

IN THE PRIVY COUNCIL

Judgment
22
1973

NO OF 1972

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)

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
28 MAY 1974
25 RUSSELL SQUARE
LONDON W.C.1

PETITION

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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No. 1 - APPLICATION FOR DETERMINATION

IN THE WORKERS' COMPENSATION COMMISSION)
OF NEW SOUTH WALES

No. of Matter
2867 of 1970.

In the Matter of the Worker's Compensation
Act, 1926, as amended

In the matter of a Determination between

KATHLEEN MARY CLUFF

Applicant

- and -

FINEMORE'S TRANSPORT PTY. LIMITED

Respondent

10

An application under the above-mentioned Act is hereby made by the applicant against the respondent for the determination of the liability and amount of compensation payable by the respondent.

Particulars are hereto appended.

1. Name, age, and late address of deceased worker.	KENNETH LEONARD CLUFF 27 years 54 Crampton Street, Wagga Wagga.	20
2. Name, place of business, and nature of business of respondent from whom compensation is claimed.	FINEMORE'S TRANSPORT PTY. LTD. 217 Urana Street, Wagga Wagga. Haulage Contractors.	
2. (a) Name and Address of Employer's Insurer	EMPLOYERS MUTUAL INDEMNITY ASSOCIATION LTD 26 O'Connell Street, Sydney.	30
3. Nature of employment of deceased at time of injury, and whether employed under respondent or under a contractor with him.	Labourer employed by respondent.	

4. Date and place of injury, nature of work on which deceased was then engaged, and cause of injury.	27th February, 1970 at 217 Urana Street, Wagga Wagga. Employed on cleaning motor vehicle parts with petrol when explosion and fire occurred severely burning deceased.	
5. Nature of injury to deceased, and date of death.	Burns to upper and lower limbs causing eventual septicaemia and multiple lung abscesses resulting in death on 25th March, 1970.	10
6. Earnings of deceased during the four years next preceding the injury, if he had been so long in the employment of the employer by whom he was immediately employed, or if the period of his employment had been less than the said four years, particulars of his average weekly earnings during the period of his actual employment under the said employer.	Casually employed. Average earnings not known to Applicant.	20
7. Amount of weekly payments (if any) made to deceased under the Act, and of any lump sum paid in redemption thereof or any lump sum paid as compensation under the Act.	Nil.	30
8. Name and address of applicant.	KATHLEEN MARY CLUFF 54 Crampton Street, Wagga Wagga.	
9. Character in which applicant applies - i.e., whether as legal personal representative of deceased, or as a dependant, and if as a dependant, particulars showing how he is so.	Dependant widow.	40

<p>10. Particulars as to dependants of deceased by whom or on whose behalf the application is made, giving their names and addresses and descriptions and occupations (if any) and their relationship to the deceased, and if infants, their respective ages, and stating whether they were wholly or partially dependent on the earnings of the deceased at the time of his death.</p>	<p>Applicant Charmaine Maree Cluff born 14.3.66 Patrice Suzanne Cluff born 15.6.67 Daniel James Cluff born 27.8.68 Simon Michael Cluff born 2.10.69 All wholly dependant.</p>	<p>10</p>
<p>11. Particulars as to any persons claiming or who may be entitled to claim to be dependants, but as to whose claim a question arises, and who are therefore made respondents, with their names, addresses, and descriptions and occupations (if any).</p>	<p>Nil.</p>	<p>20</p>
<p>12. Particulars of amount claimed as compensation, and of the manner in which the applicant claims to have such amount apportioned and applied.</p>	<p>\$10,000.00 plus \$5.00 per week for each child.</p>	<p>30</p>
<p>13. Date of service of statutory notice of -</p> <p>(a) Injury on respondent from whom compensation is claimed, and whether given before deceased voluntarily left the employment in which he was injured.</p> <p>(b) Date when claim for compensation made.</p>		<p>40</p>
<p>14. If notice not served, reason for omission to serve the same.</p>		

<p>(Where death due to a disease contracted by a gradual process.)</p> <p>15. Names and addresses of all other employers by whom deceased was employed during the twelve months previous to the date of incapacity or death, in any employment to the nature of which the disease was due.</p>	
--	--

10

The name and address of the applicant's solicitor (or agent) are: KINSEY CALLAN & HERALD,
Solicitors,
25 Bourke Street,
Cootamundra, N.S.W.

DATED this day of , 1970.

E.J. CALLAN
Solicitor for Applicant

20

IN THE WORKERS' COMPENSATION COMMISSION } No. 2867
OF NEW SOUTH WALES } of 1970

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

AND IN THE MATTER of a Determination

BETWEEN:

KATHLEEN MARY CLUFF

Applicant 10

- and -

FINEMORE'S TRANSPORT PTY. LIMITED

Respondent

TAKE NOTICE that the Respondent states:

THAT the Applicant's particulars filed in this
matter are inaccurate or incomplete in the par-
ticulars annexed hereto THAT the Respondent denies
its liability to pay compensation under the Act in
respect of the alleged injury to the Applicant
mentioned in the Applicant's particulars on the 20
grounds stated in the particulars annexed hereto.

PARTICULARS

1. Particulars in which the particulars filed
by the Applicant are inaccurate or incomplete:

As to the facts alleged in paragraphs 3,
4, 6, 9, 10 and 12.

2. The grounds upon which the Respondent denies
its liability to pay compensation:

- (a) The Deceased was not a worker within the meaning of the Act.
- (b) The Applicant was not dependant upon any moneys received by the Deceased from the Respondent.
- (c) That deceased workers death did not result from injury.

AND FURTHER TAKE NOTICE that the names and addresses of the Respondent and its Solicitor are:

OF THE RESPONDENT: FINEMORES TRANSPORT 10
 PTY. LIMITED
 217 Urana Street,
 WAGGA WAGGA. N.S.W.

AND OF ITS SOLICITOR: CHARLES A. VANDERVORD,
 26 O'Connell Street,
 SYDNEY. N.S.W. 2000.

DATED this 8th day of June, 1970.

CHARLES A. VANDERVORD
SOLICITOR FOR THE RESPONDENT

TO: The Registrar of the Commission, 20

AND TO: The Applicant and her Solicitors,
 Messrs. Kinsey Callan & Herald,
 25 Bourke Street, Cootamundra. N.S.W.

THE WORKERS COMPENSATION COMMISSION
OF NEW SOUTH WALES

BEFORE HIS HONOUR JUDGE WALL

AT WAGGA WAGGA:

Tuesday, 10th November, 1970

No. 2867 of 1970

IN THE MATTER OF A DETERMINATION BETWEEN KATHLEEN
MARY CLUFF and FINEMORE'S TRANSPORT PTY. LIMITED

MR. HARRINGTON appeared for the applicant.
MR. LANGSWORTH, Q.C. and MR. CRIPPS
appeared for the respondent.

10

(Par. 2 of Particulars amended to add that
the deceased worker did not receive injury
arising out of and in the course of his
employment.)

APPLICANT

Sworn examined deposed:

TO MR. HARRINGTON: My name is Kathleen Mary Cluff
and I reside at No. 54 Crampton Street, Wagga Wagga.
I am the widow of the late Kenneth Leonard Cluff.

Q. When were you married to your husband? A. On 20
the 24th September, 1965.

Q. You have four children of the marriage, Charmaine
Maree born on 14th March, 1966, Patrice Suzanne
born on 15th June, 1967, Daniel James born on 27th
August, 1968 and Simon Michael born on the 3rd
October, 1969? A. Yes.

Q. You were totally dependent for support on the
earnings of your husband at the time of his death
on 25th March, 1970, as also were the four infant
children? A. Yes. 30

Q. I think your husband was a police constable
stationed at Wagga? A. Yes.

Q. I think he averaged about \$104 per fortnight in
take home pay but there were a lot of deductions
from his salary? A. Yes.

Q. For superannuation, hospital benefits and that sort of thing? A. That was a clear sum.

Q. I think he was also a footballer of some note. He had played first grade Rugby League in Sydney and was a footballer in the local Magpie Club?
A. Yes.

Q. He had played about 12 games in a season and got about \$40 for each game? A. Yes.

Q. Did he do some casual employment on his days off? 10
A. Yes.

Q. Did you see him working for any one? A. Yes.

Q. For whom did you see him working? A. For Finemore's.

Q. Did you take him to work on occasions? A. Yes.

Q. Finemore's Transport Pty. Ltd.? A. Yes.

Q. I think you know one of the directors, Ronald Finemore? A. Yes.

Q. Did you actually see him working in and around the depot at 217 Uranna Street? A. They are down in Traill Street. 20

Q. The depot is at Traill Street? A. Not Traill Street - Travers Street.

Q. In any event is the main Finemore's depot where they have a workshop? A. Yes.

Q. And they have interstate semi-trailers? A. Yes.

Q. Did your husband on occasions drive, or go as an offsider on the semi-trailers employed by Finemore's? A. Yes, he did drive.

Q. And I think it is necessary to keep a log book as a transport driver? A. Yes. 30

Q. Shortly before the 27th February, 1970 he had taken his annual holidays over four weeks? A. Yes.

Q. And did he work for three of those weeks at Finemore's depot? A. Yes.

Q. And that would be in work repairing semi-trailers and motor cars? A. And cleaning them.

Q. And he would be dressed in overalls and he would get very greasy? A. Yes.

Q. I think you picked him up at that place on occasions? A. Yes.

Q. And, you had seen him working there? A. Yes.

Q. I think you were informed by Mr. Ron Finemore about 11 o'clock on the 27th February that your husband had been involved in an accident?

A. Mr. Stan Finemore told me.

Q. I think you visited your husband at the hospital during the next month or so, did you? A. Yes.

Q. And he had several operations and he was under the care of Dr. Dalton and he died on the 25th of March, 1970? A. Yes. 10

CROSS-EXAMINATION:

MR. CRIPPS: Q. I think you said your husband had had four weeks leave? A. Yes.

Q. And he had finished his four weeks leave and had gone back to his job as a policeman? A. Yes.

Q. And then on an off day or some off days in February he went to work for Finemore's. Is that your understanding? A. Yes. 20

Q. Your husband had been a member of the Police Force since about 1963. Would that be correct? A. Yes.

Q. And he was a member of the Police Force at the time he died in March 1970? A. Yes.

Q. And I think you had received, just before he died, and after he died, his pay as a policeman, the pay that was owing to him? A. Yes.

(Witness retired.)

RONALD STANLEY FINEMORE 30

Sworn examined deposed:

TO MR. HARRINGTON: My name is Ronald Stanley Finemore and I reside at 177 Bourke Street, Wagga Wagga.

Q. I think you knew the late Constable Cluff? A. Yes.

Q. Under what circumstances did you know him? A. As a friend, and he worked for us.

Kathleen Mary Cluff,
Examination,
Cross-examination.

9. Ronald Stanley Finemore,
Examination.

Q. How often did he work for you? A. An average over 12 months of a couple of days a week.

Q. What would you pay him? A. It would depend on the hours that he worked.

Q. What was the rate you paid him? A. \$1.50 per hour.

Q. What sort of work did he do? A. He did whatever I wanted done.

Q. Work in and around the transport depot? A. Yes.

Q. I think you are one of the sons of the virtual owners of Finemore's Transport? A. Yes, I am a director. 10

Q. Who are the directors of it? A. My father and mother and my brother Doug Finemore.

Q. When you say that you gave him work, you mean it was Finemore's Transport Pty. Limited? A. Yes, or me personally more so.

Q. Is that (indicating) a copy of the group certificate which was issued in respect of work on the 27th February? A. It would be, yes. It is my signature. 20

(Abovementioned document tendered and marked Exhibit "A".)

Q. Where is the depot situated? A. In Travers Street, Wagga.

Q. And I think it is a reasonably big area, with a workshop attached on the block of land? A. Yes.

Q. And off the workshop is a cleaning bay for cleaning parts of motor cars and motor vehicles? A. Yes. 30

Q. Were you present on the 27th February 1970? A. I was there at the time, yes.

Q. What time did Constable Cluff start work that day? A. From memory 7.30 or 8 o'clock.

Q. What drew your attention to the fact that something had happened? A. Well, I was in my office, on the phone and someone yelled out "Get a fire extinguisher".

Q. Did you go out? A. Yes I dropped the phone and went out and then I raced back and called an ambulance and a doctor. 40

Q. Do you know what Constable Cluff was doing on that occasion? A. He was cleaning parts.

Q. That is in the little bay off the main workshop?
A. Yes.

Q. And I think the method was to use a painter's spray gun to blow petrol on to the engine parts being cleaned? A. He wasn't using it.

Q. One of the men had been using it? A. Yes, previously.

Q. And he was washing it in a cut down drum? 10
A. Yes.

Q. Petrol was being used? A. I couldn't say for sure.

Q. When you reached the shed the fire was still burning in the washing part of the main workshop?
A. Yes.

Q. I think Mr. Cole got Mr. Cluff out, and he was admitted to hospital? A. Yes,

Q. Did you see that he was burnt? A. Yes.

Q. And there were no signs of burns when you first saw him in the morning? A. No. 20

CROSS-EXAMINATION:

MR. CRIPPS: Q. I think you knew that the late Mr. Cluff was a member of the Police Force?
A. Yes.

Q. And you had known that for some time? A. Yes.

Q. Evidence has been given about him working intermittently for the company of which you and your father are directors? A. Yes.

Q. He worked the day before the day he received his burns? A. Yes. 30

Q. The day before that? A. Yes, he went away in a truck the day before.

Q. When was the time before that that he worked for you? A. Approximately a fortnight, or it might have been less. He had worked for a three weeks period straight whilst on holidays.

Q. Did you keep any records relating to the work that he did for you? A. Not really, no.

MR. HARRINGTON: Q. I think he did go on some transport trips also? A. Yes he did at times.

Q. And they were on transports owned by Finemore's Transport Pty. Limited? A. Yes.

(Witness retired.)

ARTHUR JOHN COLE
Sworn examined deposed:

TO MR. HARRINGTON: My name is Arthur John Cole and I reside at Mangoplah.

Q. You were employed as a welder-boilermaker by Finemore's Transport Pty. Ltd. in February 1970? And you are still employed there. Is that so? A. Yes. 10

Q. You knew the late Constable Cluff did you? A. Yes.

Q. Had you seen him working in and around the depot on occasions? A. Yes.

Q. And he would be covered in grease like most motor mechanics would be as he was carrying out his duties, would he? A. Yes. 20

Q. And I think he was carrying out cleaning duties in the washing bay off the main workshop? A. Yes.

Q. Did you walk into the washing bay area? A. Not into the washing bay itself, but I was outside.

Q. Outside the door? A. Yes.

Q. What did you do? A. They were talking for a while and I said, "hello" and I had a bit of talk and I lit up a cigarette and up she went.

Q. A violent explosion occurred and you were hurled backwards but you still endeavoured to go in and get Mr. Cluff and on the second attempt you were able to pull him out of the fire? A. Yes. 30

Q. And I think the ambulance was called and he was taken to hospital? A. Yes.

MR. CRIPPS: I have no questions Your Honour.

(Witness retired.)

(The following medical report of Dr. John R. Dalton dated 15th of May, 1970 tendered and marked Exhibit "B":-

Ronald Stanley Finemore,
Cross-examination.

12. Arthur John Cole,
Examination.

"Mr. Cluff was working for his employer on Friday 27th February, 1970, viz; Finemore's Limited, Wagga, and was cleaning some engine parts when suddenly the fluid ignited and he was burned. He was rushed to the Wagga Base Hospital and I saw him on admission.

On examination he had burns to the feet, the legs, the thighs, arms, hands and face. I ordered intravenous therapy and analgesics and when he had recovered from the shock he was taken to theatre and under a general anaesthetic by Dr. G. Flynn I removed obvious dead skin, cleaned the burns off his feet, legs and thighs, bandaged the toes separately, bandaged the legs separately and then inspected and cleaned the burns of both hands and arms. I bandaged all the fingers separately, the arms and then cleaned the burns of his face. 10

He was returned to the ward and had further intravenous therapy and chemo-therapy. He was admitted to a special room for burns observation and was seen in consultation two or three times each day by myself and by Drs. Flynn and Thompson, the anaesthetists. 20

On Tuesday 4/3/70 he was given another general anaesthetic and his burns were inspected again. The right hand appears to have been damaged as far as these burns are concerned, the medial side of the right forearm and upper arm may well need grafting. The dorsal aspect of the left hand is blistered but I have left this dressed for another week and again the medical aspect of this forearm and upper arm will probably need grafts. I then inspected his legs and feet and I have removed dead burnt skin from the calves, from the knees to the ankles. I have removed dead skin from the dorsal aspect of his feet to clean the toes. He also has some dead skin to remove from his thighs and buttocks but I considered at that stage that he had had enough surgical trauma under anaesthetic and I bandaged the legs again. 30 40

On the 6th March we shall start daily dressings and saline baths and take him to the theatre again on Tuesday next.

This man has sustained about 50 per cent to 60 per cent burns and will need prolonged medical treatment and a number of operations before he is fit enough to leave hospital.

For at least the first fortnight to three weeks he will also need to be seen in consultation frequently with the anaesthetist. 50

I will send you further reports about him as time goes on."

"15th May 1970.

Further medical report re: late Kenneth Cluff.

Further to my letter of the 5th March 1970 he had an operation to remove dead skin on the 10th March, 1970 from the thigh, calves and arms, then on the 17th of March, 1970 I performed a further operation to remove dead skin and then apply split skin to his forearms and to clean the previous areas of split skin graft to both lower legs. On the 24th March, 1970 under a further general anaesthetic he was turned on to his face and split skin was removed from his buttocks, back, shoulders and upper arms and applied to cover the whole of the posterior aspect of the calves and part of the lower thighs. He recovered quite satisfactorily from the anaesthetic and during the evening was quite well but then quite suddenly at 2.15 in the morning his heart stopped beating and all attempts at cardiac resuscitation failed.

Unhappily, people with 60 to 70 per cent burns are always in a precarious situation until the burn areas are cleaned and covered with skin. Mr. Cluff had reached the stage where we were beginning to cover the large areas with skin but unhappily his heart stopped beating and he died. This is a fairly common story with burns of this degree and in spite of all attempts on the part of medical researchers we are still as a profession in the dark as to why people do this at this particular stage and so suddenly".)

JOHN RUSSELL DALTON
Sworn examined deposed:

TO MR. HARRINGTON: My name is John Russell Dalton and I am a legally medical practitioner, carrying on practice at Maurice Street, Wagga.

Q. The late Constable Cluff came under your care on the 27th February, 1970? A. Yes.

Q. What did you find on examination? A. On examination he had burns to his feet, legs, thighs, buttocks, both hands, arms, and his face.

Q. Were they consistent with burns having been occasioned by a petrol explosion? A. Yes.

Q. His Honour has read your reports of the 15th May, 1970 and in your second report you said how burn cases quite often die is a mystery to the medical profession? A. Yes.

Medical Report
of Dr. Dalton.

John Russell Dalton,
Examination.

Q. Was the death in this case due to the burns in your opinion? A. Yes.

Q. I think you are familiar with the post mortem findings? A. Yes.

Q. Did they add anything to your opinion? A. No, I think they confirmed that he died of burns.

Q. Apart from the burns the post mortem findings showed cysts in the lungs and some septicaemia?
A. No, the post mortem findings showed that he had a suppurative broncho-pneumonia.

10

Q. Is that a complication of the toxic effects?
A. Yes. As well as the skin being burnt, which is obvious, as a person is breathing they suck in fumes and smoke and hot air from the burning flames and they get inflammatory changes through the bronchial tree and so they do get inflammatory processes in this. I would say there is no clinical evidence to say that he had septicaemia, and again on pathological report his kidneys were quite normal, which is what you would not expect in septicaemia.

20

CROSS-EXAMINATION:

MR. CRIPPS: Q. Is it your opinion that he had no septicaemia? A. Yes.

Q. None at all? A. No.

Q. So you disagree with the statement that he had a septicaemic condition prior to his death? A. Yes I would disagree with that statement.

Q. He was operated on I think the day before he died?
A. Yes.

Q. What was the purpose of that operation? A. To clean off more areas of slough and also to cover the clean granulating areas with skin. These people are always in danger of dying from toxemia all the while. They have areas of their body exposed without skin on it and the purpose of operating on these people is to get off the dead skin and replace this by new skin that is viable. Once the skin is covered - once all the areas are covered the danger of a patient dying of toxemia is virtually gone.

30

Q. If he did have septicaemia would that in any way alter your view as to the necessity for this operation?
A. He did not have a septicaemia so the question did not arise.

40

Q. But would you assume that he did? (No answer.)

John Russell Dalton,
Examination,
Cross-examination.

HIS HONOUR: Q. The distinction is between toxemia and septicaemia? A. Yes.

Q. What is toxemia? A. That is where the patient is ill from the absorption of dead products of burns, whereas septicaemia is where they actually have pus and organisms in their blood stream, which is a different condition altogether, and the patient's clinical condition is also quite different. They are usually confused, have a swinging temperature; have little areas on the skin to suggest these multiple emboli and, he had none of this. 10

Q. Had he had the septicaemia it would have been obvious just on a visual examination? A. It would have been obvious on clinical examination of his burns, temperature, his general condition, because they are also mentally confused, and, I was talking to him before operation.

Q. I appreciate that it is your opinion he did not have septicaemia. This is, I take it, after you had made a clinical examination before operation? A. Yes, it is also on the pathological reports I have since had of the pieces of tissue that were actually sent to the pathologist for examination, and abnormalities in the kidneys and in a patient who has a septicaemia there invariably are changes in the kidneys because septicaemia means that the whole body is involved in this process, and the kidneys are also involved and you can see the septicaemic process going on. At his age and with this degree and extent of burning his chances of dying from toxemia are somewhere between 85 and 95 per cent, and again, and we are still uncertain why these people die, because the pathology changes you can demonstrate at post mortem are not sufficient a cause to say the person died of these changes, in the post mortem. 20 30

Q. Is it possible for a person to have septicaemia without it being picked up on clinical examination? A. I think it is not possible for them to have any degree of septicaemia without it being picked upon clinical examination. 40

Q. If you would assume that he did have septicaemia before he was operated on - would you make that assumption? A. If there was a clinical suspicion.

Q. I am just asking you hypothetically to assume it. Will you assume that you knew he had septicaemia? A. One does not assume anything.

Q. Could you just make the assumption for the next question? Will you make this assumption, that I get burnt and I go to a doctor, and will you make the assumption that I do have septicaemia? Will you make that assumption? A. Yes. 50

Q. Having had a septicaemia, should that in your view in any way alter the decision to do the sort of operation that was done on this man the day before he died, on me the hypothetical patient?

A. With an established diagnosis of septicaemia you would then treat the person's septicaemia and consider at what stage the person is, whether you give the anaesthetic and continue on. One has to make a balance of the skin coverage, which is terribly important.

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Q. Assume that I lost the same amount of skin as Mr. Cluff? A. The urgency in his case was to get the skin covered. Some cases do get septicaemia and this is because they have areas of skin that are covered by necrotic tissue, so, part of the treatment for the man to get him over this septicaemia is that you give him antibiotics and get rid of the dead skin, and I would say in this case we would do this operation.

HIS HONOUR: Q. You would not necessarily refuse to operate on an urgent burn case because the patient had septicaemia? A. No, because one accepts that there is a certain amount of danger - well, there is a definite danger all the way through of septicaemia with a person with burns because of the tremendous area of exposed fat and muscle and so on, whereas the danger of septicaemia passes when you have grafted.

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MR. CRIPPS: Q. If you assume that he did have septicaemia would that have altered your decision to operate the day before he died? A. If we knew the organism we would load him with more antibiotic, but given the condition that this man is suffering from this large area we would operate.

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Q. It was more important to get his skin covered?
A. Yes.

RE-EXAMINATION:

MR. HARRINGTON: Q. Is part of the routine treatment prophylactic doses of antibiotic? A. Yes.

Q. Did the operation have any bearing on his death the day following, or the anaesthetic? A. No, these are always a danger and suddenly they will "go" and one doesn't know why. I don't think the anaesthetic had any influence.

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HIS HONOUR: Q. Cardiac standstill is a common feature of this sort of thing? A. No. In fact the other post mortem finding is that there were a number of pulmonary emboli and I would say if one wanted to pinpoint it and say probably the thing that did it in a

John Russell Dalton,
Cross-examination,
Re-examination.

man who was toxic and sick from these multiple burns, to make him go off so rapidly and so quickly it was a shower of pulmonary emboli, because the lungs showed pulmonary emboli, and I think this is where there may have been confusion between the naked eye appearance of the lungs at post mortem and what was found in the lungs on cutting them; that he suddenly became breathless and within a matter of 10 or 15 minutes died. This is in fact what happens to them quite suddenly.

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Q. It is a classical picture of pulmonary embolism?
A. Yes.

Q. All these complications arose from the burns?
A. Yes, and the small emboli he had probably would not kill a person that was fit.

Q. The absorption of the toxins would affect the clotting mechanism of the blood? A. Yes.

(Witness retired.)

(Further hearing adjourned to Sydney
to a date to be arranged.)

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WORKERS' COMPENSATION COMMISSION
OF NEW SOUTH WALES

BEFORE HIS HONOUR JUDGE WALL

WAGGA WAGGA

No. 2867 of 1970

TUESDAY 10TH NOVEMBER, 1970

IN THE MATTER OF A DETERMINATION BETWEEN KATHLEEN
MARY CLUFF AND FINEMORE'S TRANSPORT PTY. LIMITED

MR. HARRINGTON Appeared for the Applicant.
MR. CRIPPS Appeared for the Respondent.

(Evidence of Sgt. R. Masters only.)

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RALPH MASTERS
Sworn, examined, deposed:

TO MR. CRIPPS: My name is Ralph Masters and I am
a Sgt. of Police, stationed at Wagga Wagga.

Q. You knew Kenneth Leonard Cluff, the deceased?

A. Yes.

Q. He had been a member of the Police Force, stationed
at Wagga for some years? A. Yes.

Q. How many years had he been here? A. I think about
five years - two years to my knowledge.

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Q. Is that the signature of the deceased, Kenneth
Leonard Cluff? (Indicating.) A. Yes.

(At this juncture Mr. Harrington stated
that it would not be denied that the
deceased, Kenneth Leonard Cluff, was a
policeman and still was a policeman up
until 25th March, 1970, the date of death.)

CROSS-EXAMINATION:

MR. HARRINGTON: Q. I think you knew he was a man in
a great physical state of health? A. Yes.

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Q. And that he played first grade rugby league?

A. Yes.

(Witness retired.)

Ralph Masters,
Examination,
Cross-examination.

KATHLEEN MARY CLUFF
- V -
FINEMORE'S TRANSPORT PTY. LIMITED

WALL, J.: This is a claim by the widow of a member of the police force who died as the result of severe burns sustained whilst he was doing work for the respondent on 27th February, 1970. Death occurred on 25th March, 1970.

The question arising in the case is whether the deceased was a worker within the meaning of the Act, having regard to the specific exclusion of a member of the police force from the definition of "worker" which as the Act prescribes means any person who has entered into or works under a contract of service.....with an employer. 10

It is clear from the authorities 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 Enever v. The King 3 C.L.R. 969; Attorney-General for New South Wales v. Perpetual Trustee Company Limited 92 C.L.R. 113). It is for this reason a little difficult to discern why the legislature has found it necessary specifically to exclude a member of the police force from the primary definition of "worker"; and it would seem that the express exclusion was intended merely to be declaratory. 20

Respondent's case is that the exclusion is such that it brought about the position that the deceased was not and could not be a worker so that section 7(1)(a) could not become operative as to receipt of compensable injury and, by reference to section 6(2) section 8 could not become operative in favour of the deceased's dependants whether or not he was engaged on police duties. Put shortly, the submission is that a member of the police force cannot under any circumstances be a worker within the meaning of the Act. 10

This then amounts to a proposition that by reason of the exclusion in the definition clause, the mere status of being a member of the police force precludes the worker (or his dependants) from making a claim or becoming entitled under the Act under any circumstances whatever.

I do not think the Act says this. I think that what the Act is saying is that a member of the police force as such may not look to the Act for compensation in respect of injuries in the course of his employment as such a member. This proposition received judicial confirmation as early as the decision in Sudell v. Blackburn Corporation 3 B.W. C.C. 227. The practical reason for the exclusion is that compensation for injury sustained by a policeman in the course of his duty is provided for under the Police Regulation Act and ancillary superannuation legislation. But the legislative method of achieving 20

this was by declaring that an employment relationship which might look very much like a master and servant relationship was not included in the class of master and servant relationship which is the primary criterion of eligibility under the Act.

The Workers' Compensation Act is, of course, concerned with relationships of service only insofar as it discriminates as to which of these relationships is to attract benefits under it.

The status of a police constable is grounded 10 upon the prescriptions of the general or Common Law and derives from early historical origins. For very real and functional reasons his service is clearly distinguishable from service under a master and servant relationship.

Under the Police Regulation Act, and regulations thereunder, a member of the police force is called upon to devote the whole of his time and services to his duties. He is specifically forbidden to enter other employments and it is provided 20 that he shall forfeit his office by doing so.

Section 7(2) of that Act is as follows:-

Any constable of police who is or becomes a bailiff, sheriff's bailiff, parish clerk, or hired servant, or acts in any of the said capacities, or sells any beer, wine, or spirituous liquors by retail, shall become incapable of acting, and shall forfeit his appointment as such constable, and all authority, privileges, salary, and 30 gratuity payable to him as such.

I leave aside any consideration of what effect the provision in relation to forfeiture of

office may have in the present case. It is to be pointed out that the deceased's purported contract of service with the respondent was illegal because he, being a member of the police force, was by the Police Regulation Act forbidden or even, if one gives Mr. Langsworth's submissions the full force of their logical development because, as a police constable, sui generis, he was incompetent, to enter into such a contract. But this is just such a situation as was intended to be covered by section 40 of the Workers' Compensation Act which is as follows:-

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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.

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Thus, provided the Commission thinks it is proper to do so, it may deal with the matter not merely as if there were a valid contract of service but as if the injured person were a "worker" under such a contract.

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In the present instance I think it is proper to deal with the matter in accordance with the section. There will therefore be an award for the applicant under section 8.

MR. HARRINGTON (instructed by Kinsey Callan & Herald)
appeared for the applicant.

MR. LANGSWORTH, Q.C. and MR. CRIPPS (instructed by
Charles A. Vandervord) appeared for the respondent.

IN THE WORKERS' COMPENSATION COMMISSION) } No. of Matter
OF NEW SOUTH WALES } 2867 of 1970.

CORAM: Wall J. at Sydney.

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

IN THE MATTER of a determination between

KATHLEEN MARY CLUFF

Applicant

- and -

FINEMORE'S TRANSPORT PTY. LIMITED

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Respondent

Having duly considered the matters submitted, the Commission -

1. finds -

- (a) the deceased worker's death resulted from injury arising out of and in the course of his employment with the respondent;
- (b) the applicant, Kathleen Mary Cluff, and the children, Charmaine Maree Cluff, born 14.3.66, Patrice Suzanne Cluff, born 15.6.67, Daniel James Cluff, born 27.8.68, and Simon Michael Cluff, born 2.10.69, to have been dependent for support upon the deceased worker at the time of his death on the Twenty-fifth day of March, 1970; 20
- (c) the compensation payable by the respondent in respect of the death of the deceased worker to be the sum of Ten thousand dollars and in addition there- 30
to an amount pursuant to section 8 (1) (b) of the Workers' Compensation Act of FIVE DOLLARS per week from the Twenty-fifth day of March, 1970, to the Second day of December, 1970,

and of SIX DOLLARS TWENTY-FIVE CENTS per week from the Third day of December, 1970, in respect of each such child, the said Charmaine Maree Cluff, the said Patrice Suzanne Cluff, the said Daniel James Cluff and the said Simon Michael Cluff, such last-mentioned weekly amount to continue in respect of each such child until such child dies or attains the age of sixteen years, whichever event first occurs: 10
Provided that where such a child on such child attaining the age of sixteen years is a student, such payments shall continue in respect of that child until that child dies, or attains the age of twenty-one years, or ceases to be a student, whichever event first occurs.

2. HEREBY ORDERS AND AWARDS: 20

(a) That in pursuance of the provisions of section 57 (1) of the Act, the respondent DO PAY the said sum of TEN THOUSAND DOLLARS to the Registrar of the Commission forthwith after the date of this award.

(b) That the respondent DO PAY the applicant, Kathleen Mary Cluff, the weekly amount hereinbefore mentioned.

(c) That the respondent DO PAY the applicant's costs of and incident to this determination, such costs, in default of agreement between the parties as to the amount thereof, to be taxed by the Registrar under the appropriate scale of the scales of costs prescribed by the Commission, and to be paid by the respondent forthwith after the date of such taxation. 30

3. grants the application for case stated.

DATED the Second day of July, 1971.

For the Commission,

T. HIGGINS

Registrar of the Commission. 40

IN THE SUPREME COURT)

OF NEW SOUTH WALES)

COURT OF APPEAL)

Term No. 2867 of 1971.

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

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

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AND IN THE MATTER of a Determination

BETWEEN:

KATHLEEN MARY CLUFF

(Applicant) Respondent

- and -

FINEMORE'S TRANSPORT PTY. LIMITED

(Respondent) Appellant

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1. This case is stated by His Honour Judge Wall a member of the Workers' Compensation Commission of New South Wales at the request of the appellant employer under the provisions of Section 37(4)(b) of the Workers' Compensation Act, 1926 (as amended) and refers for the decision of the Court of Appeal certain questions of law which arose in the proceedings before the said Commission brought by the Applicant for the recovery of compensation from the

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Respondent employer in which said proceedings His Honour on 2nd July, 1971 made an Award in favour of the Applicant.

2. By Application for Determination undated the Respondent (Applicant) alleged that she and her four children were dependant upon the earnings of her husband Kenneth Leonard Cluff who received fatal injuries whilst employed by the Appellant (Respondent), on the 27th day of February, 1970 and died on 25th March, 1970.

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3. By Answer dated the 8th day of June, 1970 the Appellant (Respondent) denied that the Deceased was a worker within the meaning of Section 7 of the Workers' Compensation Act, 1926 (as amended) and that the Applicant or her children were dependant for support upon the worker. At the hearing the said Answer was amended and alleged that the Deceased did not receive injury arising out of or in the course of his employment by the Respondent.

4. The matter was heard before the Commission on the 10th day of November, 1970 and on the 16th day of December, 1970. On the 2nd day of July, 1971 an Award was made in favour of the Respondent (Applicant).

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5. At the hearing the following facts were proved in evidence.

(a) That on 27th February, 1970 the Deceased received injuries which resulted in his death on 25th March, 1970.

- (b) That the Applicant and her four children were totally dependant for support upon the Deceased.
- (c) That on 27th February, 1970 the Deceased was employed by the Appellant (Respondent) and received such fatal injuries arising out of or in the course of such employment.
- (d) That up until the Deceased's death on 25th March, 1970 and at all relevant times he was a member of the Police Force being a Police Officer in the New South Wales Police Force. 10

6. His Honour found that the contract of service under which the Deceased was engaged at the time when the injury happened was illegal and thereupon after having regard to all the circumstances of the case and determining that it was proper to do so dealt with the matter as if the Deceased had at the time of injury been a worker under a valid contract of service. 20

7. The following question of law is referred for the decision of the Court of Appeal:-

"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."

8. _____ Copies of the Application for Determination, Answer, Transcript, His Honour's reason for Judgment and the Award are annexed as part of this case.

9. _____ This case was settled by His Honour Judge Wall on the 2nd day of September, 1971.

DATED this 14th day of October, 1971.

Sgd. COLMAN WALL

Judge

Annexures:

- | | | |
|----|--------------------------------|----|
| A. | Application for Determination. | 10 |
| B. | Answer. | |
| C. | Transcript. | |
| D. | Reason for Judgment. | |
| E. | Award. | |

NO. 7 - JUDGMENT OF SUPREME COURT
OF NEW SOUTH WALES COURT OF APPEAL

IN THE SUPREME COURT)
OF NEW SOUTH WALES) Term No. 643 of 1971.
COURT OF APPEAL)

CORAM: JACOBS, J.A.
TAYLOR, A-J.A.
HARDIE, A-J.A.

Tuesday, 9th May, 1972

CLUFF -v- FINEMORE'S TRANSPORT PTY. LIMITED

JACOBS, J.A.: I am of the opinion that the question asked should be answered "No", and that the appellant 10 should pay the respondent's costs.

I publish my reasons.

TAYLOR, A-J.A.: I agree and I do not wish to add anything.

HARDIE, A-J.A.: I agree and I publish my reasons.

JACOBS, J.A.: Then the order of the Court will be as I have indicated.

IN THE SUPREME COURT)

OF NEW SOUTH WALES

COURT OF APPEAL

} Term No. 643 of 1971.
}

CORAM: JACOBS, J.A.
TAYLOR, A-J.A.
HARDIE, A-J.A.

Tuesday 9th May, 1972.

CLUFF -v- FINEMORE'S TRANSPORT PTY. LIMITED

JACOBS, J.A.: The respondent is the widow of the late Kenneth Leonard Cluff and she claimed compensation under the Workers Compensation Act from the appellant claiming that her late husband had been a worker employed by the appellant, that he had received injury arising out of or in the course of his employment with the appellant, that death had resulted from that injury and that she and the four children of her marriage were wholly dependent upon the deceased worker. 10

The deceased received his injuries on 27th February, 1970 and died as a result of them on 25th March, 1970. The widow and the four children were totally dependent for support upon him. At the time when he received his injuries the deceased was employed by the appellant and received the fatal injuries arising out of or in the course of his employment with the appellant. It is stated in the stated case as a fact that up until the deceased's death on 25th March, 1970 and at all relevant times 20

Reasons for Judgment
of His Honour
Jacobs, J.A.

he was a member of the Police Force being a Police Officer in the N.S.W. Police Force. The Workers Compensation Commission found that the contract of service under which the deceased was engaged at the time when the injury happened was illegal and thereupon after having regard to all circumstances of the case and determining that it was proper to do so dealt with the matter as if the deceased had at the time of injury been a worker under a valid contract of service. In so doing the Commission purported to exercise the power conferred by s.40 which reads as follows: 10

"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." 20

Upon these facts the following question of law is referred to this Court for decision.

"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." 30

I have felt considerable doubt whether this Court should answer the question in the form in which it is stated. There is really a prior question which

ought to be determined, namely, whether the deceased was in any sense a worker within the definition of that word in s.6(1). That definition is 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, labour, clerical work, or otherwise, and whether the contract is expressed 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 purposes of the employer's trade or business; or

(e) an officer of a Friendly Society whose remuneration from such Friendly Society does not exceed seven hundred dollars per year; or

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(f) an officer of a religious or other voluntary association who is employed upon duties for the association outside his ordinary working hours, so far as the employment upon such duties is concerned, provided his remuneration from the association does not exceed seven hundred dollars per year; or

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(g) a member of the police reserve appointed under Part IIA of the Police Regulation Act, 1899-1939, employed upon duties as such member, so far as the employment upon such duties is concerned.

If the exclusion of "a member of the Police Force" is an absolute one then no question of illegality arises and s.40 is wholly inapplicable. If it is not absolute then s.40 may still not be applicable.

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Therefore, it seems to me that truly the first question

Reasons for Judgment
of His Honour
Jacobs, J.A.

to be determined is the construction of the definition of worker in s.6(1) rather than the application of s.40. However, upon the material before him, His Honour found that the contract of service under which the deceased was engaged at the time when the injury happened was illegal. It is not clear to me precisely upon what material this finding was made but no question is asked of this Court concerning that finding. We were referred to s.7(2) of the Police Regulation Act, 1899, which reads as follows: 10

"Any constable of police who is or becomes a bailiff, sheriff's bailiff, parish clerk, or hired servant, or acts in any of the said capacities, or sells any beer, wine or spirituous liquors by retail, shall become incapable of acting, and shall forfeit his appointment as such constable, and all authority, privileges, salary, and gratuity payable to him as such."

I refer to this subsection only in order to 20 state that although we were referred to it the question asked in the case stated does not require this Court to construe it. I would doubt whether its terms would make the contract of service with the appellant illegal. Indeed they might have the opposite effect. But it was part of the appellant's case that the contract of service was illegal and the Police Regulations were tendered in support of that case. The finding of illegality was made and stands unchallenged by anything raised in this case stated. 30

It may then be said that the proper question to be determined is whether s.40 is applicable in the following way. If the deceased was wholly outside the

definition of "worker" in s.6(1) because he was a member of the Police Force then, whether or not the contract of service with the appellant was illegal, there was no power in the Commission to make an award. Section 40, dealing as it does with illegality of the contract of service, would be irrelevant and therefore if the Commission purported to exercise the power conferred by that section it would err in law. On the other hand, if the deceased was not as a member of the Police Force wholly and for all purposes and at all times outside the definition of "worker" in s.6(1) but if nevertheless any contract of service other than his contract of service as a member of the Police Force was illegal, then the power given to the Commission by s.40 might be exercised by the Commission. In this way, somewhat obliquely, the question as it is asked raises the point of law. 10

The question then is the true construction of the definition of worker in s.6(1). Is every member of the police force wholly excluded in all circumstances from coming within the terms of the definition of "worker" or is a member of the police force only excluded from that definition in respect of the contract of service which he has as a member of the police force? The question is one which I do not find it easy to answer. I think that the answer must be found in the language of the Workers' Compensation Act itself. At first sight to say that 20

the word "worker" does not include persons in a number of different categories would appear to mean that those persons because of characteristics personal to them are excluded from the operation of the Act. However, I have come to the conclusion that this is not a true interpretation. It would be a construction inapplicable to any of the other categories in the paragraphs of the definition. It is proper to take into account not only the paragraphs still surviving in the definition but also the two first paragraphs numbered (a) and (b). The first of these was amended from time to time before it was finally repealed in 1957 and I shall set out its form prior to its repeal. 10

- (a) any person whose remuneration exceeds two thousand pounds per year, exclusive of payments for overtime, bonuses and special allowances.

Paragraph (b) prior to its repeal by Act No. 97 of 1967 was "an outworker". In respect of paragraphs (a) in any of its forms, (b), (d) and (e) it seems to me to be an impossible construction of the Act that persons who possess the characteristics there set out should in respect of any contract of service at all be excluded from the definition of worker. In respect of paragraphs (f) and (g) the Act makes it clear that the exclusion is only so far as the employment upon the particular duties is concerned and this, as has been pointed out in argument, could be some indication that the earlier categories 20 30

were not intended to be so limited. However, although this argument must be given weight I am of the opinion that it is displaced by the whole context of paragraphs (a) to (e) inclusive. The purpose of the Workers' Compensation legislation is to provide for compensation to persons who have entered into or work under a contract of service with certain exceptions. Previously if the service was remunerated at more than a certain specified sum or if the service was that of an outworker and now if the service is that of a person whose employment is casual or is that of an officer of a Friendly Society whose remuneration from such Friendly Society does not exceed the stated amount then that service will not come within the words "contract of service" in the definition of "worker". Amongst these descriptions of persons by reference to the nature of their contract of service comes the reference in paragraph (c) to "a member of the police force". I do not think that a different method of construction can be used in relation to this paragraph from that used in relation to the surrounding paragraphs. I am of the opinion that the member of the police force is referred to in a context which places emphasis upon the contract of service entered into by him as a member of the police force and that it does not describe a status which attaches to him at all times and which for all purposes excludes him from the definition.

The definition of "workman" in the English Workmen's Compensation Act, 1906, was very similar to our definition. It was as follows:-

"Workman" does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250 l. a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an outworker, or a member of the employer's family dwelling in his house, but save as aforesaid, it 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 expressed or implied, is oral or in writing. 10

Fletcher Moulton L.J. had occasion to construe this definition in Skales v. Blue Anchor Line Limited (1911) 1 K.B. 360 at 366-7. His words express not only the difficulty which I have felt but also the conclusion to which I have come. 20

"It will be seen, therefore, that the term 'workman' includes all persons who have entered into or work under a contract of service or apprenticeship with an employer with certain exceptions. These exceptions are set out in the earlier part of the clause, and the language used is such as to make them appear at first sight to be personal exceptions excluding the person from the benefit of the Act. But a closer examination convinces me that this is not the true reading and that the whole clause has in view the contract of service and not the individual. For instance, a person may occupy a portion of his time by being an outworker, but no one would contend that if the remainder of his time was occupied in service under an ordinary contract of service, say as a watchman, and an accident occurred to him while so engaged, his employer under that contract of service could escape paying compensation under the Act. The same might be said of the other exceptions. I have come, 30 40

therefore, to the conclusion that the true meaning of the definition is that working for an employer under a contract of service of the excluded kind prevents the individual from being a 'workman' by reason of that contract so as to have the right to make a claim upon his employer under that contract, but that it does not affect his acquiring the requisite status under some other contract of service under which he may also work. In other words, the definition deals with the acquisition of the status of a workman by reason of a contract of service, and the exceptions do no more than provide that this status does not attach to him by reason of certain classes of contract. 'Contract of service', 'employer', 'employed', run throughout the definition and are found in every part of it. They are correlative words, and their use in the definition shews that it is the status of the workman acquired by reason of the particular contract which is alone referred to."

It is true that this passage appears in a dissenting judgment but Fletcher Moulton L.J. dissented upon the meaning of the word "remuneration" (see G.W. Railway v. Helps (1918) A.C. 141 at 146) and even though the construction placed by him upon the definition was important in his reasoning upon the meaning of the word "remuneration" nevertheless his general elucidation was not inconsistent with the reasoning of the majority and was in no way that I can see disapproved by the majority. I find it cogent reasoning and I respectfully adopt it.

I do not find in it anything inconsistent with the decision of the Court of Appeal in Sudell v. Blackburn Corporation (1910) 3 B.W.C.C. 227.

There a police constable was injured while acting as a fireman. It was held that it was part of his duty

as a member of the police force so to act and therefore at the time of his injury he was acting as a member of the police force. It is to be observed that, if the appellant's argument in the present case were correct, there would have been no case at all for the English Court of Appeal to consider. It would not have mattered whether acting as a fireman was part of the policeman's duty or not. But, as it was, the basis of the Court's decision was not so much that the applicant 10 was a member of the police force but that "he was acting ... in the execution of his duty as a member of a police force when he was injured". See per Cozens-Hardy M.R. at page 228. It is further to be observed that Fletcher Moulton L.J. was a member of the Court and concurred.

Fletcher Moulton L.J. was also a member of the Court of Appeal which decided Brandy v. Owners of S.S. Raphael (1911) 1 K.B. 376. In his judgment he referred to his recent judgment in 20 Skailes v. Blue Anchor Line Ltd. (supra) and found the point being considered not unlike the point in Skaile's Case. He applied the same line of reasoning. His judgment was referred to with approval by Lord Loreburn L.C. in the same case on appeal to the House of Lords (1911 A.C. 413 at 414), with whom Lord Atkinson concurred.

For these reasons I am of the opinion that the deceased, being a member of the police force,

was not thereby wholly removed outside the scope of the definition of "worker" but that he was only outside that definition in respect of his contract of service as a member of the police force.

Therefore, if his contract of service with the appellant was an illegal contract it was open to the Commission to exercise the power contained in s.40.

I am therefore of the opinion that it was open to the Commission to exercise the power conferred upon it by Section 40 and therefore in my opinion the question asked should be answered "No". The appellant should pay the respondent's costs.

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IN THE SUPREME COURT)
OF NEW SOUTH WALES) Term No. 643 of 1971
COURT OF APPEAL)

CORAM: JACOBS, J.A.
TAYLOR, A-J.A.
HARDIE, A-J.A.

Tuesday 9th May, 1972

CLUFF -v- FINEMORE'S TRANSPORT PTY. LIMITED

TAYLOR, A-J.A.: I have read the Judgment of
Jacobs J.A. and I agree with it. I do not wish 10
to add anything.

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COURT OF APPEAL)

No. 643 of 1971

CORAM: JACOBS, J.A.
TAYLOR, A-J.A.
HARDIE, A-J.A.

Tuesday, 9th May, 1972

CLUFF -v- FINEMORE'S TRANSPORT PTY. LIMITED

HARDIE, A-J.A. I have had the benefit of reading
the judgment prepared by Jacobs, J. I concur in the 10
order proposed and the reasons therefor. However,
in view of the lack of direct authority on the point
and out of deference to the argument presented by
Senior Counsel for the appellant I would add a few
observations of my own.

Before the Workers' Compensation Commission
the appellant raised various points to resist the
award sought against it. In the Case before this
court stated at the request of the appellant one
question is asked, namely:- 20

"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".

Counsel for the appellant seeks an affirmative
answer to the question on one argument only; his sub- 30
mission was that the language of the definition of
"worker" in S.6 of the Act precluded the Commission

as a matter of law from holding that the deceased was at the date of his death a worker for the purposes of the Act, and thus precluded it from invoking the provisions of S.40 of the Act and making an award on the basis of the deceased being a notional or "deemed" worker.

The right of the widow to an award under the Act is dependent upon proof that the deceased was a worker for the purpose of the Act. S.6 defines worker as meaning:-

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"'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 expressed or implied, is oral or in writing, but does not include -

(a) * * * * *

(b) * * * * *

(c) a member of the police force; or..."

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It was contended on behalf of the Appellant that the portion of the definition of 'worker' in S.6 which expressly excludes from the defined class, a member of the police force was an over-riding paramount provision of the Act to which the discretionary power conferred by S.40 had to yield. That definition, so it was argued, disclosed a legislative intent that a member of the police force could never be a worker for the purpose of the Act, whether in relation to the Crown and the performance of his duties as a police officer or in relation to employment or work unconnected with and unrelated to his

30

position as a police officer. The wide operation and impact of the provision contended for was said to flow from the generality of the language used, the historic role of a police officer having an obligation to give all his time and attention to the maintenance of law and order, and the positive express statement of that obligation both in the Police Regulation Act and in the Regulations made thereunder. Support for this construction was also sought by reason of the omission from the relevant part of the definition of any restrictive or limiting words such as the phrase "so far as the employment upon such duties is concerned" appearing in the exclusions set out in clauses (f) and (g) of the definition of "worker". 10

The words "a member of the police force" appears as an exception to the definition of "worker" as meaning "any person who has entered into or works under a contract of service or apprenticeship with an employer...." The subject matter of the definition are persons having a particular contractual relationship with other persons (i.e. a work relationship). It deals not with persons or individuals as such, but with persons or individuals in such a relationship. 20

The exceptions should prima facie be understood and construed likewise as dealing with work relationships. The exception under consideration should on this approach be understood as referring

to a member of the police force in his work or duty relationship with the Crown or the Government. In that relationship or capacity a police officer is not a worker for the purposes of the Act, but in respect to other relationships or capacities, he may be. On that approach the relevant exception provision does not extend to work relationships between a person who is a police officer and other persons, which are unrelated to his status or duties as a member of the police force. 10

It follows that the appellant has failed in its challenge to the view adopted and acted upon by the Commission that it was entitled to use the discretionary power conferred by Section 40 of the Act.

NO. 8 - RULE OF COURT OF APPEAL

IN THE SUPREME COURT)
OF NEW SOUTH WALES) Term No. 643 of 1971
COURT OF APPEAL)

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 10

AND IN THE MATTER of a Determination

BETWEEN:

KATHLEEN MARY CLUFF

(Applicant) Respondent

- and -

FINEMORE'S TRANSPORT PTY. LIMITED

(Respondent) Appellant 20

The ninth day of May, 1972.

UPON MOTION made this day WHEREUPON AND UPON READING the Case Stated herein dated the 14th day of October, 1971 AND UPON HEARING Mr. C.C. Langsworth of Queen's Counsel with Mr. J.S. Cripps of Counsel for the Appellant and Mr. D.G. McGregor of Queen's Counsel and Mr. J.A. Harrington of Counsel for the Respondent

IT WAS ORDERED that the matter stand for Judgment and the same standing in the list for Judgment this day IT IS ORDERED THAT the question asked in the 30

Stated Case be answered in the negative AND IT IS
FURTHER ORDERED that the costs of the Respondent of
and incidental to this Appeal be paid by the Appellant
to the Respondent or to her Solicitor.

By the Court,

C.G.E. ALLFREE

Deputy Prothonotary.

NO. 9 - RULE OF SUPREME COURT OF NEW SOUTH WALES
GRANTING FINAL LEAVE TO APPEAL TO
HER MAJESTY IN COUNCIL

IN THE SUPREME COURT)

OF NEW SOUTH WALES)

COURT OF APPEAL)

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 10

AND IN THE MATTER of a Determination

BETWEEN:

KATHLEEN MARY CLUFF

(Applicant) Respondent

- and -

FINEMORE'S TRANSPORT PTY. LIMITED

20

(Respondent) Appellant

The 29th day of June, 1972.

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the 27th day of June, 1972
WHEREUPON AND UPON READING the said Notice of Motion the Affidavit of CHARLES ALEXANDER VANDERVORD sworn on the 27th day of June, 1972 and the Prothonotary's Certificate of Compliance AND UPON HEARING what is alleged by Mr. J.S. Cripps of Counsel for the

Appellant and Mr. P. Dent of Counsel for the Respondent IT IS ORDERED that final leave to appeal to Her Majesty in Council from the Judgment of the Court of Appeal given and made herein on the 9th day of May, 1972 be and the same is hereby granted to the Appellant AND IT IS FURTHER ORDERED that upon payment by the Appellant of the costs of preparation of the Transcript Record and despatch thereof to England the sum of fifty dollars (\$50-00) deposited in Court by the Appellant as security for and to- 10 wards the costs thereof be paid out of Court to the Appellant.

By the Court,

For the Registrar,

K.C. FLACK

Chief Clerk.
