8, 1980

IN THE PRIVY COUNCIL No. 31 of 1979

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

BETWEEN :

T.H. BUSHBY (First Appellant)

- and -

GLENMORE PTY., LIMITED (Second Appellant)

- and -

SYDNEY BLAIR MORRIS, R.D. GEORGE, F.W. McKERN, C.F. WHITEHOUSE and THE REGISTRAR OF THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES (Respondents)

CASE FOR THE APPELLANTS

Record

1. This is a consolidated appeal by leave of the Supreme Court of New South Wales by Single Order finally granted under the Order in Council of 1909 on the 11th day of December, 1978 from an Order of that Court dated the 28th day of November, 1977 (Moffitt P., Hope and Glass J.J.A.) answering in a manner adverse to the interests of the Appellants questions of law referred for the decision of that Court by the Workers' Compensation Commission of New South Wales (Judge Williams) on its own motion, pursuant to Section 37(4)(b) of the Workers' Compensation Act, 1926 (as amended). pp.227-231 pp.189-190 p.5

2. The appeal involves questions as to whether:

(a) On its true construction the Workers' Compensation Act, 1926 (as amended) allows awards to be made against successive employers in respect of the same incapacity in the circumstances existing in the instant case;

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(b) On its true construction the Workers' Compensation Act, 1926 (as amended) permits of identical awards being made against separate employers in respect of the same incapacity;

(c) The decision of the Court of Appeal of England in Noden v. Galloways Limited (1912) 1 K.B. 46) should have been applied and followed;

(d) The Court of Appeal of New South Wales should have departed from the decision of the Court of Appeal of England in Noden v. Galloways Limited (supra) where:

(i) "So far as authority and perhaps practice is concerned thereis much to support the view that the word 'result' has the consequence that a particular incapacity can result from but one injury". (Moffitt P.)

p.145 L1.10-13

(ii) "Fairly meagre support (was advanced) for a proposition the adoption which will require a radical alteration in the practice of the Workers' Compensation Commission (of New South Wales)". (Glass J.A.)

p.184 L1.18-21

(e) There was jurisdiction in the Workers' Compensation Commission of New South Wales to order that compensation paid by one employer under an award made against it should be a pro tanto discharge of the liability of other employers under awards made against them.

3. On the 16th day of November, 1964, the first Respondent to this appeal, Sydney Blair Morris (Morris), was employed as a bricklayer by the second, third and fourth Respondents to this appeal, R.D.George, F.W.McKern and C.F.Whitehouse (George and McKern), Arising out of and in the course of that employment Morris received an injury to his low back, namely a lumbar disc strain.

p.119

p.119 L.1.18-21

4. The Appellant Glenmore Pty. Limited (Glenmore) was the principle of George and McKern within the meaning of Section 6(3) of the Workers' Compensation Act, 1926 (as amended) at the time Morris received the said injury.

p.119 L1.33-41

5. On the 17th day of June, 1966, Morris was employed as a bricklayer by the Appellant T.H.Bushby. Arising out of and in the course of that employment Morris

p.122 L1.16-19

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received a further injury to his low back, namely aggravation and exacerbation of a pre-existing condition of his lumbar spine.

6. On the 5th day of November, 1968 Morris received an award of compensation in the Workers' Compensation Commission of New South Wales (No. 3517 of 1964) against Glenmore in respect of incapacity resulting from the injury received on the 16th day of November, 1964 and relating to the following periods: pp.119-120

- 17th November, 1964 to 6th December, 1964 (total incapacity); p.120 Ll.6-14
- 4th March, 1968 to 23rd April, 1968 (total incapacity);
- 24th April, 1968 to 2nd August, 1968 (partial incapacity);

and for hospital and medical expenses pursuant to Section 10 of the Workers' Compensation Act, 1926 (as amended). p.120 Ll.15-18

7. On the 5th day of November, 1968 Morris received an award of compensation in the Workers' Compensation Commission of New South Wales (No. 3481 of 1967) against T.H.Bushby in respect of incapacity resulting from the injury received by him on the 17th June, 1966 and relating to the following periods: pp.122-123

- 17th June, 1966 to 22nd June, 1966 (total incapacity); p.122 Ll.36-44
- 4th March, 1968 to 23rd April, 1968 (total incapacity);
- 24th April, 1968 to 2nd August, 1968 (partial incapacity);

and for hospital and medical expenses pursuant to Section 10 of the Workers' Compensation Act, 1926 (as amended) p.122 L.45 p.123 Ll.3-5

8. On the 1st day of April, 1968 Morris underwent a laminectomy to the lumbar level of his spine. In 1970, 1971 and 1973 he received medical treatment in respect of his lumbar spine condition. In 1974 and 1975 Morris underwent medical and hospital treatment, including a spinal fusion operation. This was followed by rehabilitation treatment at a Rehabilitation Centre between October, 1975 and 11th March, 1976. p.21 Ll.21-30

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pp.96-97 9. On the 9th day of November, 1974 Morris filed an application for determination (No. 8102 of 1974) in the Workers' Compensation Commission of New South Wales against George and McKern claiming weekly
p.97 compensation and medical expenses for incapacity
Ll.26-30 resulting from the injury sustained by him in the course of his employment with them on 16th November 1964.

10. On the 13th day of May, 1975 Morris filed an
pp.99-101 application for determination (No. 3600 of 1975) in the Workers' Compensation Commission of New South
p.100 Wales against Glenmore claiming weekly compensation
Ll.26-30 and medical expenses for incapacity resulting from
Ll.33-34 the injury sustained by him in the course of his employment with George and McKern on 16th November, 1964.

pp.105-108 11. On the 17th day of November, 1975 Morris filed an application for determination (No. 9101 of 1975) in the Workers' Compensation Commission of New South Wales against Bushby claiming weekly compensation
p.108 and medical expenses for incapacity resulting from
Ll.12-21 the injury sustained by him in the course of his employment with Bushby on 17th June, 1966.

12. Morris also filed an application for
p.49 determination (No. 7933 of 1973) against Hull and
L.17 Lowrey claiming compensation for incapacity
p.6 resulting from an injury sustained by him on and
L.10 prior to 21st December, 1972 arising out of and in
p.11 the course of his employment with them.
Ll.12-15

p.49 13. The Workers' Compensation Commission of New
Ll.24-25 South Wales found such injury to have been received and that total incapacity for a period of 14 days resulted from it. Whilst making the above findings
p.17 no award was made initially in the matter but
Ll.17-20 later an award of compensation limited to the short period of total incapacity was made in favour of Morris against Hull and Lowrey.

p.53 14. Morris filed a further application for
L.20 determination (No. 8110 of 1974) claiming compensation in respect of incapacity resulting from an injury received in July, 1974 arising out
p.11 of and in the course of his employment with
Ll.16-18 D.O'Brien and Co. Pty, Limited.

p.53 15. The Workers' Compensation Commission of New
L.27 South Wales found such injury had been received
p.54 and that Morris was totally incapacited for work
Ll.3-4 for at least one month as a result of that injury. Whilst making the above findings no award was made initially in the matter but later an award of

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compensation limited to the short period of total incapacity referred to was made in favour of Morris against D.O'Brian and Co.Pty. Limited. p.17 Ll.18-19

16. A claim was made by Morris (No. 8103 of 1974) under Section 18C of the Workers' Compensation Act, 1926 (as amended) for payment out of the funds of the Uninsured Liability Scheme of any compensation which might be awarded to Morris against George and McKern on the grounds that George and McKern did not at the relevant time have a policy of insurance or indemnity under the Workers' Compensation Act, 1926 (as amended) for the full amount of their liability to Morris under such Act. p.53 Ll.6-8 p.6 Ll.2-7

17. The applications gainst George and McKern, Glenmore, Bushby, Hull and Lowrey, D.O'Brian and Co.Pty. Limited and the Uninsured Liability Scheme were all heard together. p.6 Ll.2-12

18. On the 7th day of July, 1976 the Workers' Compensation Commission of New South Wales made anaward of compensation against George and McKern as follows: pp.21-24

- $80 per week from 16th January, 1973 to 21st February, 1973 (total incapacity); and p.23 Ll.16-18
- $80 per week from 18th August, 1974 to 2nd February, 1976 (total incapacity); and p.23 Ll.16-18
- $70 per week from 3rd February, 1976 to the date of award and continuing (partial incapacity); p.23 Ll.20-24

and for hospital and medical expenses pursuant to Section 10 of the Workers' Compensation Act, 1926 (as amended). p.23 Ll.25-26

19. Identical awards were made against Glenmore and against Bushby. The facts and findings of the Workers' Compensation Commission of New South Wales were set out in a single written judgment dated 30th November, 1976. p.17 Ll.14-16 p.40

20. George and McKern were found by the Woerkers' Compensation Commission of New South Wales to have been uninsured against their full liability to Morris under the Workers' Compensation Act, 1926 (as amended) at the time he received his injury in their employment, but in the exercise of its discretion declined to make any order for payment to Morris from the Uninsured Liability Scheme. p.53 Ll.8-18 p.6 Ll.17-24

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p.25
p.31
p.38

21. On the 4th day of August, 1976 the amounts of compensation awarded were amended by the Workers' Compensation Commission of New South Wales so as to reduce from $80 per week to $53 per week the compensation payable under each award in respect of the periods from 16th January, 1973 to 21st February, 1973 and from 18th August, 1974 to 30th August, 1975.

p.16
Ll.25-27

22. The Workers' Compensation Commission of New South Wales expressly found that the medical and hospital treatment the subject of the awards against George and McKern, against Glenmore and against Bushby did not result from the injuries received by Morris in December, 1972 or July, 1974.

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Ll.21-25

23. In each of the awards of compensation made against George and McKern, against Glenmore and against Bushby, the Workers' Compensation Commission of New South Wales noted that compensation paid to Morris under any award should pro tanto discharge the liability of the other employers under the awards made against them.

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Ll.24-31

24. The Workers' Compensation Commission of New South Wales of its own motion stated a case on seven questions for the Court of Appeal of New South Wales. The Registrar of the Workers' Compensation

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Commission of New South Wales was not a party to the case as stated but was added as a party to the proceedings by an order of the Court of Appeal of

pp.124-125

New South Wales on 2nd August, 1977. The questions submitted for the decision of the Court of Appeal

pp.18-20

of New South Wales and the answers given by that Court to those questions were as follows:

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Question 1: Whether upon the true construction of the provisions of Section 6(3) of the Act, the Award made in favour of the Applicant against the Respondents R.D.George and F.W.McKern is invalid by virtue of the fact that, at the time the Award was made, the Commission had made, on 15th November, 1968, an Award for compensation in favour of the Applicant against the Respondent Glenmore Pty.Limited under the provisions of Section 6(3)(a) of the Act with respect to the injury received by the Applicant on 16th November, 1964 in the course of the Applicant's employment with the Respondents R.D.George and F.W.McKern?

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L.15

Answer: No.

p.18
p.189

Question 2: If the answer to question (1) be in the negative, whether upon the true construction of the provisions of Section 6(3) of the Act, the Award

made in the instant proceedings in favour of the Applicant against the Respondent, Glenmore Pty. Limited was invalid by virtue of the fact that the Award made in favour of the Applicant against the Respondents R.D.George and F.W.McKern had been made before the first mentioned Award was made?

Answer: No. p.189 L.24

Question 3: Whether there was any evidence to support the findings set forth in the Award made in favour of the Applicant against the Respondents R.D.George and F.W.McKern? p.19 p.189

Answer: Yes. p.190 L.2

Question 4: Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent Glenmore Pty. Limited? p.19 p.190

Answer: Yes. p.190 L.6

Question 5: Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent T.H.Bushby? p.19 p.190

Answer: Yes. p.190 L.10

Question 6: Whether the Applicant was disentitled to the Award of Compensation specified in the Award in his favour against the Respondent T.H.Bushby once the Commission had made validly any one of the two instant Awards against the Respondents, R.D.George and F.W.McKern and the Respondent Glenmore Pty., Limited for the payment of the same compensation as he was awarded under the Award made against the Respondent T.H.Bushby? p.19 p.190

Answer: No. p.190 L.19

Question 7: Whether the Order made by the Commission in each of the three above-mentioned matters, that the Compensation paid by the respective Respondents under the relevant Awards should be pro tanto a discharge of the liability of each of the other two Respondents under the respective Awards made against them, it or him, as the case may be, was unlawful and without force and effect? pp.19-20 p.190

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L.27

Answer: NOT ARGUED.

25. In answering Question 7 the Court of Appeal of New South Wales appears to have overlooked a submission put by Counsel for the Appellant, Bushby, and recorded at page 52 of the transcript of the argument before the Court of Appeal of New South Wales as follows:

Mr. Cripps: . . . . "The final question in the case is whether or not the learned Judge was able to make the orders he did make; that is did he have jursidiction to make orders that if I paid the worker, that payment discharged Glenmore and if Glenmore paid the worker that discharged me.

My submission is that there is no jurisdiction to make that order."

26. It is submitted that on its true construction the Workers' Compensation Act, 1926 (as amended), and in particular Section 9 of that Act, does not permit of more than one award being made against more than one employer for the same period of total incapacity.

27. It is further submitted that on its true construction the Workers' Compensation Act, 1926 (as amended), and in particular Section 9 of that Act, does not permit of more than one award being made against more than one employer for the same period and for the same partial incapacity.

28. It is also submitted that on its true construction the Workers' Compensation Act, 1926, (as amended), and in particular Section 10 of that Act, does not permit of more than one award being made in respect of particular medical, hospital and rehabilitation expenses.

29. The Appellants submit that the scheme of the Workers' Compensation Act, 1926 (as amended), and in particular of Sections 7, 8, 9 and 10 of that Act, is not such as to permit the making of the awards made by the primary Judge in the instant case.

30. Section 7(1a) of the Workers' Compensation Act, 1926 (as amended) provides:

> "A worker who has received an injury whether at or away from his place of employment (and in the case of the death of the worker, his dependants) shall receive compensation from his employer in accordance with this Act."

Section 8 of the Act provides for the payment of compensation in differing amounts depending upon whether the deceased worker died leaving dependants or not in those cases "where death results from the injury".

Section 9 of the Act provides for the payment of weekly compensation to a worker "where total or partial incapacity for work results from the injury."

Section 10 of the Act provides for payment of the cost of medical, hospital and rehabilitation treatment which an injured worker requires as a result of injury sustained by him.

31. In the event of incapacity (whether total or partial) or of death, the question which the Court must answer when determing the entitlement of an injured worker to compensation is:

> "Did the incapacity (or death as the case may be) result from the injury."

(Commonwealth of Australia v. Butler (1958) 102 C.L.R. 465 at 480; Darling Island Stevedoring and Lighterage Co. Limited v. Hankinson (1967) 117 C.L.R. 19 at 25; Dunham v. Clare (1902) 2 K.B.292 at 296, 297; Hogan v. Bentinck West Hartley Collieries (Owners) Limited (1949) 2 All E.R. 588 at 590, 593 - 594).

32. In dealing with the entitlement of a worker to compensation under the Act and the liability of an employer to pay such compensation the question referred to above should not be inverted as its inversion tends to distract from the simple relationship which the legislation contemplates as existing between "the injury" and "the incapacity" (Commonwealth v. Butler (1958) 102 C.L.R. 465 at 479; Darling Island Stevedoring and Lighterage Co. Limited v. Hankinson (1967) 117 C.L.R. 19 at 25 to 26; Ward v. Corrimal-Balgownie Collieries Limited (1938) 61 C.L.R. 120 at 141 per Dixon J.).

33. The simple relationship which exists between "the injury" and "the incapacity" or "death" was recognised by the Court of Appeal of England in Noden v. Galloways Ltd., (1912) 1 K.B. 46. In that case a worker was found to be suffering from an incapacity to which two accidents had each contributed. The primary Judge made anaward in favour of the injured worker on the basis of the accident which had occurred first and in so doing posed as the question for determination

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"whether that accident is a contributing cause to the incapacity which has come on." This was held to be an error, the Court taking the view that where two injuries contribute to one incapacity such incapacity cannot be "the result" of both injuries. This is the proposition for which the case is quoted as authority in the standard English work of reference (Willis: Workmens' Compensation Acts; 37th Edition, 1945).

34. The decision in Noden v. Galloways Ltd., (Supra) has been applied in England (Roberts v. Broughton and Plas Power Colliery Co. Limited (1921) 14 BWCC 186; Hutchinson v. Kiveton Park Colliery Company (1926) 1 K.B. 279 and was referred without disapproval in Hutchings v. Devon County Council (1931) 24 B.W.C.C. 320 at 331.

35. It is submitted that the cases in England proceed upon the basis that where a man has been incapacitated as a result of an accident and subsequently has a second accident, the question whether his state of incapacity is to be found to result from the first or the second accident, whilst difficult, must be answered (Gilmour v. Garellan Coal Co. (1926) 19 BWCC 683 at 692). This would be unnecessary if the construction of the Workers' Compensation Act, 1926 (as amended), adopted by the Court of Appeal of New South Wales were correct.

36. Noden v. Galloways Ltd., (Supra) has been applied in the Workers' Compensation Commission of New South Wales (eg., Gunter v. Gunter (1966) 40 WCR.21 at 28; Hill v. Brewer Ford Motors Pty. Limited (1969) 43 WCR.80 at 85; Grice v. Cumming (1974) WCR 114 at 118) by the Court of Appeal of New South Wales (Astill v. Orange Blue Metal Pty. Limited (1969) 43 WCR. 39 at 41; Pyrmont Publishing Co. v. Peters (1972) 46 WCR. 27; La Macchia v. Cockatoo Docks (1972) 2 N.S.W.L.R.644 at 648) and by the High Court (The Commonwealth v. Butler (1958) 102 C.L.R. 465 at 473).

37. It has also been applied in New Zealand Boyd v. Napier Harbour Council (1919) 38 N.Z.L.R. 353 at 355) and has been treated as a correct statement of the law applicable in New Zealand in the standard works of reference in that country (MacDonald's Workers' Compensation; 4th Edition; 274 281; Workers' Compensation Law in New Zealand; Campbell, 2nd Edition 40).

38. It is submitted that insofar as authority and practice are concerned the view has been taken that a particular incapacity can result from but one injury. This view was taken by the President of the court of Appeal of New South Wales in the present case.

p.145 L.10

39. The construction put on behalf of the Appellants is supported by the other provisions of the Act, including Sections 53, 63 and 64.

40. Section 16 of the Workers' Compensation Act, 1926 (as amended), provides for a lump sum payment of compensation in respect of certain specified injuries. Authority relating to this sectionis consistent with the approach adopted in Noden v. Galloways Ltd. (Supra). Section 16 requires each injury to be considered separately in relation to the effect which is produced by it. (King v. Hayward (1943) 67 C.L.R.488 at 493; Rodios v. Trefle (1937) 54 W.N.(N.S.W.) 197; Grice v. Cumming (1974) W.C.R.114).

41. The words "where total or partial incapacity for work results from the injury" appearing in Section 9 of the Act are to be found in earlier cognate legislation in New South Wales (Workmens' Compensation Act, 1916, Schedule 1 (No. 71 of 1916); Workmens' Compensation Act, 1910, Second Schedule (No. 10 of 1910) and are derived from equivalent legislative provisions in the United Kingdom, in particular the Workmen's Compensation Act, 1906, First Schedule (6 Ed. VII Ch.58) (Ward v. Corrimal-Balgownie Collieries Limited (1938) 61 C.L.R. at 141 per Dixon J.) which in turn stemmed from Workemns' Compensation Act, 1897, First Schedule (60 and 61 Vict.Ch.37). They were carried forward into the Workmens' Compensation Act, 1925 (U.K.).

42. By the time those words were enacted in the current New South Wales Act they were well known (Ward v. Corrimal-Balgownie Collieries Ltd. (Supra)) and had a settled meaning. In these circumstances the re-enactment in 1926 of the relevant words supports an inference that the Legislature was adopting the received interpretation of the provisions through the interpretation given to their English equivalents. (Edwards v. Mainline Constructions Ltd., (1975) 1 N.S.W.L.R. 90; Attorney General v. Shire of Kyneton (1875) 1 V.L.R.(E), 269; Pillar v. Arthur (1912) 15 C.L.R. 18; Platz v. Osborne (1943) 68 C.L.R. 133; R. v. Reynhoudt (1962) 107 C.L.R. 381). Whilst it is recognised that the strength of this principle has been somewhat lessened in modern times (Salvation Army Property Trust v. Ferntree Gully Corporation (1951/2) 85 C.L.R. 159; Galloway v. Galloway (1956) A.C.299 at 320) it is submitted it still has a role to play in respect of decisions given on English legislation adopted in New South Wales

(Bitumen and Oil Refinery Australia Limited v. Commissioner for Government Transport (1954/5) 92 C.L.R. 200 at 211).

43. It is submitted that the construction contended for on behalf of the Appellants has been recognised by the House of Lords in Doudie v. Kinnell Cannel and Coking Coal Co. Ltd. (1947) A.C. 377 at 382, 395, 387 and 389). That case was concerned with Section 9(1) of the Workmens' Compensation Act, 1925 (U.K.), the relevant provisions of which are in essence the same as those of Section 9. of the Workers' Compensation Act, 1926 (as amended) (N.S.W.). In that case Viscount Lord Simon said:

"Where s.9 begins by saying that:

> 'The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained', "the injury" is the specific injury then under consideration which produces a degree of incapacity. The proviso is a proviso to this section and relates to compensation for the specific injury. The fact that a workman has been previously injured and partly incapacitated is irrelevant". (at 382); and

> "The appellant acquired on the occasion of each accident a separate right to compensation in respect of the personal injury caused by the particular accident. If so the measurement of the compensation in respect thereof will involve a separate measurement in respect of each right to compensation and ss.8 and 9 are thus deisgned to quantify the compensation due in respect of injury caused by the particular accident, in respect of which the statutory right to compensation is acquired." (at 385).

Lord MacMillan said:

> "As Slesser L.J. said in Thompson's case (1935) 2 K.B. 90, 100)
>
> 'The partial incapacity is not so absorbed in the total incapacity that there is but one claim; there are two separate and continuing liabilities giving rise to two separate claims for compensation'." (at 387).

The approach adopted by Lord du Parcq (at 389) is consistent with this.

44. The decision in Doudie v. Kinneil Cannel and Coking Coal Co. Ltd. has been applied in New South Wales both by the Court of Appeal of New South Wales (Holmes v. Civil and Civic Pty. Ltd. (1970) 72 S.R. (N.S.W. 583) and by the Workers' Compensation Commission of New South Wales (Shaw v. Darling Island Stevedoring and Lighterage Co. Pty. Ltd. (1957) WCR. 135; Beaton v. Yipps & Co. (1966) WCR. 78 and Barbosa v. Peter Verhuel Pty. Ltd. (1974) WCR. 207).

It has also been applied in New Zealand (Raumati v. Pukemiro Collieries Ltd. (1957) N.Z.L.R. 901 at 903).

45. The views expressed in Doudie v. Kinneil Cannel and Coking Coal Co. Ltd. (Supra) accord with those expressed in Jones v. Amalgamated Anthracite Collieries Ltd. (1944) A.C. 14 at 23, 25) and in Amalgamated Anthracite Collieries Ltd. v. Wilds (1948) A.C. 440 at 447, 454).

46. The Court of Appeal of New South Wales adopted a construction of the Act which involved a radical alteration in the practice of the Workers' Compensation Commission of New South Wales. To do so was an error, for such a step requires substantial reasons (Geraldton Building Co. Pty. Ltd. v. May (1976) 136 C.L.R. 379 at 389 per Barwick C.J.) and these did not exist. In rejecting the decisions of the Court of Appeal of England, the Court of Appeal of New South Wales acted contrary to authority which binds it (Public Transport Commission of New South Wales v. J. Murray-Moore (N.S.W.) Pty. Limited (1975) 132 C.L.R. 336 at 341, 349 and Viro v. The Queen (1978) 52 A.L.J.R. 418 at 430).

47. The absence of any relevant apportionment provisions in the Workers' Compensation Act, 1926 (as amended), is material to the adoption of the approach taken by the English Court of Appeal in Noden v. Galloways Ltd. (Supra) and is inconsistent with the orders made by the Workers' Compensation Commission of New South Wales concerning pro tanto satisfaction of each award by payment made under one of the awards. (Adelaide Assemblers Ltd. v. Kutos (1974) 9 S.A.S.R. 102; Brakespeare v. The Northern Assurance Co. Ltd. (1959) 101 C.L.R. 661).

48. The construction contended for by the Appellants involves a consistent approach to the relationship between "the injury" and "the incapacity" which "results" from such injury. It does not require the importation into the Workers' Compensation Act, 1926 (as amended),

of complicated concepts of causation drawn from the Common Law nor does it require the importation of any apportionment concepts dependant upon dual insurance principles, nor an importation into the Act of notions drawn from apportionment legislation designed to overcome the pre-existing Common Law situation in relation contribution between to tort-feasors. (Thomson v. Armstrong and Royce Pty. Ltd. (1950) 81 C.L.R. 585 at 616; Hogan v. Bentinck West Bartley Collieries (Owners) Ltd. (1949) 2 All E.R. 588 at 593-4).

49. The applicability of the principles relating to dual insurance is doubtful since the event to which insurance under the Workers' Compensation Act, 1926 (as amended) attaches is injury. Australian Iron and Steel Limited v. Coal Mines Insurance (1951) 52 S.R.47; Fisher v. Hebburn Collieries Ltd. (1960) 105 C.L.R. 188 at 203, 207; cf. United Collieries Ltd. v. Simpson (1909) A.C. 383 at 393 and the assumption made in Ogden v. Lucas (1970) A.C. 113; Floreani Bros. Pty. Ltd. v. Woolscourers (S.A.) Pty. Ltd. (1976) 13 SASR. 313 at 320; Halsbury's Laws of England, 4th Edn.Vol. 16, p.838).

50. If a view contrary to that submitted on behalf of the Appellants were to be taken of the relationship between incapacity and "the injury", so that the one incapacity could be said to "result" from more than one "injury" some curious results flow eg., the dependants of a deceased worker could be entitled to two awards in respect of the death of a worker, unless the reasoning in Doudie v. Kinneil Cannel and Coking Coal Co. Pty. Ltd. (Supra) is incorrect.

51. The approach taken by the Court of Appeal of New South Wales also creates severe difficulties in relation to the administration of Section 15 of the Workers' Compensation Act, 1926 (as amended).

52. The decision of the Court of Appeal of New South Wales gives rise to the anomalous situation of a worker having two awards in respect of the same periods of total incapacity. This is contrary to the policy of the Act and to authority. (Wheatley v. Lambton , Hetton and Joicey Collieries Ltd. (1937) 2 K.B. 426; Amalgamated Anthracite Collieries Ltd. v. Wilds (1948) A.C. 440; Dawkins v. Metropolitan Coal Co. Ltd. (1947) 75 C.L.R. 169 at 187).

53. The Court of Appeal of New South Wales has not demonstrated any adequate reason for departing from the well established practice and authority which

existed in relation to the interpretation of Section 9, in its application to the situation in the present case.

54. It is respectfully submitted that the decision of the Court of Appeal of New South Wales:

(a) depends upon the adoption of Bratovich v. Rheem Australia Pty. Limited (1971) 2 SASR.33), which decision itself demonstrate inadequate reason for departing from the settled interpretation given to the South Australian equivalent Section 9 of the New South Wales Act and its English counterparts, and, depends upon an incorrect application of Doudie v. Kinneil Cannel and Coking Coal) Co. Pty. Ltd. (supra);

(b) relies upon Conkey & Son Limited v. Miller (1977) 51 A.L.J.R. 583) as authority for a proposition for which it is not authority. It is submitted that such case is authority for the proposition that the selection of the event from which death "results" is a question of fact, and there was evidence to support the event which the primary Judge chose as being that from which the death in question resulted;

(c) is inconsistent with the conclusion arrived at by the Court of Appeal of New South Wales in Biegelmann v. Eglo Engineering Pty. Limited (unreported) 18 October, 1978 (CA 1 of 1978).

(d) is incorrect.

55. The Appellants respectfully submit that the order of the Supreme Court of New South Wales was wrong and ought to be reversed and that the questions asked in the case stated by the Workers' Compensation Commission of New South Wales should be answered in the following manner:

Q.1. Not argued.

Q.2. Not argued.

Q.3. Subject to the answer to Question 6, Yes.

Q.4. Subject to the answer to Question 6, Yes.

Q.5. Subject to the answer to Question 6, Yes.

Q.6. Yes.

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Q.7. Does not arise, or alternatively "Yes".

REASONS

1. BECAUSE the decision appealed from assigns an incorrect construction to the Workers' Compensation Act, 1926 (as amended).

2. BECAUSE the Court of Appeal of New South Wales erred in failing to apply the decision of the Court of Appeal of England in Noden v. Galloways Ltd. (Supra).

3. BECAUSE the Court of Appeal of New South Wales misconstrued the provisions of S.9 of the Workers' Compensation Act, 1926 (as amended).

4. BECAUSE the Court of Appeal of New South Wales erred in holding that there was jurisdiction in the Workers' Compensation Commission of New South Wales to order that compensation paid by one employer under an award made against it could and should be a pro tanto discharge of the liability of another employer or other employers under awards made against them.

B.S.J. O'KEEFE

A.R. ABADEE

No. 31 of 1979

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

BETWEEN :

T.H. BUSHBY First Appellant

- and -

GLENMORE PTY. LIMITED Second Appellant

- and -

SYDNEY BLAIR MORRIS, R.D. GEORGE, F.W. McKERN, C.F. WHITEHOUSE and THE REGISTRAR OF THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES Respondents

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CASE FOR THE APPELLANTS

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