of Victoria	29th July 1971

IN THE PRIVY COUNCIL No.23 of 1971

ON APPEAL 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

RECORD OF PROCEEDINGS

NO. 1

CASE STATED AT THE REQUEST OF THE RESPONDENT FOR THE DETERMINATION OF THE FULL COURT

In the Supreme Court of Victoria

No.1

Case Stated

6th November 1970

1. This claim for compensation was made on behalf of the Applicant Winifred Adele Egan the widow of Martin Thomas Egan deceased by her solicitors by letter dated the 12th day of July, 1968. Pursuant to Section 44 of the Workers' Compensation Act the said claim was referred to the Workers' Compensation Board by Notice dated the 24th day of September, 1968. A copy of the said Notice is hereunto annexed and marked with the letter "A" and forms part of this case stated.

2. The said claim came on for hearing before the Workers' Compensation Board on the 7th day of May, 1970. Each party was represented by Counsel.

3. No evidence was called by either party but a Statement of agreed facts was filed with the Board and adopted by it. A true copy of the said statement of agreed facts is hereunto annexed and marked with the letter "B" and forms part of this case stated.

4. After consideration of the said statement of agreed facts and the submissions of Counsel the Board on the 7th day of May, 1970 made an award in favour of the Applicant ordering inter alia the Respondent to pay compensation in the sum of Nine thousand dollars. A copy of the said award is hereunto annexed and marked with the letter "C" and

In the Supreme Court of Victoria

No.1

Case Stated

6th November 1970 (continued)

forms part of this case stated. In making the award the Board said that it adopted the reasoning set out in its earlier decision in the case of Denyer v. Maryborough Knitting Mills. A copy of the Reasons for Decision in that case is annexed hereto and marked with the letter "D" and forms part of this case stated.

5. The questions of law submitted for the opinion of the Full Court are:

(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 $9,000.00?

(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?

No.2

NO. 2

ANNEXURES TO CASE STATED

Annexures to Case Stated

ANNEXURE "A"

Annexure "A" Notice of Employer with Denial of Liability 24th September 1968

THE WORKERS' COMPENSATION RULES

Form 11

NOTICE BY EMPLOYER THAT CLAIM FOR COMPENSATION HAS BEEN MADE

(Where death has resulted from the Alleged Injury)

THE WORKERS' COMPENSATION ACTS

S.A.I.O. Claim No.S64.02664
.... 19 .. No.5809/68

The Registrar, Workers' Compensation Board, 160 Queen Street, Melbourne C.1.

TAKE NOTICE that a claim for compensation has been made by or on behalf

..... Mrs. Winifred Egan
..... 9 Glendearg Grove
..... MALVERN

Claimant

In the Supreme Court of Victoria

No.2

Annexures to Case Stated

Annexure "A" Notice of Employer with Denial of Liability

24th September 1968 (continued)

..... City of Northcote,
..... Town Hall, NORTHCOTE
an Employer
In respect of the Death of MARTIN THOMAS EGAN
of 9 Glendearg Grove, MALVERN Deceased

PARTICULARS

The claim was made on the 12th day of July, 1968.
The claim is for compensation for the death of the deceased workers (husband).
The deceased was a male aged 66 years.
The claim was made by Messrs. Holding, Ryan & Redlich whose name and address are 140 Queen Street, MELBOURNE.
The alleged circumstances of injury were arriving home from work after shopping at a bank at .....
The injury is alleged to have happened on the 19th day of June 1964.
Death occurred on the 2nd day of April 1968.
The condition alleged to have constituted injury was not known (alleged heart attack).
The worker was paid the sum of $452.48 as compensation.
No payment of compensation or otherwise was made to the worker.
Liability has been denied by this Office.
The name and address of the Employer's Agent are:-

STATE ACCIDENT INSURANCE OFFICE
State Insurance Centre
480 Collins Street, Melbourne C.1.

DATED the 24th day of September, 1968.

J.T. INKSTER Insurance Commissioner

Received by Registrar ..... 19 .... per .....

In the Supreme Court of Victoria

No.2

Annexures to Case Stated (continued)

Annexure "B"

Statement of Agreed Facts

ANNEXURE "B"

STATEMENT OF AGREED FACTS

1. On the 19th June 1964 Martin Thomas Egan of 9 Glendearg Grove Malvern was a worker employed by the City of Northcote.

2. On the 19th June 1964 whilst travelling between his place of employment and place of residence the worker suffered a coronary occlusion to which neither the said employment nor the travelling was a contributing factor.

3. The said coronary occlusion was a personal injury within the meaning of the Workers' Compensation Act 1958 prior to its amendment by Act No.7292 and arose in the course of his employment with the City of Northcote.

4. A coronary occlusion is the blocking, probably by the formation of a clot, of a coronary vessel affected by atheroma thereby seriously impairing the supply of blood to the heart muscle.

5. In respect of the incapacity (namely from 19.6.64 to 11.11.64) which resulted from the said coronary occlusion the worker was paid weekly payments of compensation pursuant to s.9 (2) of the said Act.

6. The worker resumed his employment on or about the 11th November 1964 on light duties and continued in such employment until the 18th March 1968.

7. The death of the said worker occurred on the 2nd April 1968.

8. The said death was materially contributed to by the coronary occlusion which occurred on the 19th June 1964.

9. The said 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 namely the coronary occlusion which occurred on the 19th June 1964.

10. The deceased left one dependant namely his

widow Winifred Adele Egan. The said Winifred Adele Egan was at the time of the deceased's death wholly dependent on the deceased's earnings.

ANNEXURE "C"

Form D

BEFORE THE WORKERS COMPENSATION BOARD
Number 5809/68
IN THE MATTER of a Claim for Compensation made by
MRS. WINIFRED EGAN The Claimant
to CITY OF NORTHCOTE the Employer
in respect of the death of MARTIN THOMAS EGAN the Deceased.

AWARD

The Board having found that the Deceased left the abovenamed Claimant wholly or mainly dependent upon his earnings
DOTH AWARD the sum of $9000 to be paid into the custody of the Board:
AND DOTH FURTHER AWARD reasonable costs of medical, hospital, nursing or ambulance services and of burial (the amounts of which are reserved);
AND DOTH ORDER the Employer to pay the costs of the Applicant to be taxed on Scale "F";
AND CERTIFIES for the costs of items mentioned in Rule 53 qualifying fees for Doctor/s Stubbe, Biggins and Stock.
the attendance of Counsel on the Summons for Directions.
AND DOTH FURTHER ORDER that in default of the said sum being paid within 7 days after service of this award interest at the rate of eight per centum per

In the Supreme Court of Victoria

No.2

Annexures to Case Stated (continued)

Annexure "C"

Award of Workers Compensation Board

7th May 1970 (continued)

annum shall be payable as from the expiration of that period.

DATED the 7th day of May 1970

By Order of the Workers Compensation Board

E. MANSFIELD

Registrar

Annexure "D"

Copy of Reasons for Decision in Denyer v. Maryborough Knitting Mills

18th September 1969

ANNEXURE "D"

WORKERS' COMPENSATION BOARD OF VICTORIA

DENYER v. MARYBOROUGH KNITTING MILLS 6929/1967

(5th March, 8th May, 1969)

Judge Harris, Chairman; Messieurs Wood and Dynon, Members).

Injury - Aggravation of disease thereby contributing to death - no casual relationship between employment and injury - Date of injury before Act 7292 of 1965, death occurring in 1967 - entitlement of widow to compensation. The worker sustained a heart attack before the amending Act of 1965. This attack occurred in the course of the employment, but was not shown to arise out of the employment. He died in 1967. Death was contributed to by the 1965 attack. The Respondent contended that unless the injury was one which fulfilled the requirements of the Act at the date of death (i.e. was causally related to the employment) there was no liability to pay compensation to the widow. Respondent relied on Ogden Industries Pty. Ltd. v. Lucas (1968) 43 A.L.J.R.63.

HELD The appropriate law by which to determine the

quality of the "injury" was that in force at the date of the events constituting the "injury". Accordingly the claim succeeded despite the fact that death resulted after the amending Act. Ogden Industries Pty. Ltd. v. Lucas (supra) is confined strictly to the question there in issue, viz. the relevant law for quantifying the claim.

Hill (instructed by D. & A. Aronson) for the Applicant.
Costigan (instructed by Mallesons) for Respondent.

REASONS FOR DECISION

(Delivered September, 18th 1969)

This claim was made by Nancy Hazel Denyer, the widow of a worker who died in September, 1967. The Board heard evidence directed at establishing a causal relationship between the Worker's employment after July, 1965 and his death. This evidence did not satisfy the Board. However, the alternative basis of the claim was that a heart attack in March 1965 materially contributed to the fatal attack. The earlier attack had been the subject of proceedings before a Board in 1966, when the worker obtained an award of compensation for personal injury "arising out of or during the course of his employment" by the respondent. In the present proceedings the Board has been satisfied that the damage done to the heart by the 1965 event did materially contribute to the worker's death. This conclusion however does not end the matter. The amending Act of 1965 introduced the requirement of a causal connection between work and injury. Before 1965 a temporal connection sufficed. The award made in the workers' favour in 1966 does not indicate whether or not there was a causal connection found in relation to the 1965 heart attack. No evidence was led in the present proceedings to establish such a connection. The question for decision then is whether an injury to a worker arising in the course of the employment (but for present purposes not out of the employment) before 30th June 1965, resulting in death after that date, entitles the widow to the higher sum of compensation prescribed by the 1965 Act (No.7292) or to any compensation at all.

The question is one of many arising out of the patchwork amendments to the principal Act made

In the Supreme Court of Victoria

No.2

Annexures to Case Stated (continued)

Annexure "D"

Copy of Reasons for Decision in Denyer v. Maryborough Knitting Mills

18th September 1969 (continued)

in 1965. Basically, the difficulties are due to the absence of any legislative guide to Parliament's intentions concerning transitional cases. The difficulties are not diminished, it may be said with appropriate respect, by the decision of the Privy Council in Ogden Industries Pty. Ltd. v. Lucas (1968) 43 A.L.J.R. p.63. That decision established that if a widow succeeds in a claim to compensation, having proved the appropriate injury and the fact of her dependency, then the extent of that compensation is fixed by legislation in force at the date of death. The Privy Council said (at p.66) "... the rights of the dependants and the corresponding liability of the employer must be tested and ascertained at the date of the death".

If this quotation could be applied in its simplicity to the facts of the present case, then a widow who was not dependent on the earnings of the worker, and whose claim was based on an injury which had merely a temporal and not a causal connection with the employment, would fail in her claim. The present case does not require examination of the relevant law for dependency, but it does require a decision as to the relevant law for the ascertainment of the injury. The automatic application of the quotation already given (and of any other quotation from decided cases) is warned against in the same judgment in these words (at p.66) "... the greatest possible care must be taken to relate the observations of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit." In the Privy Council case, the date of death was chosen in preference to the date of injury. It was chosen for the purpose of fixing the time when the parties became identified and their rights and liabilities discovered. But this is not to say that the injury which is the ultimate basis for liability and entitlement has to fulfil the requirements of the law at the date of death. The legislation has not moved the date of the actual occurrence of the injury. If that injury happened before June 30th, 1965 and was then acceptable to the contemporary law as a compensable event, and if death later resulted from it, why should the enquiry after June 1965 be concerned with seeing whether the

initial injury still qualified under the changed law? Should it not suffice that death has resulted from an event which was regarded by law as an injury at the time it had happened?

On the other hand, the respondent contends that the Privy Council decision and the orthodox canons of statutory interpretation lead to complete rejection of the widow's claim. When the principal Act of 1958 was amended in 1965, no express reference was made to events pre-dating the amendment.

In the ordinary course, therefore, section 7 (2) (c) of the Acts Interpretation Act would apply, and preserve rights and liabilities already accrued. If no right or liability had accrued, there would be nothing to be protected. The respondent's contention is that the general principle underlying Ogden Industries Pty. Ltd. v. Lucas (supra) is that in an enquiry into the rights and obligations of the parties one cannot select a starting point before the parties are identified and the occasion for the claim has arisen. This point is the date of death. The situation in a claim by a dependent is different from that where the injured worker is pursuing his claim after the amendment. He has rights which accrued before the amendment. The widow has not. So she does not have any rights accrued which would receive the protection of Section 7 (2) (c) of the Acts Interpretation Act. Although the Board accepts the proposition that no rights accrued to the widow, it considers that the preceding sub-clause may be in point:- "Unless the contrary intention appears the repeal or amendment shall not -

(a) .....
(b) affect the previous operation of any enactment so repealed or amended or anything duly done or suffered under any enactment so repealed or amended.."

Looking at the facts here, there has been injury suffered (not necessarily of course in the sense used in the sub-clause) during the operation of the previous Act. That Act stamped the injury as a compensable one. For all time, thereafter, "unless the contrary intention appears," that injury has the appropriate characteristics of an injury for the purposes of workers' compensation. It does not constitute a right of liability. It is simply something which was an injury by reason of the operation of the enactment then in force, and the amendment of

In the Supreme Court of Victoria

No.2

Annexures to Case Stated (continued)

Annexure "D"

Copy of Reasons for Decision in Denyer v. Maryborough Knitting Mills

18th September 1969 (continued)

In the Supreme Court of Victoria

No.2

Annexures to Case Stated (continued)

Annexure "D"

Copy of Reasons for Decision in Denyer v. Maryborough Knitting Mills

18th September 1969 (continued)

that enactment does not take away the characteristic. The next step is to say that when the Act as amended speaks of death resulting from any injury, it is speaking of death resulting from any injury which possesses or has possessed the characteristics of a compensable injury. To say otherwise is to say that something done or suffered within the contract of service under the previous enactment is now to have a different result - i.e. to be treated as something outside the Act. Or to use the earlier words of the sub-clause, the previous operation of the enactment, which resulted in the occurrence being stamped as injury for the purposes of the Act, is now affected, to the extent of completely negating the operation of that earlier enactment on the events or occurrence which formerly constituted an injury. Since there is no intention appearing for this to be so, the ordinary effect of clause 2 (b) is to sustain and carry on the significance of the events constituting injury into the period of time when the claimant obtains a right to claim compensation following her husband's death. It may be contended that clause 2 (b) is irrelevant because one cannot speak of the "operation" of an enactment in relation to neutral events such as the components of a physical or mental injury. In other words, those were factual and not legal matters, simply occurring at a point of time. The contemporary legislation was not called on to speak about those events then, nor did those events bear any relationship to it as being "duly done or suffered" under it. They happened anyway. But the fact that they happened under or within the ambit of a contract of service whose statutory incidents included workers' compensation matters seems to suggest that one cannot divorce the facts themselves from the law then existing. If that law gave the facts a particular legal significance, it has "operated" on them, and its operation is preserved after the amending legislation.

There is no doubt that if the Privy Council decision had gone the other way, this claim would have succeeded. If there had been a finding in Ogden Industries Pty. Ltd. v. Lucas that the rights and liabilities accrued at the happening of the injury, this would have attracted section 7 (2) (c) of the Acts Interpretation Act, and resulted in an award at the rates of the unamended Act. Then in the present case there would have been a similar accrual of rights and liabilities at the

date of the injury (when a temporal relationship sufficed) and a similar award. Does the denial of this proposition by the Privy Council automatically lead to the rejection of the present claim? It appears to the Board that only if that decision is taken completely denying the relevance of all pre-amendment legislation in death claims, does it conclude the issue here. The result of such a broad application of the decision can be curious. E.g. a man who was not a worker pre-1965 because he received $4001 per year when the limit was $4000, is injured, pre-1965, and dies in 1966. His wife (factually dependent) claims as the widow of a worker, for after 1966 the limit of remuneration for a worker is $6000. On the application of Ogden Industries Pty. Ltd. v. Lucas in accordance with the respondent's contention she would succeed. Her husband would have had no claim in his lifetime. A widow not factually dependent whose husband died in 1966 following an injury arising out of the employment pre-1965 gets no rights until the event of death; at that stage she is not qualified as a dependent, and her claim would fail, on a similar broad application of the Privy Council decision. Of course had he died before 1965 she would succeed for the pre-1965 amount even if her claim was not adjudicated upon until after 1965. If that decision is restricted to its particular facts, and if heed is taken of their Lordships' comments concerning United Collieries v. Simpson (1909) A.C.383, then there is still room to look at the pre amended legislation for certain matters. At p.66 their Lordships say, of Simpson's case:- "The appellants relied on some observations in Lord MacNaghten's opinion ..... as establishing the principle that the liability accrues from the occurrence of the accident, and of course so it does in the sense intended by the noble Lord when he went on to say that the liability falls upon the employer by reason of the accident; no one could doubt the accuracy of that as a general statement. In other words, the nature of the "accident" or injury has to be ascertained. If it is a "liability-creating" injury (under the law in force at the time it occurred) then when looking at rights and liabilities in the future, it stands as a good "root of title" even although had it occurred under the amended law this would not have been so. Similarly, the person who is to be the victim of the injury has to qualify as a worker

In the Supreme Court of Victoria

No.2

Annexures to Case Stated (continued)

Annexure "D"

Copy of Reasons for Decision in Denyer v. Maryborough Knitting Mills

18th September 1969 (continued)

under the legislation at the time he is hurt; all the incidents of his contract of service are to be judged by the law then in force, and not by an enactment not even on the statute book when he and the employer were associated. And so far as concerns his widow, she can only successfully claim if she can show that there was an injury according to the law in force at the time it happened. She has to go back to the actual events which then happened in order to begin her claim. There is nothing illogical in going back to the law then in force to discover the significance of those events. The principle of statutory interpretation already mentioned, concerning the effect of an amendment operating as a complete repeal, gives way to Section 7 (2) (b) of the Acts Interpretation Act already mentioned.

The Board has studied the judgments in Ogden Industries Pty. Ltd. v. Lucas in both the High Court and the Privy Council for guidance. It notes the comment of Windeyer J. that the intention of the legislature may be gauged by the probability that in this day and age "an Australian legislature increasing death benefits under workers' compensation laws would intend the dependants of all workers dying after the change in law to enjoy its benefits" (116 C.L.R. at p.591). The amendment to section 5 of the Act, reintroducing the causal element, and the added requirement of actual dependency, must obviously cut down the number of workers whose dependants have successful claims. Today, the widow of a worker whose death was due to a post-1965 injury only temporally related to work gets no benefit at all. The increase of benefits by reason of the amendments is only for a narrower category of qualified applicants. It so happens that in the present instance the Board's conclusion results in the same benefit to a widow whose husband was injured before the amendment as to the case of an injury after the Act, but we cannot thank the legislators for making this obvious, nor, in the light of the other amendments referred to, for patently intending such an equality of increased benefits. Possibly Taylor J. was too lenient when he said (at p.571): "Perhaps it was thought that the matter was too clear for words ....." It also appears that Taylor J. thought that a construction of the Act which made entitlement to compensation depend on when the qualification as a dependent was

determined, would be unacceptable (p.572). The Board notes that he also spoke about "injury sustained in the course of his employment either before or after the passing of the amending Act", but whether he was referring intentionally to temporally associated injuries is not clear.

The Board has already referred to the result which would follow in the present case if the Privy Council decision had favoured the employer. So too, the minority judgments in the High Court would support the present claimant - e.g. Barwick C.J. (at p.549):- "The receipt of the injury is the general circumstance on which the Act operates", and "the Amendment Act is constructed on the assumption that its provisions will only apply in respect to injuries received after its commencement" (p.555). The Privy Council's unwillingness to adopt this as a general proposition does not mean the proposition is inapplicable in the present case. Again the judgment of Windeyer J. (one of the majority) includes a passage which gives support to the Board's conclusion (at p.585) - "The only matter which was past and closed when the 1965 Act came into operation was ..... that the worker had suffered an injury of a kind which, if death ensued, would entitle his dependants to compensation. An alteration of the definition of "injury" would not alter this (in the absence of an express provision that it should do so)".

This statement supports the view that the pre-1965 legislation is the appropriate law by which to test the event constituting the injury, and that secion 5 (3) of the Acts Interpretation Act does not require that the reference in the Act after 1965 to "injury" be treated as a reference to an injury as now defined.

There is nothing in the judgment of the third member of the majority in the High Court (Owen J.) which is in direct opposition to the Board's conclusion. That judgment does not advert to the nature of the "injury" which becomes the basis for dependant's claim, and the ratio of the judgment is simply that "it is the law in force at the time of death that is to be applied in measuring the extent of that liability and of the corresponding rights." In short, Owen J. is confining himself strictly to the law for determining who are entitled and the

In the Supreme Court of Victoria

No.2

Annexures to Case Stated (continued)

Annexure "D"

Copy of Reasons for Decision in Denyer v. Maryborough Knitting Mills

18th September 1969 (continued)

extent of their entitlement. His judgment does not require a conclusion either way as to the relevant law for determining the nature of the injury. In the result, therefore, the Board is of the opinion that the applicant is entitled to an award of $9000, on the basis that the worker sustained a compensable injury in March 1965 which materially contributed to his death in 1967.

Order costs on Scale F. Certify items under Rule 53. Qualifying fees Dr. Biggins. Reserve other qualifying fees. Certify two refreshers and brief to hear judgment. Circuit fee $26. Stay of 28 days.

No.3

Copy Reasons for Judgment of Supreme Court of Victoria (Full Court) (Winneke C.J. Gowans J. & Menhennit J.

11th May 1971

NO. 3

COPY REASONS FOR JUDGMENT OF SUPREME COURT OF VICTORIA (FULL COURT)
(WINNEKE C.J., GOWANS J., MENHENNIT J.)

Delivered 11th May 1971

This is a case stated by the Woerkers' Compensation Board. There came before the Board on 7th May 1970 a claim for compensation by Winifred Adele Egan in respect of the death of her husband Martin Thomas Egan. The claim was made against the City of Northcote. No evidence was called by either party but a statement of agreed facts was filed with the Board and adopted by it.

The statement as amended and adopted by the Board established the following facts. On 19th June 1964 the husband was a worker employed by the respondent City. On that date, whilst travelling between his place of employment and his place of residence the worker suffered a coronary occlusion to which neither his employment nor the travelling was a contributing factor. A coronary occlusion is the blocking,

probably 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 coronary occlusion was a personal injury within the meaning of the Workers' Compensation Act 1958 prior to its amendment by the Workers' Compensation (Amendment) Act 1965 (No.7292) and it arose in the course of the worker's employment with his employer. In respect of the incapacity which resulted from that coronary occlusion (namely from 19th June 1964 to 11th November 1964) the worker was paid weekly payments of compensation pursuant to sec. 9 (2) of the Workers' Compensation Act 1958. The worker resumed his employment on or about 11th November 1964 on light duties. The Workers' Compensation (Amendment) Act 1965 came into operation on 1st July 1965. The worker continued thereafter in such employment 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. The worker left one dependant namely his widow, the applicant, who was at the time of his death wholly dependent on his earnings.

The Board made an award in favour of the applicant ordering, inter alia, that the employer pay compensation in the sum of $9,000.

The questions of law submitted for the opinion of this Court are:-

(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?

In order to state the contentions of the parties it is necessary first to refer to the relevant legislation. As is indicated in the agreed facts, the Workers' Compensation Act 1958 was amended on 1st

In the Supreme Court of Victoria

No.3

Copy Reasons for Judgment of Supreme Court of Victoria (Full Court) (Winneke C.J. Gowans J. & Menhennit J.)

11th May 1971 (continued)

July 1965. These amendments were very significant. By the one amending Act they increased greatly the quantum of compensation and the category of persons who were workers, and at the same time restricted the circumstances in which there was a liability to pay compensation. Thus under the Workers' Compensation Act 1958 before its amendment in 1965, if a worker suffered a coronary occlusion at work or whilst travelling between his place of residence and his place of employment, he was entitled to compensation whether or not the injury was one to which the employment was a contributing factor (James Patrick & Co. Pty. Ltd. v. Sharpe (1955) A.C.I.) But under the Act as amended in 1965, in the case of an injury which is a disease (which includes a coronary occlusion) the injury is compensable only if the employment is a contributing factor (Edwards v. Lamson Paragon Ltd. 41 A.L.J.R.325; (1968) V.R.374). Again under the 1965 amendments, in the case of death liability to pay compensation is confined to cases where there was actual dependency at death whereas previously compensation was payable to a widow or children whether or not they were actually dependent. On the other hand the 1965 Act substantially increased rates of compensation both for workers in respect of incapacity and for dependents in respect of death, the standard amount payable in respect of death being increased from $4,480 to $9,000. Again by the 1965 Act the definition of worker was amended to include any worker whose earnings did not exceed $6,000 a year, whereas previously the maximum earnings for a person to be a worker had been $4,000 a year.

In Ogden Industries Pty. Ltd. v. Lucas (1970) A.C.113; 118 C.L.R.32 the Privy Council held that in a case where a worker suffered a coronary occlusion before 1st July 1965 to which the work was a contributing factor and died after 1st July 1965 and the occlusion materially contributed to his death, the worker's dependants were entitled to be paid compensation at the rate prescribed by 1965 Act.

In the present case the injury occurred before 1st July 1965 and the death to which the injury materially contributed occurred after 1st July 1965. However, in the present case the injury, the coronary occlusion, whilst it occurred in the course of the worker's employment was a disease to which the employment was not a contributing factor. Accordingly

it fell within the definition of injury in the Act before the 1965 Amendment Act but not within the definition of injury introduced by that Act.

The contention for the widow is that so long as the coronary occlusion when it occurred fell within the definition of injury under the law as it then stood, the dependants are entitled to compensation if the death after 1st July 1965 results from or is materially contributed to by the injury even if the coronary occlusion is not an injury as defined by the Act at the time of death. This contention was accepted by the Board. For the employer the contention is that the occlusion must be an injury as defined by the current Act at the time it occurs and at the date of death or if not both, certainly at the date of death. Both sides placed strong reliance on the judgments in Ogden Industries Pty. Ltd. v. Lucas, both in the Privy Council and in the High Court.

In Ogden Industries Pty. Ltd. v. Lucas the Privy Council's decision involved a consideration of the very legislative provisions with which this case is concerned and their operation in relation to the death of a worker. In these circumstances the starting point of our consideration of this matter must be to ascertain what their Lordships decided in that case. Their Lordships decided 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 death; at that time there was an obligation upon the employer under and by virtue of the Act of 1958 as amended by the Amendment Act to compensate the dependants in accordance with its provisions." (1970) A.C.113 at 127; 118 C.L.R.32 at 38. They also decided that in determining rights and liabilities on the foregoing basis, the facts which give a right to compensation may include some facts which occurred before 1st July 1965. This must follow we think from the actual decision that the dependants were entitled to compensation at the rate prescribed by the 1965 Act despite the fact that the coronary occlusion occurred before 1st July 1965. Further, their Lordships' decision appears to us to have involved a rejection of an argument for the employer that the provisions of the amended Act do not apply to injuries sustained before the amendment (see report of argument (1970) A.C.113 at pages 119-121).

In the Supreme Court of Victoria

No.3

Copy Reasons for Judgment of Supreme Court of Victoria (Full Court) (Winneke C.J. Gowans J. & Menhennit J.)

11th May 1971 (continued)

It appears to us to be involved in the first of the above-mentioned matters decided by their Lordships that in the case of death it is the law at the date of death by which the rights and liabilities of the parties are to be tested and ascertained. It follows also we think that whilst a fact happening prior to 1st July 1965 may be included in the facts which give a right to compensation, such fact must be one which with other relevant facts gives a right to compensation according to the law at the date of death. Further, it was conceded on behalf of the applicant, and in our opinion rightly so in the light of the Privy Council decision, that not merely the question of the quantum of compensation but also the question of whether a person is a dependant entitled to compensation is to be determined by the law as at the date of death, so that if death occurs after 1st July 1965 the widow must establish that she was in fact dependent at the date of death. She did not, as we have said, have to establish any such factual dependency if the death occurred before that date. But their Lordships' statement that the rights of the dependants 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.

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.

Reference was made in argument to the intention of the legislature. It seems to us that where the

legislature at one and at the same time both increases substantially the quantum of compensation and narrows the circumstances in which compensation is payable, the legislative intention manifested is that the compensation thereafter payable is to be paid only in respect of events which, whenever they happen, satisfy the new conditions of entitlement. If the relevant portion of the definition of injury introduced by the 1965 Act is written into sec. 5 of the Act the pertinent provisions of secs. 5 and 9 then read as follows:-

> 5. If in any employment personal injury arising out of or in the course of his employment (being 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) 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.
>
> 9. Where the worker's death results from or is materially contributed to by the injury the compensation will be a sum in accordance with the provisions contained in this section.
> The clauses referred to
>
> 1. The amount of compensation shall be ascertained as follows:-
>
> (a) Where death results from or is materially contributed to by the injury:-
>
> (i) If the worker leaves any dependants wholly or mainly dependent upon his earnings the amount of compensation shall be the sum of $9,000.."

If these provisions, which are those applicable at the date of death of the worker in the present case, are applied to the facts of the present case it is conceded that the applicant has no entitlement to compensation. For the applicant to succeed it would be necessary to read into the provisions in

In the Supreme Court of Victoria

No.3

Copy Reasons for Judgment of Supreme Court of Victoria (Full Court) (Winneke C.J. Gowans J. & Menhennit J.)

11th May 1971 (continued)

some way not only the definition of injury in the 1965 Act but also that in the 1958 Act. We cannot visualise the mechanics by which both of these could be read into secs. 5 and 9 and we are not aware of any principle of statutory construction which would enable that to be done. Nor do we see any justification for reading into sec. 9 but not into sec. 5 some words which would confine an injury occurring before 1st July 1965 to one which satisfied the definition of injury before that date but not thereafter. The only way we can see by which the earlier provisions could become applicable would be if some liability could be regarded as created and preserved by sec. 7 of the Acts Interpretation Act, but their Lordships have decided that sec. 7 of the Acts Interpretation Act has no application.

It was further submitted for the applicant that sec. 5 (1) of the Workers' Compensation Act 1958 prior to its amendment imposed an obligation on the employer in respect of the injury when it occurred "to pay compensation in accordance with the provisions of this Act", and that sec. 5 (3) of the Acts Interpretation Act operated to attach that liability to the provisions of the Act as amended by the 1965 Amending Act so as to make applicable the amended rates in sec. 9 and the definitions of dependency applicable to that section. In our opinion this submission cannot be accepted consistently with their Lordships' decision, which we understand to mean that the rights and liability of the parties must be tested and ascertained in their entirety at the date of death. We say this because of their Lordships' decision that the obligation upon the employer under and by virtue of the Act of 1958 as amended by the Amendment Act was to compensate the dependants in accordance with its provisions, that is the amended provisions.

For the applicant reliance was placed upon passages in the reasons for judgment of the majority of the High Court in Ogden Industries Pty. Ltd. v. Lucas and their Lordships' statement immediately following the passage we have quoted above - "That was the ground of the decision of the majority of the High Court in their very careful judgments with which their Lordships agree" - (1970) A.C.113 at 127: 118 C.L.R. 32 at 38. We also have regard to their Lordships' warnings as to the use to be made of

judicial pronouncements in earlier cases (1970) A.C.113 at 127: 118 C.L.R.32 at 39). It appears to us that what their Lordships said as to the judgment of the majority in the High Court does not lead to conclusions different from those we have stated.

In the Supreme Court of Victoria

No.3

Copy Reasons for Judgment of Supreme Court of Victoria (Full Court) (Winneke C.J. Gowans J. & Menhennit J.)

11th May 1971 (continued)

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. The further contention for the employer that the injury must also satisfy the definition of injury at the time it occurred does not arise for decision in this case, and we only say that in our view it would have to be tested against the basic principles laid down by the Privy Council to which we have referred.

We answer the questions in the case stated as follows:-

Question (a) No.

Question (b) No.

As the respondent employer has succeeded it is ordered that the applicant pay the respondent's taxed costs of the case stated.

NO. 4

No.4

ORDER OF THE FULL COURT OF THE SUPREME COURT OF VICTORIA

Order of the Full Court of the Supreme Court of Victoria

BEFORE THE FULL COURT THEIR HONOURS THE CHIEF JUSTICE MR. JUSTICE GOWANS AND MR. JUSTICE MENHENNIT THE 11TH DAY OF MAY 1971

11th May 1971

THIS CASE STATED coming on to be heard upon the 21st, 22nd, 23rd and 26th days of April, 1971 before this Court UPON READING the case stated at the request of the Respondent AND UPON HEARING Mr. Connor one of Her Majesty's Counsel and Mr. Costigan of Counsel for the Respondent and Mr. Hill and Mr. Ashley of Counsel for the Applicant THIS COURT DID ORDER that this matter should stand for judgment and this matter standing for judgment this day accordingly THIS COURT DOTH

In the Supreme Court of Victoria

No.4

Order of the Full Court of the Supreme Court of Victoria

11th May 1971 (continued)

ORDER that the questions for the determination of this Court in the case stated by the Workers' Compensation Board be answered as follows:-

Question (a) No.

Question (b) No.

and THIS COURT DOTH FURTHER ORDER that the costs of the case stated of the Respondent be taxed and when taxed be paid by the Applicant to the Respondent.

BY THE COURT

This Order was taken out by Michael Walsh of 480 Collins Street Melbourne Solicitor to the Insurance Commissioner and Solicitor for the Respondent.

No.5

NO. 5

Order of the Full Court of the Supreme Court of Victoria giving leave to Appeal

ORDER OF THE FULL COURT OF THE SUPREME COURT OF VICTORIA

BEFORE THE FULL COURT THEIR HONOURS THE CHIEF JUSTICE MR. JUSTICE GOWANS AND MR. JUSTICE MENHENNIT THE 31st DAY OF MAY 1971

31st May 1971

THIS MOTION coming on to be heard upon the 31st day of May 1971 before this Court UPON HEARING Mr. Ashley of Counsel for the Applicant and Mr. Costigan of Counsel for the Respondent THIS COURT DOTH ORDER upon the Applicant undertaking not at any time to set down her Appeal to the High Court of Australia, that the Applicant have leave to appeal to Her Majesty in Her Majesty's Privy Council under Rule 2 (a) of Order in Council dated the 23rd day of January 1911 of Rules Relating to Appeals to the Privy Council, on condition that the Appellant do within two months of the date of the hearing of this application for leave to appeal, enter into good and sufficient security, to the satisfaction of the Prothonotary of this Honourable Court in the sum of One Thousand Dollars ($1,000.00) for the due prosecution of the Appeal as provided in Rule 5 (a) of the Order in Council and the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an Order granting her final leave to appeal, or of the Appeal

being dismissed for non-prosecution, or of Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be), AND THIS COURT DOTH FURTHER ORDER that the costs of this Motion be reserved.

BY THE COURT

This Order was taken out by Holding Ryan & Redlich of 140 Queen Street, Melbourne, Solicitors for the Applicant.

In the Supreme Court of Victoria

No.5

Order of the Full Court of the Supreme Court of Victoria giving leave to Appeal

31st May 1971 (continued)

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10 NO. 6

No.6

ORDER OF THE FULL COURT OF THE SUPREME COURT OF VICTORIA

Order of the Full Court of the Supreme Court of Victoria granting final leave to Appeal

13th August 1971

BEFORE THE FULL COURT THEIR HONOURS MR. JUSTICE SMITH, MR. JUSTICE ADAM AND MR. JUSTICE McINERNEY THE 13th DAY OF AUGUST 1971

UPON MOTION this day made to this Court on behalf of the abovenamed Applicant and UPON READING the Notice of Motion herein dated the 2nd day of August 1971 and the Affidavit of Peter Joseph
20 Redlich dated the 9th day of August 1971 and the Certificate of the Prothonotary dated the 29th day of July 1971 and exhibited thereto and UPON HEARING Mr. Ashley of Counsel for the Applicant and Mr. Costigan of Counsel for the Respondent THIS COURT DOTH DECLARE that it is satisfied that the conditions imposed by the Order of this Court herein dated the 31st day of May 1971 have been complied with and THIS COURT DOTH ORDER that final leave be granted to the Applicant to appeal to
30 Her Majesty in Her Majesty's Privy Council under Rule 2 (a) of the Orders in Council dated the 23rd day of January 1911 regulating Appeals to the Privy Council from the State of Victoria against the Order of this Court made herein on the 11th day of May 1971 and THIS COURT DOTH FURTHER ORDER that costs of this application be reserved AND THAT there be liberty to both parties to apply generally.

BY THIS COURT

This Order was taken out by the Solicitors for the
40 Applicant Messrs. Holding, Ryan & Redlich of 140 Queen Street, Melbourne.

IN THE PRIVY COUNCIL No.23 of 1971

ON APPEAL 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

R E C O R D O F P R O C E E D I N G S

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Solicitors for the
Respondent