

IN THE PRIVY COUNCIL

ON APPEAL from the Supreme Court  
of New South Wales in Term No. 643  
of 1971

IN THE MATTER of the Workers'  
Compensation Act, 1926 (as amended)

AND IN THE MATTER of a Case Stated at  
the request of the Appellant (Respondent)  
by His Honour Judge Wall a Member of  
The Workers' Compensation Commission of  
New South Wales in pursuance of Section  
37(4)(b) of the said Act referred for  
the decision of the Court of Appeal  
certain questions of law which arose  
in proceedings before the Commission

AND IN THE MATTER of a Determination

BETWEEN:

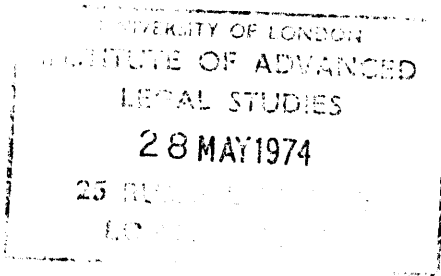
KATHLEEN MARY CLUFF

Respondent (Applicant)

- and -

FINEMORE'S TRANSPORT PTY. LIMITED

Appellant (Respondent)



CASE FOR THE APPELLANT

Respondent's Solicitors:

KINSEY CALLAN & HERALD,  
25 Bourke Street,  
COOTAMUNDRA, N.S.W.  
AUSTRALIA

Appellant's Solicitor:

CHARLES A. VANDERVORD,  
36 York Street,  
SYDNEY, N.S.W.  
AUSTRALIA

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- and -

FINEMORE'S TRANSPORT PTY. LIMITED

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CASE FOR THE APPELLANT

Respondent's Solicitors:

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AUSTRALIA

Appellant's Solicitor:

CHARLES A. VANDERVORD,  
36 York Street,  
SYDNEY, N.S.W.  
AUSTRALIA

ON APPEAL from the Supreme Court of  
New South Wales Court of Appeal

In Term No. 2867 of 1970.

BETWEEN:

FINEMORE'S TRANSPORT PTY. LIMITED

Appellant

- and -

KATHLEEN MARY CLUFF

Respondent 10

CASE FOR THE APPELLANT

RECORD:

1. This is an Appeal by leave of the Court of Appeal of the Supreme Court of New South Wales granted on the 29th June, 1972 pursuant to ORDER IN COUNCIL of 1909 from a decision of that Court given on the 9th May, 1972 pursuant to which the question asked in the Stated Case by His Honour Judge Wall was answered in the negative.

2. The questions raised by this Appeal relate: 20

- (i) To the construction of the Workers' Compensation Act, 1926 (as amended) in its application to compensation, if any, payable to dependants of a member of the Police Force of New South Wales.
- (ii) To the rights, if any, under the Workers' Compensation Act, 1926 (as

amended) of dependants of a member of the Police Force of New South Wales when that member was, for reward, carrying out activities which were not part of his duties as a member of the Police Force.

FACTS:

3. On 27th February, 1970 Kenneth Leonard Cluff (hereinafter referred to as "the Deceased") received injuries which resulted in his death on 25th March, 1970. 10

4. At the time of receiving his injuries and at the date of his death Kathleen Mary Cluff (hereinafter referred to as "the Respondent") and her four children were totally dependent for support upon the Deceased.

5. On the 27th February, 1970 the Deceased was performing labouring duties on behalf of Finemore's Transport Pty. Limited (hereinafter referred to as "the Appellant") and received remuneration at the rate of one dollar and fifty cents (\$1-50) per hour. 20

6. The Deceased became a member of the Police Force of New South Wales in 1963 and thereafter and until the Deceased's death on 25th March, 1970 he remained a member of the Police Force.

7. The Respondent commenced proceedings in the Workers' Compensation Commission of New South Wales claiming the Deceased was a "worker" within the meaning of the Workers' Compensation Act, 1926 (as amended). 30

8. The Application for Determination came on for hearing before His Honour Judge Wall on 10th November, 1970 and 16th December, 1970. On 2nd July, 1971 His Honour made an Award in favour of the Respondent.

9. After referring to the definition section of "worker" in the Workers' Compensation Act and to the Police Regulation Act, 1899 (as amended) His Honour Judge Wall sought to apply Section 40 of the Workers' Compensation Act, 1926 (as amended) so as to treat the Deceased as being under a valid contract of service with the Appellant. Section 40 of the Act provides:-

"If on any proceedings for the recovery under this Act of compensation for an injury, it appears to the Commission that the contract of service or apprenticeship under which the injured person was engaged at the time when the injury happened was illegal, the Commission may, if, having regard to all the circumstances of the case, the Commission thinks it proper so to do, deal with the matter as if the injured person had at the time aforesaid been a worker under a valid contract of service or apprenticeship."

10. After making an Award in favour of the Respondent His Honour Judge Wall when requested to state a case for the opinion of the Court of Appeal refused to make a finding that the Deceased was a "worker" within the meaning of Section 6 of the Act. The question stated in the Case was as follows:-

"Whether the Commission erred in law in exercising the power conferred upon it by Section 40 of the Workers' Compensation Act, 1926 (as amended) to deal with the matter as if the Deceased injured person had at the time when the injury happened been a worker under a valid contract of service."

11. The Court of Appeal answered the question in the negative.

ARGUMENT:

12. Section 6 of the Workers' Compensation Act, 1926 (as amended) defines a "worker" as follows:-

"Worker means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is express or implied, is oral or in writing, but does not include:-

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- (a) .....
  - (b) .....
  - (c) a member of the Police Force; or
  - (d) a person whose employment is casual (that is, for one period only of not more than five working days) and who is employed otherwise than for the purpose of the employers' trade or business; or
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- (e) an officer of a Friendly Society whose remuneration from such Friendly Society does not exceed \$700-00 per year; or
  - (f) an officer of a religious or other voluntary association who is employed upon duties for the association outside his ordinary working hour so far as the employment upon such duties is concerned, provided his remuneration from the association does not exceed \$700-00 per year; or
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- (g) a member of the Police reserve appointed under Part 2A of the Police Regulation Act, 1899-1939 employed upon duties as such member, so far as the employment upon such duties is concerned."

13. In the Court of Appeal the Appellant argued that Section 40 of the Workers' Compensation Act, 1926 (as amended) could not operate so as to permit the

Commission to treat as a "worker" a person who was excluded by reason of the definition section contained in the Act. The Respondent did not seek to argue the contrary but maintained that, in all the circumstances, the Deceased was a "worker" within the meaning of the definition section.

14. In the Court of Appeal Jacobs J.A. (with whom Taylor A.J.A. and Hardie A.J.A. concurred) doubted whether the Court should answer the question in the form stated by His Honour Judge Wall. His Honour was of the opinion that a prior question needed to be determined namely:-

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"Whether the Deceased was in any sense a worker within the definition of that word in Section 6(1)".

His Honour held that if the exclusion of a "member of the Police Force" was absolute no question of illegality could arise and Section 40 was wholly inapplicable. With this part of His Honour's reasons the Appellant respectfully agrees.

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15. It is the contention of the Appellant that, as a matter of construction, a person who is a "member of the Police Force" at the relevant time is precluded, by reason of his status, from being "a worker" within the meaning of the definition section of the Workers' Compensation Act.

16. The Judgment of the Court of Appeal means, in effect that the words "a member of the Police Force" mean "a member of the Police Force employed upon duties as such member, so far as the employment

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upon such duties is concerned". It is submitted there is no warrant for placing such a limitation on the words used by the legislature.

17. It is not appropriate, it is respectfully submitted, to argue by analogy that, because a person is an Officer of a Friendly Society and that person could be a "worker" if he had, during different working hours, entered into a master and servant relationship, a person who is a "member of the Police Force" can be a "worker" if, during the period of his membership of the Police Force he enters into an alleged master and servant relationship. 10

18. If Section 6(1)(c) is to be construed by reference to the other subsections the appropriate subsection is Section 6(1)(g) which provides that a person is excluded from the definition of "worker" if that person is "a member of the Police Reserve appointed under part 2A of the Police Regulation Act, 1899-1939 employed upon duties as such member, so far as the employment upon such duties is concerned". 20  
If the legislature wished to qualify sub-clause (c) it could have done so by adding words similar to those contained in sub-clause (g).

19. It is clear from the authorities, as His Honour Judge Wall held in the Commission, that a member of the Police Force has a special status and that his relationship with the Police authority or the Crown is not that of master and servant (see Enerver -v- The King, 3 C.L.R. 969; Attorney General for New South Wales -v- Perpetual Trustee Co. Limited, 30



92 C.L.R. 113). Accordingly, it is respectfully submitted, His Honour Mr. Justice Jacobs was in error in holding that the Deceased was outside the scope of the definition of "worker" but was only outside the definition in respect of his "contract of Service as a member of the Police Force".

20. Because the relationship between a member of the Police Force and the Police Authority or the Crown is not that of master and servant it would have been unnecessary to exclude from the definition of "worker" a "member of the Police Force" if the only intended subject matter for exclusion was a claim for compensation by a member of the Police Force in his work or duty relationship with the Crown or Police Authority. The purpose of the exclusionary words "a member of the Police Force" is to ensure that by reason of his status a person "who is a member of the Police Force" and while such membership continues is not to be regarded as "a worker" within the meaning of the Workers' Compensation Act. 10 20

21. The powers of a member of the Police Force and the duties of such members are regulated by the Police Regulations Act, 1899 (as amended) and the common law. A police officer is required to take an oath when appointed and is thereafter bound to serve Her Majesty from the day upon which such oath is taken until he is legally discharged. He is not at liberty to resign his office or withdraw from duty unless expressly authorized in writing so to do. The powers vested in a police officer are exercisable 30

by him so long as his appointment continues. He is forbidden from becoming a "hired servant" and is required to devote the whole of his time and energy to the police service and is forbidden from carrying on any trade or business or under any circumstances accept other remunerative employment from any source (Police Rule 4(1)(a)). Further, a police officer has special powers concerning arrests and right of search and seizure. Notwithstanding "rostered" hours of duty his relationship with the Crown or Police Authority continues from the date of his appointment until he is legally discharged. At the time of his death the Deceased was still a member of the Police Force. 10

..... J.S. Cripps .....  
..... J.S. CRIPPS, .....  
Counsel for the Appellant.