Privy Council Appeal No. 23 of 1971

Winifred Adele Egan – – – – – – – – *Appellant*

v.

City of Northcote – – – – – – – – *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF VICTORIA

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 question in this appeal is whether the appellant, who is the widow of a deceased workman, is entitled under legislation of the State of Victoria to compensation in respect of his death. It is a transitional question arising out of the amendment of the Workers' Compensation Act 1958 by the Workers' Compensation (Amendment) Act 1965. The Act of 1965 did not contain any transitional provisions giving an explicit answer to this question.

The deceased worker, Martin Thomas Egan, was on 19th June 1964 in the employment of the respondent the City of Northcote. On that day, while travelling between his place of residence and his place of employment, he suffered a coronary occlusion, to which neither the employment nor the travelling was a contributory factor. Notwithstanding the absence of any causal connection between the employment and the onset of the disease, the workman was entitled, under the Act of 1958 as it then stood, to compensation for incapacity resulting from the coronary occlusion. Also, if he had died as a result of the coronary occlusion while the Act of 1958 was in force unamended by the Act of 1965, the appellant as his widow would have been entitled to compensation in respect of his death. That was the effect of legislation introduced by an Act of 1946 and continued in the Act of 1958. *James Patrick and Co. Pty. Ltd. v. Sharpe* [1955] A.C.1.

The provisions of the Act of 1958 which had that effect were as follows:

> "*Section 3 (1)*
>
> '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.

'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".

"*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."

(It will be noted that this subsection refers to "personal injury arising out of or in the course of the employment", whereas the former Workmen's Compensation Acts of the United Kingdom and earlier legislation of the State of Victoria had referred to "personal injury *by accident* arising out of *and* in the course of the Employment." *James Patrick and Co. Pty. Ltd. v. Sharpe* (*supra*) at p. 13)

"*Section 8 (2)*

An injury to a worker shall be deemed to arise out of or in the course of the employment if the injury occurs—(*b*) while the worker (i) is travelling between his place of residence and his place of employment . . ."

"*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."

Clause 1 of the Clauses appended to Section 9

"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 a widow or any children under sixteen years 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 . . ."

Section 9 (2) and Clause 1 (*b*) of the Clauses appended to section 9 provided for payment of compensation to the worker in cases where incapacity for work resulted from or was materially contributed to by the injury.

This extension of the right to workers' compensation so widely as to include compensation for disease not causally connected with the employment appears to have been at least unusual, whether or not it has been rightly stated to have been unique, in Australian legislation, and there was no such extension in the Workmen's Compensation Acts of the United Kingdom. The extension was abolished by the Act of 1965, which came into force on 1st July 1965, and it will be convenient to refer to that date as "the amendment date". The transitional problem arises because the appellant's late husband, the deceased worker, suffered his coronary occlusion before the amendment date (when the coronary occlusion was a compensable injury although it was not contributed to by the employment) and died after the amendment date (when the coronary occlusion was not a compensable injury because it was not contributed to by the employment).

For an understanding of the background of the legislation it is helpful to set out a passage in the judgment of Jordan C.J. in *Salisbury v. Austin Iron and Steel Ltd.* (1944) SR. N.S.W. 157 (although this was a New South Wales case). He said at pp. 160–1:

> "Although the general rules are well established, it is often difficult to apply them in borderline cases, and the authorities run into fine distinctions. This is largely due to the fact that there is a fundamental antinomy between the important social service which the Act is intended to provide and the means adopted for providing it. The object of the Act is to benefit the community by preventing workers and their dependants, who constitute the great majority of the community, from suffering destitution through the breadwinners becoming incapacitated for work. The means adopted to achieve this object are to throw the whole burden of the relief upon the employers. This has made it necessary for the Legislature to restrict the benefits of the Act to workers whose incapacity can be to some extent causally connected with their employment. Since, however, when a worker is incapacitated, his needs and those of his dependants are just as imperative whether the incapacity arises from his employment or not, it is natural that there should be a constant struggle on the part of workers to obtain and retain sorely needed relief in cases in which incapacity is not, or is no longer, associated with an employment injury, and equally natural that there should be a struggle on the part of employers to dissociate incapacity from employment whenever possible. The tendency of recent authorities has been to uphold the claims of workers to the furthest limits that the language of the Acts will permit."

Having those considerations in mind, one can see that in the Acts of 1946 and 1958 the social service view of workers' compensation prevailed, so that a merely temporal connection between the onset of a disease and the employment was made to suffice as a basis of compensation; but that in 1965 there came about, so far as this subject of disease was concerned, a reversion to the other view of workers' compensation, namely that compensation payable by employers as such should be limited to matters resulting from or contributed to by the employment. A change in the basis of entitlement must involve drawing a line somewhere between those who are to be entitled in the future and those who are not to be so entitled. Those who are just on the wrong side of the line are likely to appear harshly treated in relation to those who are just on the right side of the line, and it seems impossible to avoid sharp contrasts of this kind as between cases in which some relevant event occurred on or before 30th June 1965 and cases in which it occurred on or after 1st July 1965. In the Act of 1965, perhaps as an incidental consequence of the struggle to which Jordan C.J. referred, there is no transitional provision stating expressly where the line of demarcation comes. Any suggestion of a policy or philosophy of the Act to be used as a basis for determining where the line of demarcation ought to come seems too speculative to be of assistance in construing the relevant provisions which have to be applied. It is necessary to examine the relevant provisions in order to ascertain as a matter of construction where the line of demarcation does come. A similar situation, where there was no policy guidance to aid construction, was eloquently described by Lord Macnaghten in *United Collieries v. Simpson* [1909] A.C. 383 at p.391.

What then are the relevant provisions of the Act of 1965? It should be mentioned that there was substituted for the former definition of "dependants" a new definition based principally on actual financial dependency rather than relationship, and there was a new definition of

"worker", extending the upper limit of earnings from £2,000 to £3,000 per annum, and there were increases in the amounts of compensation for the workers and their dependants. For the present purpose the vital amendment was the substitution, for the former definition of "injury", of the following definition

> "'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 sub-section (2) of section eight of this Act."

For the present purpose the crucial feature of this new definition is the insertion of the words "and to which the employment was a contributing factor" and the words "where the employment was a contributing factor to such recurrence aggravation or acceleration".

Section 5 (1) and section 9 (1) remained textually unchanged, but they were changed in content, because, when they are read as parts of the amended Act, the "injury" to which they refer must be an injury as defined in the new definition and the "provisions" to which they refer must be provisions of the amended Act.

The decision in the present case must depend, largely at any rate, on the proper interpretation and application of the decision of the Judicial Committee, affirming the majority decision of the High Court of Australia, in the *Ogden case* (*Ogden Industries Pty. Ltd. v. Lucas* [1970] A.C. 113). In that case the disease-injury happened in the course of the employment and was contributed to by the employment and therefore complied with the statutory definition of "injury" both as it was before and as it was after the amendment date. But as the death had occurred after the amendment date there was a question whether compensation in respect of the death should be £2,400 as provided before the amendment date or £4,800 as provided after the amendment date.

This was a difficult and highly debatable question, as the difference of opinion in the High Court of Australia shows. If the compensation in respect of the death was to be measured according to the provisions in force at the date of the injury it was £2,400. If it was to be measured according to the provisions in force at the date of the death it was £4,800. Which were the applicable provisions? It was contended on behalf of the employers that their liability was incurred at the date of the injury, and by virtue of section 7 (2) of the Acts Interpretation Act 1958 that liability remained unaffected by the amendment introduced by the Act of 1965 and so was to be measured by the provisions of the unamended Act of 1958.

Section 7 (2) of the Acts Interpretation Act 1958, so far as it may be material, provides that

> "Where any Act passed on or after the first day of August One thousand eight hundred and ninety, whether before or after the commencement of this Act, repeals or amends any other enactment,

then unless the contrary intention appears the repeal or amendment shall not—

. . .

(*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; or

(*c*) affect any right privilege obligation or liability acquired accrued or incurred under any enactment so repealed or amended;

. . ."

In the *Ogden case* paragraph (*b*) of section 7 (2) was set out in some of the judgments of the High Court of Australia and by Lord Upjohn in giving the judgment of the Judicial Committee at pp. 124–5 and was evidently not overlooked, but seems to have been regarded for the purposes of that case as immaterial or as adding nothing of importance to paragraph (*c*). Their Lordships would concur in that view in relation to the present case.

Under paragraph (*c*), however, the employers had a plausible contention. Under that paragraph a repealing or amending Act, unless the contrary intention appears, does not "affect any right privilege obligation or liability acquired accrued or incurred under any enactment so repealed or amended". Section 5 (1) of the Workers' Compensation Act, amended or unamended, uses the word "liable": it provides that "if . . . personal injury . . . is caused to a worker his employer shall . . . be liable to pay compensation in accordance with the provisions of the Act". In the case of compensation payable to the workman himself, the Judicial Committee assumed without deciding, that "when the injury happens the worker has a vested interest in the compensation payable to him during incapacity under section 9 (2), although such incapacity may not appear until later". (*Ogden's case* p. 125.) But it was also said that "the rights to compensation of the dependants of the injured workman who has died are independent of his rights" (*ibid*). It was found impossible to say that at the time of the injury to the worker there was an accrued or incurred liability of the employers towards those persons who would be, perhaps at some distant future date, the dependants of the worker on his death. Such persons would be unknown, and might not even be in existence, at the time of the injury. Moreover it was considered that the liability of the employers must be correlative with some right on the other side. Obviously a right could not be held by undetermined and perhaps non-existent persons. *Ogden's case* in 116 C.L.R. at pp. 571 and 572 per Taylor J. and at p. 600 per Owen J. and in 1970 A.C. at p. 126 per Lord Upjohn.

In the same case at p. 127 Lord Upjohn said "In the view that their Lordships take there is for the purposes of the Interpretation Act no right in the dependants and no correlative liability upon the worker's employers until the moment of death. 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 the 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 judgment with which their Lordships agree." Similarly Owen J. had said (116 C.L.R. at p. 597) "Notwithstanding a number of

authorities to which we were referred, I am of opinion that it is when the death of the worker occurs that liability is incurred by the employer to compensate those, if there be any, who are then found to be his dependants, and the right to compensation vests, and that it is the law in force at the time of the death that is to be applied in measuring the extent of that liability and of the corresponding rights". Long before, in the early days of Workmen's Compensation, Lord Loreburn had said in *United Collieries Ltd. v. Simpson* [1909] A.C. 383 at p. 389 "Now where the Act says that the employer is liable to make compensation in the event of death in case there are dependants . . . and they are described as the persons for whose benefit it is to be paid, that certainly looks like a debt arising on the death from employer to dependants. When I turn to the other provisions of the schedule, I think they fit this view . . . If there is this right, when does it arise or become vested? The statute evidently treats it as arising because of the workman's death. It seems to follow that it arises on the workman's death, unless some other event is fixed." The passage in Lord Macnaghten's speech at p. 394 seems to be consistent with Lord Loreburn's view. At p. 395 Lord James of Hereford concurred in the judgments of Lord Loreburn and Lord Macnaghten and in the reasons on which they were founded. Lord Shaw of Dunfermline said at p. 397 "upon the one hand the statute creates a liability and upon the other a right, and these two things are correlative to each other". At p. 398 he said "I agree with Lord Mackenzie that 'it seems likely that it was intended the right to compensation should vest from the time of death so as to form a fund of credit'". There were important dicta to the contrary in other cases, but they were fully considered and explained in the *Ogden case*.

The decision and reasoning in the *Ogden case* must be taken as authoritative and binding. Obviously they constitute at least a formidable obstacle in the path of the appellant.

The Workers' Compensation Board, however, decided in favour of the appellant, adopting their Reasons for Decision given in an earlier case. The basis of their decision appears in the following passage:

> "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?" . . . 'That Act' (i.e. the Act of 1958 unamended) 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 or liability. It is simply something which was an injury by reason of the operation of the enactment then in force, and the amendment of 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."

Counsel for the appellant also relied upon a passage in the judgment of Windeyer J. in the *Ogden case* (116 C.L.R. at p. 585) when he said:

> "Lord Tenterden C.J. in *Surtees v. Ellison* (1829) 9 B. & C. 750, 752 said 'It has long been established that when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed'. 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. An alteration of the definition of 'injury' would not alter this (in the absence of an express provision that it should do so). But when the Act of 1965 came into operation it provided a new measure of the actual pecuniary liability of the employer which would arise when a worker died leaving dependants. Whether the present respondent can have the benefit of the new measure depends upon ascertaining, by permissible means, the intention of the Parliament of Victoria. It is to be decided, I think, by bearing in mind that the amendment was enacted to take its place in an existing and continuing system of workers' compensation law, and to be construed in the light of s. 5 (3) of the Acts Interpretation Act."

The scheme suggested is attractive, but can it be extracted from, or even reconciled with, the statutory provisions which have to be construed and applied? Is it possible to derive from the relevant enactments a provision to the effect that an injury which was a compensable injury under the law in force when it happened remains a compensable injury under the later statute substituting a different definition by which the injury would not be compensable? The theory requires that there be inserted by mere implication in the new Act (the amending Act) some provision to the effect that notwithstanding the express definition of injury it is to be understood that any injury which was compensable by the law in force at the time when it happened shall be deemed to be a compensable injury for the purposes of this Act. In their Lordships' opinion that is too difficult to be acceptable. The difficulty was concisely pointed out in a somewhat different way in the judgment of the Supreme Court of Victoria when they said "For the applicant to succeed it would be necessary to read into the provisions in 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 Sections 5 and 9, and we are not aware of any principle of statutory construction which would enable that to be done".

In the end there is a comparatively simple point of construction. It follows from the decision and reasoning in the *Ogden case* that the appellant acquired no vested right before the time of her husband's death, and her claim to have acquired a right at that time must be tested by the law in force at that time. Then she must claim it under the provisions of section 5 (1) and section 9 (1) of the amended Act, and those provisions when they refer to an injury must be read as referring to an injury as defined in the amending Act. The definition of injury rules out her claim, because the coronary thrombosis relied on as the injury was not contributed to by the employment.

It does not help the appellant's case to call attention to the tense in the words "personal injury is caused" in section 5 (1) and suggest that this is dealing only with future injuries. This is the provision under

which she must claim in respect of the past injury. Moreover it was applied in the *Ogden case* in respect of a past injury.

In their Lordships' opinion the decision of the Supreme Court of Victoria against the appellant's claim was correct.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

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