Privy Council Appeal No. 12 of 1968

Ogden Industries Pty. Limited – – – – – *Appellants*

v.

Heather Doreen Lucas – – – – – – – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER 1968

Present at the Hearing:

LORD REID
LORD HODSON
LORD UPJOHN
LORD DONOVAN
LORD PEARSON

[*Delivered by* LORD UPJOHN]

This appeal gives rise to a question of some general importance with regard to the rights of dependants of a worker who was injured before but died after the amendment to the Workers' Compensation legislation in the State of Victoria in 1965.

When the claim for compensation came before the Workers' Compensation Board in Melbourne the facts were agreed and can be very briefly stated. The deceased Reginald George Lucas, an employee of the appellants, suffered from heart disease but it was admitted that this disease was aggravated and accelerated by the nature of the deceased's employment with the appellants and was a contributory factor to his death. He suffered from a coronary occlusion and myocardial infarction on 18th February 1965 and became totally incapacitated; he did not work again. He became entitled to weekly payments at the rate prescribed by the Workers' Compensation Act 1958 of the State of Victoria (the 1958 Act) which he duly received. In March 1965 the deceased was admitted to hospital for treatment; he returned there on 19th June 1965 and so remained until his death on 7th July of that year. On 30th June 1965 he suffered a further coronary occlusion and myocardial infarction and on the day of his death he had a pulmonary oedema from which he died. He left surviving him three persons wholly dependent upon his earnings namely his widow the respondent and two children under the age of sixteen. No difficulty would have arisen and the compensation payable to the dependants would have been calculated in accordance with section 9 of the 1958 Act (to which their Lordships will refer presently) but for the fact that that Act was amended by the Workers' Compensation (Amendment) Act 1965 No. 7292 of the State of Victoria (the Amendment Act) which became operative on 1st July 1965. The Amendment Act greatly increased the benefits payable to dependants and also altered a number of definitions but the substantial question is whether in the circumstances the

dependants are entitled to be paid compensation at the increased rate under the Amendment Act. An interim award of the amount admittedly due to the dependants under the 1958 Act was made and when the matter came before the Workers' Compensation Board they were awarded the additional amount due on the footing that the Amendment Act was applicable. This question of law was reserved for the determination of the Supreme Court of the State of Victoria. On 28th February 1967 the Full Court (Winneke C. J., Smith and Pape JJ.) upheld the award of the Compensation Board upon the ground that for the purposes of the relevant legislation the deceased suffered an injury on 7th July 1965 which gave him a new title to compensation or that it was open to the Board so to hold as a matter of fact. The appellants appealed to the High Court of Australia. By its judgment delivered on 20th September 1967 the High Court by a majority dismissed the appeal but for reasons differing entirely from that of the Supreme Court.

Two questions arise; the first, of general importance, is whether as the Amendment Act came into operation after the original injury from which the worker suffered though before his death, his dependants on his death are entitled to the increased rates prescribed by that Act. In the High Court Taylor, Windeyer and Owen JJ. (*dissentiente* Barwick C. J. and Kitto J.) held that they were so entitled. Secondly did the deceased after 30th June 1965 suffer a further injury or aggravation thereof which gave him a new title for the purposes of the Amendment Act as held by the Full Court. No Judge of the High Court agreed with this view.

Their Lordships must set out the relevant sections of the 1958 Act and of the Amendment Act.

Workers' Compensation Act 1958

"Sec. 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."

"Sec. 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."

(The clauses referred to)

"1 (*a*) (i) If the worker leaves a widow or any children under sixteen years of age at the time of the death or leaves any other dependants wholly dependant 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*) appended thereto provided for weekly sums to be paid to the injured workman during his incapacity and he was duly paid.

Workers' Compensation (Amendment) Act 1965

"Sec. 2 (*a*) For the interpretation of 'Dependants' there shall be substituted the following interpretation: '"Dependants" means such persons as were wholly mainly or in part dependent upon the earnings of the worker at the time of the death or who would but for the incapacity due to the injury have been so dependent.';

(*b*) For the interpretation of 'Injury' there shall be substituted the following interpretation: '"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.';"

Section 5 of the Amendment Act increased the benefits payable by virtue of clause 1 (*a*) (i) of the 1958 Act to Four thousand five hundred pounds with an additional sum of One hundred pounds for each child under sixteen.

It will also be convenient at this stage to set out section 7 (2) of the Acts Interpretation Act 1958.

> " (2) 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:
>
> (*a*) . . . .
>
> (*b*) affect the previous operation of any enactment so repealed or amended or anything duly done or suffered under any enactment so repealed or amended; or
>
> (*c*) affect any right privilege obligation or liability acquired accrued or incurred under any enactment so repealed or amended; or
>
> (*d*) . . . .
>
> (*e*) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability . . . as aforesaid."

Section 5 (3) of this Act is discussed in the Judgments in the High Court but no argument was based upon it before their Lordships.

The first question depends entirely upon the true construction of the relevant Acts and in their Lordships' opinion should be solved by construing the Acts without reference to authority and then to see whether authority compels a different conclusion. The basic difference between the majority and minority view in the High Court depends upon a different approach to the true meaning of section 5 of the 1958 Act but it is fair to say that the minority view was undoubtedly affected to some extent by the considerable body of authority, especially in the House of Lords, upon this matter. The first problem is to ascertain the true nature of the liability which section 5 of the 1958 Act imposes upon the employer when it enacts that he shall be liable to pay compensation in accordance with the Act. As Windeyer J. pointed out in the course of his judgment the word liability may be used in several senses. It seems to their Lordships that in section 5, which follows quite closely the Workers' Compensation legislation in the United Kingdom, the Act is not there defining liability in any strict sense for it nowhere defines to whom the employer is to be liable nor when nor in what circumstances; and as a matter of construction section 5 directs the reader to the rest of the Act to discover what is the true nature of the liability imposed upon the employer. That leads to section 9. It seems to their Lordships that the object of section 5 or its predecessor was to introduce what was fundamentally new legislation and to indicate to the employer in general terms that though he himself might not be in breach of any duty of care to his employee he nevertheless would be liable to compensate him for injuries received during the course of his employment and that he could no longer rely on the then existing doctrine of common employment as a defence to any action by the worker. Their Lordships are content to assume 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. But it is not necessary to decide that point in this case for the injury and incapacity were coterminous. This much however is clear that upon the happening of the injury the worker has a sufficient interest to enable him to obtain a declaratory judgment if, through the nature of his injury, some incapacity is likely to appear see *King v. P.L.A.* [1920] A.C.1.

Then section 9 (1) provides for the dependants. It is not in dispute and the authorities establish that the rights to compensation of the dependants of the injured workman who has died, are independent of his right, but that does not seem to their Lordships to carry the matter any further in this case.

Under the 1958 Act the widow did not have to prove that she was in fact dependent upon the earnings of her husband though under the Amendment Act she has to do so. Nevertheless it is quite clear as a matter of law that no single person can say under either Act the moment before the death "I shall be a dependant at the death if I so long live". First it must be established that the death was caused or contributed to by the injury, secondly that the widow will be the deceased's widow at the date of death and not dead or married to some other man, and the children must show that they are under sixteen. None of these things can be ascertained (let alone proved) until after the moment of death of the worker. Accordingly it seems to their Lordships that the dependants at the death cannot before the death be described, as a matter of legal phraseology, or with strict accuracy, as a class having a contingent right to succeed to certain benefits from the employer upon the death of the injured workman. Such potential dependants have no more than a mere expectancy or as it is sometimes called a mere *spes successionis* and such a hope or expectancy gives rise to no rights in law at all. It is a mere possibility. This is well established as for example in the case of those entitled upon an intestacy, or what is perhaps more important, in the case of those who are entitled to succeed under limitations dependent upon an intestacy. The judgment of Kay J. in *re Parsons* 45 Ch. D. 51 illuminates this point. No doubt the potential dependant may assign this possibility for a consideration but this belongs to the realm of contract. In their Lordships' judgment section 5 is itself merely introductory and even when taken in conjunction with section 9 and the appended clauses does not confer upon the dependants any rights until the moment of the worker's death. If that be the true nature of the benefits conferred by the 1958 Act upon the potential dependants then the vital question is whether on the true construction of section 7 (2) (*c*) of the Acts Interpretation Act (which applies to amendments as well as repeals) the rights and liabilities of the parties are thereby preserved and so are not to be affected by the subsequent amendment of the 1958 Act.

In their Lordships' opinion in section 7 (2) (*c*) the rights, privileges and obligations acquired or accrued on the one side and the liabilities incurred on the other side referred to in that paragraph are mutual and correlative.

As in their Lordships' judgment the potential dependants had no rights in law before the death there is in their view no true liability in a legal sense for the purposes of section 7 of the Acts Interpretation Act upon the employer *vis-à-vis* the dependants until the death of the worker. In their opinion the word liability in section 7 is used to connote something quite different from the liability referred to in section 5 of the 1958 Act. The object and intent of the Interpretation Act is to preserve rights and privileges acquired or accrued on the one side and the corresponding obligation or liability incurred by the person bound to observe or perform those rights or privileges on the other side; so that when a subsequent Act repeals or amends those rights privileges and liabilities for the future that would not affect the pre-existing mutual rights and liabilities of the parties. If therefore the potential dependants could establish a right or privilege within the true meaning of paragraph (*c*) their Lordships would entirely agree with the remarks of the Chief Justice in the course of his judgment to the effect that if there had been an entire repeal of the Workers' Compensation Acts nevertheless the rights of the dependants and the corresponding liability of the employer would be preserved. But 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 1958 Act as amended by 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 judgments with which their Lordships agree. But there can be no doubt that there is a formidable body of authority tending to show that a different view has been taken of the basic nature of section 5 of the 1958 Act and of the corresponding legislation in the United Kingdom and their Lordships must examine some of the cases. They desire to reiterate however what has so often been said before that in a Common Law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observation of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.

These general principles are particularly important when questions of construction of Statutes are in issue.

It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and Courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.

No doubt a decision on particular words binds inferior Courts on the construction of those words on similar facts but beyond that the observations of judges on the construction of Statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the Court from its duty of exercising an independent judgment. It is with these principles in mind that their Lordships approach this very considerable body of authority.

They preface their observations by saying that in only one reported case namely *Dwyer v. Broken Hill South Ltd.* [1928] Workers' Compensation Reports New South Wales Volume II p. 208 before the Supreme Court of New South Wales has a point so very close to that before their Lordships as to be virtually indistinguishable come before any Court. That Court decided it in the sense in which the majority of the High Court have decided it in this case. But no authority was cited and perhaps the reasons which were stated with extreme brevity are not of great persuasive autnority. Their Lordships do not propose to review all the authorities to which they were referred and it would not be helpful so to do but there are some cases in the House of Lords and in the Court of Appeal in England which their Lordships must examine and then see how far those cases have been adopted as part of the law of workers' compensation in the State of Victoria.

The first case is that of the *United Collieries Ltd. v. Simpson* [1909] A.C. 383. A workman was injured and died 5 days after his injury as a result of it. His mother was a dependant but she died 3 months later. The mother's executrix made a claim but it was argued that as the mother had made no claim in her lifetime the executrix could not do so and it was further alleged that the mother's rights (if any) did not survive her death. Neither argument succeeded. The appellants relied on some observations in Lord Macnaghten's opinion at the foot of p. 393 and top of p. 394 as establishing the principle that the liability accrues from the occurrence of the accident, and of course so it does in the sense intended by the noble Lord when he went on to say that the liability falls upon the employer by reason of the accident: no one could doubt the accuracy of that as a general statement. He then went on to consider the precise legal issues before him namely whether liability was altered or affected by notice of the accident or a claim for compensation or the death of the mother, which have nothing to do with this case.

Plainly nothing in that opinion bears upon the instant problem and indeed other observations of Lord Macnaghten later on p. 399 and of

Lord Loreburn at p. 389 make it plain that they were considering only rights arising or becoming vested upon the workman's death.

Their Lordships were referred to some observations of Lord Dunedin in *Daff v. Midland Colliery Owners' Mutual Indemnity Company, Ltd.* Butterworths Compensation Cases Vol. VI, p. 799 at p. 814 which were quite accurate in relation to the case before the House which was concerned solely with the rights of the worker himself.

Then in 1925 and 1927 there were three cases in the United Kingdom bearing on this problem which have played the greatest part in the formulation of judicial decisions in Australia. They are *Moakes v. Blackwell Colliery Co.* [1925] 2 K.B. 64, *Briggs v. Thomas Dryden & Sons* [1925] 2 K.B. 667 in the Court of Appeal and *Clement v. Davis & Sons Ltd.* [1927] A.C. 126 in the House of Lords which approved *Moakes'* case.

In his reply before their Lordships Counsel for the appellants very fairly said that upon the main point he really relied on *Moakes'* and *Clement's* cases.

The appellants relied on some observations of Atkin L. J. (as he then was) in *Briggs'* case at p. 680 but in their Lordships' view he was doing no more than stating his view of what *Moakes'* case decided although he expressed his agreement with it.

In *Moakes'* and in *Clement's* cases the Court was also concerned with the effect of a statutory amendment, the Workers' Compensation Act 1923 after the injury. Before the amendment the position was cogently stated by Lord Sumner in 1927 A.C. at p. 133/4 as follows:

> " Before that Act an employer, who had on his books a continuing present liability to make weekly compensation payments to an injured man, would also, week by week, be entitled to write down *pro tanto* the contingent liability, which would accrue in the event of that workman's death. In the present case the employer had thus written it off altogether. Week by week his payments had vested in him a corresponding right—a diminution of his contingent liability until it reached zero."

The 1923 Act abolished this right of deduction in so far as it reduced the compensation payable to dependants below £200.

Those cases were therefore concerned with the question whether and to what extent the subsequent enactment reduced the employers' right of set-off in respect of payments to dependants. It was held that the 1923 Act had at common law no retrospective operation for that would affect the employer's right to reduce his obligation to the dependants when ascertained at the death.

In their Lordships' opinion there is nothing in the judgments of the Court of Appeal in *Moakes'* case which is of assistance. Kitto J. in his judgment in the present case relied on some observations of Pollock M. R. and Scrutton L. J. With all respect those observations did not state the true *ratio decidendi* as accurately as it was stated in the House of Lords— in *Clement's* case.

In *Clement's* case there is no doubt that some of their Lordships used language which, broadly interpreted, fully supports the argument of the appellants. Thus at p. 131 Lord Dunedin said that in the case of accidents arising out of and in the course of employment in the past certain rights and liabilities accrue at once to the workman and his dependants on the one hand and the employer on the other. But Lord Dunedin cannot have had in mind the problem before their Lordships, for it did not arise. His language was sufficiently accurate for the determination of the point in issue namely whether the employer's right to reduce his liability to whoever the dependants might be found to be at the death by payments to the worker during his life was affected by the subsequent Act.

In that context the use of the words " contingent liability " by Lord Sumner in the passage already quoted was sufficiently accurate and

appropriate to explain the point then before their Lordships and had no all-embracing meaning applicable to determination of the point in this case.

In Australia these judgments have been literally construed in some cases as establishing broad principles of construction applicable to cases going far beyond the issues at stake in those judgments; a judicial process against which their Lordships have already protested; see for example *Australian Iron & Steel Ltd. v. Coal Mines Insurance Pty. Ltd.* 52 S.R. N.S.W. p. 47 per Street C. J.; in *Van Kooten v. Haslington* 64 S.R. N.S.W. p. 387 where Walsh J. in the opening words of his judgment plainly felt himself bound by judicial authority against his inclination; and *Fisher v. Hebburn Ltd.* 105 C.L.R. 188 at p. 194 per Fullagar J. But in truth these broadly-stated observations were not inappropriate to the facts and circumstances before those Courts. Whether the judgment in *Van Kooten's* case which depended entirely upon the construction of section 71 of the Workers' Compensation Acts of New South Wales, which deals with the case where the worker or his dependants have left the State after the injury and has no close counterpart in the Victorian legislation, requires reconsideration is not a matter which their Lordships have considered.

The cases of *Stevens v. Railway Commissioners for N.S.W.* 31 S.R. N.S.W. 138, *Kraljevich v. Lake View & Star Ltd.* 70 C.L.R. 647, and *British Broken Hill Pty. Co. Ltd. v. Simmons* 30 C.L.R. 102 were all cases dealing only with the rights of the worker. In each case it was held that the rights of the worker and the corresponding liability of the employer were vested at the time of the injury and naturally some observations in *Clement's* case and *Moakes'* case were relied on; rightly in their Lordships opinion but none of these cases were in the least concerned with the problem before their Lordships.

Like the majority of the High Court, their Lordships cannot find in the English or Australian cases sufficient to compel them to depart from the view of the true construction of the relevant Acts in relation to the rights of dependants which they have already expressed. Upon the main point therefore in their Lordships' judgment the appeal fails.

Although the second point does not arise their Lordships propose to say a few words upon it. The point is peculiar to the facts of this case and depends upon proof of the fact that the deceased suffered a further injury on or after 1st July 1965, when the Amendment Act came into operation, for which he and his dependants would then be plainly entitled to compensation under its terms.

As already mentioned the Supreme Court of Victoria took the view that the deceased suffered an injury on 7th July by reason of his pulmonary oedema and that arose out of the employment, so that the employers were fixed with liability to pay compensation under the Amendment Act. In part the decision of the Supreme Court purported to depend upon the findings of the Workers' Compensation Board but in fact there were none, for the Board heard no evidence and the facts were agreed before them. No doubt the Board was entitled to draw inferences from those facts but in fact it merely interpreted those facts so as to bring them within the definition of a new injury which was plainly a matter of law open to review in the higher courts. If anything was to be made of this point then their Lordships agree with Kitto J. that the facts should have been fully explored with the direct assistance of medical witnesses rather than left to an agreed statement of facts which the learned Judge described not inaptly as a murky piece of jargon. But on the decision that there was a post 30th June 1965 injury, in the High Court of Australia all of their Honours except Owen J. (who having decided the matter in favour of the respondent on the main point quite reasonably did not feel it necessary to deal with this point) reached the conclusion that the final pulmonary oedema which caused the workman's death on 7th July was no more than a terminal phase of the illness which he had earlier incurred and that the injury for the purposes of the Workers' Compensation Acts had been caused before 30th June 1965. The position was stated succintly by the Chief Justice in these terms:—

> "The work caused the injury and on the agreed facts the injury resulted in death. The relevant effect of the contribution of work to the disease so as to constitute it an injury in my opinion was so to speak spent in February 1965 when the injury was received by the worker. All else was the result and consequence of the injury."

Their Lordships entirely agree with this view of the position and only desire to add that though it is not necessary finally to decide the point, as at present advised it seems to them that having regard to the wording of the revised definition of injury contained in section 2 of the Amendment Act, if a claim is based on a recurrence aggravation or acceleration of a pre-existing injury or disease that must be contributed to by further employment after the original disease. This may in many cases pose a most difficult question of fact but in this case there is no difficulty for the deceased never returned to his employment after 18th February 1965.

An argument was addressed to their Lordships with regard to the compulsory insurance of the employers' liability under the Workmen's Compensation legislation but the matter was never fully developed before the High Court and no point was taken thereon in the appellant's case and their Lordships therefore do not think it is necessary to deal with that argument. In any event it would seem to their Lordships that if there was a lacuna in the compulsory insurance provisions, that could not affect the proper construction of the Act as between employer and worker or his dependants.

In conclusion their Lordships share the regrets expressed by the Chief Justice and Taylor J. in the course of their respective judgments that the Victorian legislature did not see fit when passing the Amendment Act to make transparently clear their intentions as regards injuries sustained before the Amendment.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal on a Solicitor and Own Client basis in accordance with their undertaking.

39222—4 Dd. 178094 75 12/68

In the Privy Council

OGDEN INDUSTRIES PTY. LIMITED

v.

HEATHER DOREEN LUCAS

DELIVERED BY

LORD UPJOHN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1968