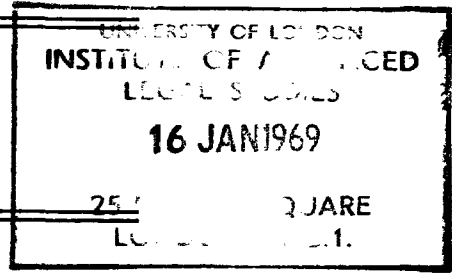


28, 1968

No. 12 of 1968

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA



BETWEEN
OGDEN INDUSTRIES PTY. LIMITED
(Respondent) Appellant
- and -
10 HEATHER DOREEN LUCAS
(Applicant) Respondent

CASE FOR RESPONDENT

INTRODUCTION

RECORD

20 1. This is an Appeal brought by special leave, granted by Her Majesty by Order in Council, dated the 26th of January 1968, from a judgement of the High Court of Australia, delivered on the 20th day of September 1967. The judgement dismissed an Appeal from a judgement of the Full Court of the Supreme Court of Victoria, dated the 28th day of February 1967 which in turn answered in favour of the respondent a question asked by the Workers' Compensation Board in a case stated pursuant to Section 56 of the Victorian Workers' Compensation Act 1958.

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The said Board awarded the respondent and her two children \$A9,400.00 as compensation for the injury done to them by the death of Reginald George Lucas a worker within the meaning of the said Act. The said sum of \$A9,400.00 is the amount fixed by the Workers' Compensation Act 1965 (No. 7292) hereafter referred to as "the

p. 10

RECORD

amending Act") as compensation for claimants in the circumstances of the respondent. The amending Act came into operation on the 1st day of July 1965 and before the death of the worker on the 7th day of July 1965.

The appellant contends that the respondent and her two children are entitled only to \$A4,800.00, that being the compensation payable to dependants on the death of the worker under the Workers' Compensation Act 1958 (No. 6419) (hereafter referred to as the Principal Act).

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pp.81-82
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The High Court decided that a dependant of a worker is entitled to compensation at the rate provided by the amending Act where the death of the worker occurred after the amending Act came into operation.

pp.61-71
pp.74-87
pp.92-107

The respondent submits that the reasons for judgement of Taylor, Windeyer and Owen JJ. were correct and adopts those reasons.

DEPENDANTS HAVE AN INDEPENDENT RIGHT

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2. The right of the dependants to compensation is a right separate from that of the worker. Willis' Workmens' Compensation 36th Edition p.246 states:- "Dependants have Distinct Rights - Subject to certain limitations the rights to compensation which the dependants have on the death of a workman are separate and distinct from those of the workman himself; they are derived directly from the statute and not through the workman."

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This statement accurately summarises the effect of the decision in Tucker v. Oldbury Urban District Council (1912) 2 K.B. 317; Manton v. Cantwell (1920) A.C. 781; Kinniel Cannel Coal Co. v. Waddell (1931) A.C. 575. The decision of Avery v. L. & N.E.R. (1938) A.C. 606 is in accordance with this proposition. The case of United Collieries v. Simpson (1909) A.C. 383 strongly supports the respondent's contention

The Workers' Compensation Acts are concerned with injury to the dependants by reason of the

death. Clause 1(a)(ii) of the Clauses to Section 9 directs the Board to assess compensation for partial dependants as "such sum ... as in the opinion of the Board is reasonable and appropriate to the injury to the dependants". In the case of total dependants the injury to the dependants is the amount fixed by the Act. The important thing is the injury to the dependants by death.

10 This is comparable with Lord Campbells Act. Section 7 of the Act of 1861 provided:-

20 "Whensoever the death of a person shall be caused by a wrongful act, neglect, or default, and that act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured"

In Steward v. The Vera Cruz 10 App. Cas. 59 the Earl of Selbourne L.C. said (at p.67) of that provision in relation to a claim by a widow "death is essentially the cause of the action". In the same case Lord Blackburn said at p.70

30 ".... a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived which can only be brought if there is any person answering the description of the widow, parent or child who suffers pecuniary loss by death."

(See Victorian Wrongs Act 1958 ss 15 to 18)

DEPENDANTS RIGHTS ACCRUE ON DEATH

40 3. The right of the dependants to compensation arises only upon the death of the worker. Until death there is no entitlement at all. Until death there is not, and could not be, any ascertainment of dependants. The law at the date of death must be looked at to see what persons answer the prescription laid down by the Act and the amount to which the persons who answer the prescription

are entitled. At the time of injury there is no present right in the persons who may ultimately qualify as dependants. No question of their rights can arise because they are not in existence qua dependants. The event which is to determine the rights of people who may ultimately become dependants has not occurred. In this case that event occurred on July 7, 1965. The respondent was not a dependant until that date. She had no rights and the appellant was under no liability to her. The decisions of Dwyer v. Broken Hill South Ltd. (1928) N.S.W. W.C.R. 207 supports this proposition.

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Although, without injury to the worker, dependants could not acquire rights, the rights of dependants (if any) accrue on the death of the worker.

The right which accrues on death must be ascertained by the law at the moment of death.

This does not involve giving the amending Act retrospective operation. It only applies to rights which accrue after it comes into operation.

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Section 7(2) of the Acts Interpretation Act does not assist the appellant. The relevant provisions of Section 7(2) of the Acts Interpretation Act provide:-

"Where any Act passed on or after the first day of August 1890, 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

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- (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 penalty forfeiture or punishment as aforesaid.

10 So far as the respondent's right to the amount of compensation fixed by the amending Act is concerned, there is nothing in this section which can be said to affect that right adversely.

NATURE OF EMPLOYERS LIABILITY TO DEPENDANTS

4. But it is said that a liability was incurred by the employer at the time of the injury which liability was of such a nature as to attract the operation of Section 7(2)(c) of the Acts Interpretation Act.

20 This argument assumes that the injury was complete before the amending Act. In the present case the Respondent contends that this is not so but on any view the Appellant's argument is incorrect, because the nature of the liability referred to in Section 7(2)(c) is different from the liability referred to in Section 5(1) of the Workers' Compensation Act. The type of liability which is referred to in Section 7(2)(c), and in
30 the cases which deal with the question of the retrospective operation of statutes is a liability which is fixed and complete. However the liability which the employer was exposed to on
40 injury was not fixed and complete but was continuous and included the contingency of the occurrence of circumstances provided for "in accordance with the provisions of this Act". It required the occurrence of death, incapacity, Section 11 injury, incurring medical or similar expenses (Section 26) to render operative the words "in accordance with the provisions of this Act". In the case of death, the persons who would be dependants could not be determined until the moment of death. Thus where death did not occur at the

time of injury it was not possible to say what liability (if any) would be incurred by the employer on death. That had to await future events, and there was no complete or fixed liability, for example, as to persons or amount.

On the other hand, given a qualifying injury, by the operation of Section 5(1) of the Workers' Compensation Act itself, the employer became and continued to be liable to pay compensation in accordance with the provisions of the Act. 10

If the worker died before the amending Act, then his employer's liability would have become complete and would have remained unaffected by the amending Act. The corresponding right of the respondent would have come into existence on death, and it too would have remained unaffected by the amending Act. The amendment simply took its place in the continuing scheme of Workers' Compensation. 20

Section 5(3) of the Victorian Acts Interpretation Act operates to produce a similar result.

Section 5(3) of the Acts Interpretation Act provides:-

5(3) Any reference in any Act (whenever passed) to that Act or any other Act or to any provision of that Act or any other Act (whenever passed) shall unless the contrary intention appears be read and construed as a reference to the Act or provision in question as re-enacted or amended from time to time;

As required by that section when the question of ascertaining what was the liability of the employer on the death of the respondent's husband arose, it was to be answered in accordance with the provisions of the principal Act as amended from time to time, thus including the amending Act. 40

In addition the application of Section 5(3) of the Acts Interpretation Act to Section 5(1) of the principal Act means that the principal

Act must be read and construed as providing that the employer shall be liable to pay compensation in accordance with the provisions of that Act as amended from time to time.

10 To read and construe Section 5(1) in this way is to do no more than the Victorian Parliament has directed must be done in reading and construing its own enactments. The question as to what occurrences will give rise to liability, the persons to whom that liability will be owed and the amount of the liability were thus left to be determined by the provisions which operated from time to time.

NO RETROSPECTIVE OPERATION INVOLVED

20 6. There is no question of retrospective operation of legislation involved. The critical event is the death of the worker and that occurred after the date of commencement of the amending Act. The contraction of the disease and the occurrence of the injury are only the first events in a series of events which may culminate in liability. A statute which creates rights and liabilities on the happening of certain subsequent events is not retrospective merely because it has taken as part of the material with which it is dealing, a circumstance or circumstances existing prior to the date of its enactment. A statute "is not properly called a retrospective statute because a part of the requisite for its action is drawn from a time antecedent to its passing" (per Lord Denman C.J. in R. v. St. Mary Whitechapel (Inhabitants) (1948) 12 Q.B. 120 at 127; Craies on Statute Law 6th Edition (1963) p. 386 et seq; Nash v. Sunshine Porcelain Potteries 101 C.L.R. 353 (High Court); Sunshine Porcelain Potteries v. Nash 104 C.L.R. 639 (Privy Council)). As Fullagar J. said in Fisher v. Hebburn Ltd. 105 C.L.R. 188 at p. 194

40 "There can be no doubt that the general rule is that an amending enactment - or, for that matter any enactment - is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts, or events which

occurred before its commencement. The rule has been frequently applied to amending statutes relating to Workers' Compensation; and it has often been held that such amendments apply only in respect of 'accidents' or 'injuries' occurring after their coming into force; the cases of Moakes v. Blackwell Colliery Co. Ltd. (1925) 2 K.B. and Kraljevich v. Lake View and Star Ltd. (1945) 70 C.L.R. 647 are familiar examples. But there is no rule of law that such statutes must be so construed, and it would not be true to say that a retrospective effect can only be avoided by confining the operation of such a statute to subsequently occurring 'accidents' or 'injuries'. It may truly be said to operate prospectively only, although its prospect begins, so to speak, with some other event than accident or injury."

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MEANING AND SIGNIFICANCE OF INJURY

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7. The Workers' Compensation Acts of Victoria provide a scheme of compensation based on a concept of 'injury' which is incompatible with the notion that a moment of injury should be the time at which the rights and liabilities of the parties become fixed. Indeed, as the term 'injury' is now used in the Victorian Acts it is no longer appropriate to speak of 'a moment of injury' at all.

But the argument for the appellant makes 'the moment of injury' the time at which the rights and liabilities of the various parties are to be defined. This may have been appropriate under legislation which was concerned with 'injury by accident arising out of and in the course of the employment'. Under that legislation the sudden event embraced in the notion 'accident' which was required both to arise out of and in the course of the employment enabled and required a pinpointing of the event from which liability arose and from which rights were derived. However, the Victorian Legislation is concerned merely with injury arising out of OR in the course of the employment and contains definitions of disease and injury which make it unnecessary, and

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often impossible to define the time at which the 'injury' can be said to have occurred. Moreover, the Victorian Legislation, containing as it does in the case of a disease, the concept of a continuing injury, has moved away from the notions which made it essential to be able to pinpoint the event which constituted injury by accident. Thus under the Victorian Legislation as it now stands it is quite inappropriate to look for a precise moment of injury to establish the parties' rights and liabilities.

8. It is necessary to look briefly at the way in which the Victorian Legislation has evolved from the English scheme and to show how these fundamental changes have come about.

The last Victorian Act to follow the English Act closely was the 1928 Victorian consolidated Workers' Compensation Act. Section 5 of that Act was concerned with injury by accident arising both out of and in the course of the employment. It contained no definition of injury or disease. Subsequent amendments have been remedial in nature (Patrick v. Sharpe (1955) A.C.1)

In 1946, by Act No. 5128, several important changes were made. Section 5 was radically amended so as to provide merely that the injury by accident either arose out of OR in the course of the employment. In itself this was a very important change. For example, in the years between the 1946 amendment of the Victorian Act and the 1953 amendment (in which latter year the word 'accident' was removed from the Act) an injury by accident, as for example a cerebro vascular accident, could arise long after the employment had ceased and entitle the worker or his dependants to compensation. That is to say, events long past (as the employment itself) could found a claim. This was quite foreign to the notions in the English Act throughout the entire period of its operation.

The fundamental nature of the change which such amendment brought about was acknowledged and considered by Evatt J. in Hetherington v. Amalgamated Collieries of W.A. 62 C.L.R. 317 at 337, Dixon C.J. in Kavanagh v. The Commonwealth 105 C.L.R. 547 at 557 and also in The Commonwealth

v. Oliver C.L.R. 107 353 at 355.

In 1953 the word 'accident' was deleted from the Victorian Act and what is said above applied with even greater force to the concept of injury (unlimited by the word accident).

Just as important as the replacement of the conjunctive "and" by the disjunctive "or" as outlined above was the insertion in the 1946 Act of the definitions of "injury" and of "disease". "Injury" was defined:-

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"'Injury' means any physical or mental injury or disease and includes the aggravation and acceleration or recurrence of any pre-existing injury or disease as aforesaid"

"Disease" was defined:-

"'Disease' includes any physical or mental ailment disorder defect or morbid condition whether of sudden or gradual development and also includes the aggravation acceleration or recurrence of any pre-existing disease as aforesaid."

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In the 1965 Act (7292), the amending Act under debate here, the definition of disease remains unaltered but injury is defined:-

"'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 and acceleration."

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When therefore disease is used in these

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10 definitions of injury it means disease as defined. This idea of disease being included in injury is an idea fundamentally different from anything in any other comparable legislation, and in particular from anything in the English legislation. For example, injury under the Victorian Act can be and commonly is a disease of gradual development. This disease may, for example, get its primary impetus from the employ-
ment, and go on developing gradually after that employment has ceased and years later culminate in death or incapacity. It is entirely logical to attach the compensation to the death or incapacity. The clauses to Section 9 speak of incapacity for work resulting from or materially contributed to by the injury. The injury remains an injury throughout the development of the disease of gradual development, it has arisen out of the past employment and it has resulted in death or
20 incapacity at a given date. Or put in terms of the 1965 Act, it is an injury (disease) or the incident in a disease to which the employment was a contributing factor (cf. Section 26). Under the Victorian Act that injury includes disease, not simply the onset of the disease. Therefore the "injury" is accruing and exists as an injury throughout the whole duration of the disease as the workers' condition is affected by the continued operation of the disease. It is a situation
30 comparable with that in Sunshine Porcelain Potteries v. Nash 104 C.L.R. 639. The view adopted in that decision was far more far reaching than that for which the respondent here contends as to the operation of the amending Act in the instant case.

9. The effect of the definitions of disease and injury is to put all injuries with a disease component in a position parallel with that of industrial diseases. (See also Section 25).

40 Thus, for example, silicosis and any other pneumoconiosis are both injury and industrial disease. Yet the appellant's submission would attach different consequences to deaths which result from them according to whether the dependant makes his claim as based on injury on the one hand or disease on the other hand. According to this argument if he claims on the basis of industrial

disease he will be entitled to the amount prescribed by the amending Act - Sunshine Porcelain Potteries v. Nash 104 C.L.R. 639; if on the basis of injury and the noxious employment has ceased before July 1st 1965, he will according to the appellant's submission be entitled to only the amount in the Principal Act. The definition of injury is not severable (between traumatic injuries and disease injuries) and therefore the principles of the operation of the industrial diseases section are applicable to the injury provisions. The fact that the industrial diseases sections prescribe principles which affect past events show that there is nothing extraordinary in the notion that past events can give rise to current or future liabilities and rights and that the determining date for the measure of the rights and liabilities is the date of death incapacity or determination of a Section 11 Table entitlement. Note too, the observations in Van Kooten v. Haslington 1964 S.R. (N.S.W.) 387 Moreover, these definitions of disease and injury emphasise the point made by Windeyer J. that the increases in amounts of compensation were designed to take their place in an existing and continuing scheme of compensation. See also Nash v. Sunshine Porcelain Potteries 101 C.L.R. 353.

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PRACTICAL EXAMPLES 30

10. It is clear that the occurrence of an injury with a disease component (a very common form of injury) will always tend to transcend legislative dates. The instance of congestive cardiac failure may be taken. The cardiac failure may be aggravated for 3 months while the Act is in its pre-1965 form and one week after its amended form and continue qua injury for varying times thereafter. What is to happen then? The injury cannot be apportioned. The logical solution is to attach the consequences to the events of death or incapacity.

Again it is clear that there can be an injury which arose out of the past (pre-1965) the occurrence of which was not known at the time but only gave rise to incapacity or death

after 1965. What is to happen then? There may be a series of legislative amendments intervene. The only logical solution is to select as the criterion of the operation of the legislation the event of death, the event of incapacity or the definition of Section 11 Table injury. This gives effect to the literal command of the legislation to pay compensation "in accordance with the provisions of this Act."

10 The analogy of the industrial disease provision is directly applicable. The acquisition of the disease may originate or extend over 40-50 years, and the disease qua disease continue in existence for varying times. In the last 40-50 years there have been several amendments of the legislation. The events which caused the death or incapacity have long since passed, yet Nash's case established the logical and practical principle of liability on the date of disablement analogous to
20 incapacity or death. The date of incapacity or death under Section 5 injuries is, as the Act now stands, and has stood since 1946, directly analogous with this. The words "arising out of" in Section 5 coupled with the definitions of "disease" and "injury" are analogous with the words "at any time" in Section 12 discussed in Nash's case.

 An example of the operation of all this is
30 Kiss v. Melody Products (1967) V.R. 440 where the Victorian Full Court regarded the date of ascertainment of Section 11 impairment as the relevant date to determine the amount of compensation. In the instant case, the "injury" embraces not only the specific incidents of the disease, but includes the disease itself (see statement of agreed facts). The injury is not completed on the cessation of the employment. It arose out of an employment which in the sense of the workers actually working in it (but only
40 in that sense) ceased in December 1964. But it continued in existence as an injury right until the moment of death. In other words this injury which arose out of the employment was no less an injury which arose out of the employment at the moment of death, than it was when it got its initial impetus from the employment. Indeed the

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moment of ascertainment of its initial impetus is as difficult (or impossible) to ascertain as was the moment of origin of the disease in Nash v. Sunshine Porcelain Potteries 101 C.L.R. 353. Put in still another way the worker sustained an injury which injury qua injury continued and was in existence qua injury at the time the amending Act came into operation. It was not an event which had passed until death ensued.

The contrary argument properly analysed is really based upon the words "if in any employment". Really it is said that because there was no employment at the time the amending Act came into operation then there could be no rights acquired under the amending Act. Without conceding that there was no employment in the relevant sense it is submitted that it was precisely this argument that was rejected in Nash v. Sunshine Porcelain Potteries 101 C.L.R. 353 and Sunshine Porcelain Potteries v. Nash 104 C.L.R. 639. Such a proposition formed the basis of the decision of the Full Court of Victoria in Nash's case and of the dissenting Judges in the High Court. Were such a view to be adopted here it would strip the conjunction or in the phrase arising out of or in the course of the employment of meaning and it would strip the word "injury" of a great part of its meaning. There is a striking contrast between "injury by accident arising out of and in the course of the employment" with "injury (as defined) arising out of or in the course of the employment". If what was required was fulfilment of the condition "in the course of the employment" then there is something to be said for the view that there must be active working employment at the time the amending Act operates. As the legislation now stands and has stood in Victoria for over 20 years this is simply not so.

THE WORKERS' COMPENSATION ACTS ARE DESIGNED TO PROVIDE A CONTINUING SYSTEM OF COMPENSATION

If it is said that the decision of the High Court gives any retrospective operation this is justified by the Statute and the circumstances of its operation and the consideration that the amendment was enacted to take its place in an

existing and continuing system of Workers' Compensation Law. Nash v. Sunshine Porcelain Potteries 101 C.L.R. 353 and 104 C.L.R. 639. See too Windeyer J. in the instant case. See also considerations discussed in Doro v. Victorian Railways Commissioners (1960) V.R.84.

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APPELLANT'S ARGUMENT BASED ON
CLEMENT V. DAVIES IS UNTENABLE

10 The cases of Moakes v. Blackwell (1925) 2 K.B. 64 and Clement v. Davies (1927) A.C. 126 do not assist the appellant. The legislation considered in those cases had fundamental differences from the legislation under present consideration. Those differences inter alia were:-

20 (i) The amount payable on death under the English legislation at the time of the injury by accident had to be reduced by the amount of weekly payments paid to the worker during his life (or by lump sums paid to the worker in redemption of the liability to make weekly payments). That is the employer was entitled to credit week by week against the contingent liability to pay a dependant who might exist on death. Indeed the whole contingent liability on death could well have been extinguished by the set off of weekly payments.

30 There is no such provision in the Victorian legislation. On the contrary, Clause 1(a)(iv) of the clauses to Section 9 provides:-

40 "No amounts paid or payable before the death of the worker as weekly payments in respect of his total or partial incapacity for work resulting from the injury shall be taken into consideration in calculating the amount of compensation payable as aforesaid upon his death but any sum paid before the death of the worker in redemption of the liability for future weekly payments or in respect of an injury for which compensation is payable under Section 11 of this Act (except so much thereof as in the opinion of the Board is referable to compensation for total or partial incapacity before the death) shall

be deducted from the amount payable as afore-said upon the death".

(ii) The special provision of Section 30 of the amending English Act expressly provided that the provisions of Sections 2-10 of the amendment would not apply to any case where the accident occurred before the commencement of the amending Act. In other words, this special provision was introduced in order to prevent the new amount from being paid to dependants who were ascertained after the amending Act but in consequence of an injury by accident before the amending Act. The funeral benefit increased by Section 24(3) of the English amendment was payable in respect of deaths occurring after the amendment as a consequence of injuries by accident sustained before the amendment. 10

Thus the English legislature proceeded on the footing that it required a special provision in the Act to prevent what the legislature assumed to be the normal operation of the legislation namely its increased benefits would apply to events occurring after the amendment but as the result of injury by accident sustained before the amendment. Had the case proceeded on the footing that Dependants were required to look at the date of the injury by accident, that would have been enough to dispose of it. There would have been no need to examine the precise terms of the Legislation. 20 30

Lord Dunedin's statement:-

"When you are construing an Act which makes changes in the law, which changes can be well referred to what the law is to be after the passing of the Act, you will not construe the words unless they are clearly to that effect so as to upset vested rights and liabilities which are complete in themselves. Applying that canon to the construction of the provisions now in question, one finds that in the case of accidents arising out of and in the course of employment in the past, certain rights and certain liabilities accrue at once to the workman and his dependants on 40

10 the one hand and the employer on the other. The exact pecuniary amount had to depend on the particular circumstances of the quality of the injury, the supervention of death and the state of the workman's family, but the method of calculation was fixed once and for all, and therefore it would not be probable that an Act which was greatly extending benefit and liability would apply to the accidents of the past, and Section 30 makes this quite clear to a great extent by expressly declaring that the additional benefits conferred by Sections 2 to 10 are not to enure to any class arising out of accidents in the past."

20 is not the ratio decidendi of the case; it has no general support and it is to be read in the light of the particular legislation under consideration. Moreover, the statement itself arose from the particular statute with its provisions for accrual of weekly set off. It must be considered in the light of the particular statutory provisions.

Lord Dunedin himself then said at page 150:-

30 "The direction as to a deduction not being allowed to reduce the amount payable to less than £200.0.0 is only a deduction which is to be made from the sum calculated on Section 1(a)(i) of the First Schedule as amended by Section 2, and the schedule as amended by Section 2 is a schedule which can only apply to new accidents because the amendments affected by Section 2 are specifically excluded from applying to old accidents."

(iii) The legislation was concerned with injury by accident which arose out of and in the course of the employment. This is fundamentally different from the Victorian legislation as previously submitted.

40 APPELLANT'S ARGUMENT BASED ON COMPULSORY
INSURANCE UNTENABLE AND IRRELEVANT

11. The appellant has contended that difficulties occur with relation to the system of compulsory

insurance if the decision of the High Court is upheld. This is simply not so. The system of compulsory insurance is designed to cover an employer's liability under the Act. If the liability is in accord with the High Court's decision the insurer is to indemnify the employer accordingly. In any event it is a consideration irrelevant to the respondent's case. A similar argument was rejected in Sunshine Porcelain Potteries v. Nash 104 C.L.R. 639.

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SOCIAL AND LEGISLATIVE CONSIDERATIONS

12. Doro v. Victorian Railways Commissioners (1960) V.R. 84 sets out principles which must be taken into account in approaching the question of amounts.

pp.62, 87

The result that widows of workers who died on the same day might receive different amounts of compensation is socially and legislatively undesirable. See too Taylor and Windeyer JJ. in the instant case. Commonwealth v. Oliver 107 C.L.R. 353 demonstrates how factors of changing social and industrial conditions must be taken into account in deciding questions such as arise in the present case. There have also been a series of cases where the question of so called retrospectivity has been looked at in a light far more liberal than in years gone by to those who are entitled to the benefits of amending legislation. Nash v. Sunshine Porcelain Potteries 101 C.L.R. 353; Commissioner for Railways v. Bain 112 C.L.R. 246; Fisher v. Hebburn 105 C.L.R. 188. There are other cases.

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SUMMARY

In summary the respondent contends:

1. The right of the dependant is a separate right from that of the worker.
2. The right of the dependant and the liability of the employer to the dependant arise on death.
3. Properly understood, the events which

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crystallize liability into monetary terms are death, incapacity, Section 11 injury or medical and similar expenses. It is when one of those events occur that the law is to be looked at to ascertain the appropriate amount.

- 10 4. The term "injury" as now used in the Victorian Workers' Compensation Acts provides a concept which is appropriate to defining rights and liabilities on the occurrence of the events referred to in (3) above.

POSITION OF THE HIGH COURT
DECISION IN QUESTION

- 20 13. The appellant in its application for special leave to appeal advanced the argument that another employer would appeal as of right from the Victorian Full Court direct to this Board. This was doubtless to offset the principles which the Privy Council has tended to develop in its relations with the High Court. These are relations of respect for the High Court decisions and a tendency to refrain from disturbing them.

30 The decision of the High Court should not be disturbed. The High Court is a corporate body. It cannot be said that this is a judgement of 3 judges in favour of the present respondent and 2 judges against. It is a decision of the Court in favour of the respondent. Notions deriving from the fact that there is dissent should at this stage of relations between this Board and the High Court be put entirely on one side. In 1904, this Board declared its attitude to the High Court.

Daily Telegraph Newspapers v. McLaughlin
(1904) A.C. 776

40 "The High Court occupies a position of great dignity and supreme authority in the Commonwealth. No appeal lies from it as of right to any tribunal in the Empire. There can be no appeal at all unless His Majesty by virtue of his Royal prerogative, thinks fit to grant special leave to appeal to Himself in Council, In certain cases touching the

constitution of the Commonwealth the Royal prerogative has been waived. In all other cases it seems to their Lordships that applications for special leave to appeal from the High Court ought to be treated in the same manner as applications for special leave to appeal from the Supreme Court of Canada, an equally august and independent tribunal."

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Two years later it went even further.

Victorian Railways Commissioners v. Brown
(1906) A.C. 381.

"Now the High Court of Australia is a Court of the very highest authority, as to which Lord Macnaghten, in delivering the judgement of this Board in the case of the Daily Telegraph Newspaper Co. v. McLaughlin (1904) A.C. 776, says: 'It occupies a position of great dignity and supreme authority in the Commonwealth. No appeal lies from it as of right to any tribunal in the Empire.' If the parties think fit to appeal to the High Court instead of coming to this Board and the judgement appealed from is affirmed by the High Court, their Lordships will not as a rule entertain a petition for special leave to appeal."

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Respect for the High Court was doubtless applied in their Lordships' refusal to grant special leave to appeal in the cases of Hornsby v. Commonwealth 103 C.L.R. 588 (refusal of leave January 17, 1961) Fraher v. Wunderlich 110 C.L.R. 466 (refusal of leave July 15, 1964) Insurance Commissioner v. Denning (refusal of leave November 20, 1967.) The High Court has declared its own position with respect to decisions of the House of Lords. Parker v. The Queen 111 C.L.R. 610 at 632. Skelton v. Collins 115 C.L.R. 94. Uren v. John Fairfax & Sons Pty. Ltd. 40 A.L.J.R. 124. This Board in Australian Consolidated Press v. Uren (1967) 3 All E.R. 523 has discussed this question to a similar effect.

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The relevance of these considerations is not restricted to applications for special leave to appeal. They are proper considerations on the hearing of this appeal brought by way of special leave, for the very reason that there is here a decision of the High Court. It is nothing to the point for the appellant to say, as it did on the application for special leave, that a similar question might well come before this Board as of right. If it had done so, with no decision of the High Court on the matter, these considerations would not apply. But the appellant sought and obtained a decision of the High Court and thereupon these considerations become relevant. And they apply with particular force to the question of the kind raised by this Appeal, in which the tribunal is being asked to discern what the Legislative intention of the Victorian Parliament was when it passed the amending legislation. In order to do this the industrial and economic atmosphere in which the amendment was intended to operate is of the greatest importance. See Wilson v. Chatterton (1946) 2 K.B. 360; The Commonwealth v. Oliver (1962) 107 C.L.R. 353 at 364; Windeyer J. in the instant case. That atmosphere may change from time to time and from place to place. The High Court of Australia had the benefit of a day to day working familiarity with these matters and it is inappropriate to impose upon this Board the task of ascertaining the Legislative intention without that benefit, and to ask it to over-rule the High Court in such a matter.

p. 87

In the present appeal the respondent has decisions of 3 Australian tribunals in her favour. Yet the appellant asks this Board to reverse these decisions on a purely local matter which can have no implication elsewhere and is of nomore than transitory importance. Particularly is this so when the question is restricted to one State of the Commonwealth of Australia and has no implications in the United Kingdom or in the common law countries. If it is said it affects the construction of the 8 odd other different compensation Acts in Australia the short answer is that no other Act has been amended in this way and if any such Act is to be amended then it is a simple matter for the legislature to make appropriate provisions as to the scope of the operation of the amendment.

pp.10, 27
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MEANING OF INJURY

p. 1 14. The respondent submits that on July 7, 1965 there was caused to the deceased worker a physical injury, namely the sudden occurrence of pulmonary oedema, from which death resulted. This being an appeal by way of case stated the question really is, was it open to the Workers' Compensation Board to find that the pulmonary oedema was an injury within the meaning of the primary words (i.e. "injury means any physical or mental injury") of the definition of injury in Section 3 of the Act as amended by the amending Act. The Board found that the pulmonary oedema was such a physical injury and that it materially contributed to death and that it occurred in circumstances in which it was deemed to arise out of or in the course of the employment within the meaning of Section 5 (Section 8(2)). It is submitted that that concluded the matter in favour of the respondent.

p. 16

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FACTS

15. Paragraph 10 of the Statement of Facts agreed upon between the parties stated:

p. 8 "10. On 7 July 1965 whilst in hospital for the said purposes (i.e. the purposes of Section 8(2)) the worker died of pulmonary oedema. The pulmonary oedema was a sudden physiological change for the worse in the lungs of the worker which occurred on 7 July 1965 and it arose out of the work aggravated and accelerated coronary artery disease and work aggravated and accelerated myocardial degeneration and out of both the coronary occlusions and myocardial infarctions previously referred to and was the terminal event in a long history of cardiac disease. Death resulted from the aggravated and accelerated coronary artery disease, the aggravated and accelerated myocardial degeneration and the coronary occlusions and myocardial infarctions and pulmonary oedema and each of them taken separately (with respect to the pulmonary oedema in the sense referred to previously) arose

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out of the employment."

FINDINGS OF THE
WORKERS' COMPENSATION BOARD

16. The Board found as follows:-

"In the present case it is agreed that on 7 July, 1965, while he was in hospital for the purpose of receiving medical or hospital advice, attention or treatment in connection with an injury for which he was entitled to receive compensation, there occurred to the worker the onset of pulmonary oedema from which he died on the same day. Such pulmonary oedema was admitted to be sudden physiological change for the worse, unexpected and not designed by the worker, and was therefore an "injury by accident" within the definition James Patrick & Co. Pty. Ltd. v. Sharpe (1955) A.C.1; 3 All E.R. 216. By reason of Section 8 it is deemed to arise out of or in the course of his employment.

The pulmonary oedema arose out of the work aggravated and work accelerated coronary artery disease and work aggravated and work accelerated myocardial infarctions which occurred in and arose out of the employment. The pulmonary oedema itself was therefore within the definition of 'injury' as set out in the 1965 Act.

Under s.5 the employer therefore became liable on 7 July 1965 to pay compensation in respect of the pulmonary oedema in accordance with the provisions of the Act as then in force. From that pulmonary oedema the worker in fact died.

The widow and the two children of the deceased under the age of 16 years were wholly dependent upon the earnings of the deceased and they are therefore entitled to an award of \$A9,400.00."

The Board thus found, inter alia, that on the 7th July, 1965 the deceased worker suffered a physical injury within the meaning of the primary words of

the definition of injury in Section 3 and having so found it made an award of \$A9,400.00.

NATURE OF A SPECIAL CASE

17. Section 56 of the Workers' Compensation Act provides:-

"56. (1) No determination award order or proceeding of the Board upon any matter within its jurisdiction shall be vitiated by reason of any informality or want of form or (except as provided in sub-section (3) of this section) be liable to be challenged appealed against reviewed quashed or called in question by any court on any account whatsoever. 10

(2) No writ of prohibition or certiorari shall lie in respect of any determination award order or proceeding of the Board relating to any matter within its jurisdiction. 20

(3) (a) When any question of law arises in any proceedings before the Board, the Board may of its own motion and shall, if either of the parties to such proceedings so requires before, or within one month after, the reasons for the decision of the Board have been pronounced, state a case for the determination of the Full Court of the Supreme Court thereon. 30

(b) A case may be stated under this sub-section notwithstanding that a determination award or order has been made by the Board.

The question asked by the case stated on this appeal is:- 40

Board on the material before it to award the applicant \$A9,400.00."

On this appeal the appellant seeks to put the argument that a physiological change for the worse which occurs as an inevitable step in the progress of a disease is not an injury within the meaning of the primary words.

10 This argument is not open to the appellant on this appeal by way of case stated because the Board made no finding of fact to give it a foundation. Indeed the facts found by the Board are inconsistent with any such finding. On an appeal by way of case stated the appellate tribunal is restricted to the facts found by the Board and it is not permissible for it to draw inferences other than those drawn by the Board. The nature of an appeal by way of case stated was discussed by the High Court in The Queen v. Rigby (1956) 100 C.L.R. 146. Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ. said at
20 pp. 150-1:-

30 "Upon a case stated the court cannot determine questions of fact and it cannot draw inferences of fact from what is stated in the case. Its authority is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties. The question may be one of the relevance of evidence and then the nature of the evidence becomes in a sense an ultimate fact for the purpose of that question. But that is not a common case: see Humphryis v. Spence (1920) V.L.R. 407, and cf. Coughlin v. Thompson (1913) V.L.R. 304. The general rule is clearly stated by Isaacs J. in the three following passages: 'It cannot be too clearly understood that on a 'case stated' the facts stated are to be taken as the ultimate facts for whatever purpose the case is stated. The
40 court is not at liberty to draw inferences unless the power is, by express words or by necessary implication, specially conferred by some enactment" ... Mack v. Commissioner of Stamp Duties (N.S.W.) (1920) 28 C.L.R. 373 at p. 381. 'Unless care is taken to distinguish

between 'inference' and 'implication', confusion is likely to occur. An implication is included in what is expressed: an implication of fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not so stated in express terms. But an inference is something additional to the statements. It may or may not reasonably follow from them: but even if no other conclusion is reasonable, the conclusion itself is an independent fact; it is the ultimate fact, the statements upon which it rests however weak or strong being the evidentiary or subsidiary facts' ...The Merchant Service Guild of Australasia v. The Newcastle and Hunter River Steamship Co. Ltd. (No.1)(1913) 16 C.L.R. 591 at p. 624. 'It has been authoritatively decided by this Court in several cases that no inferences of fact can be drawn by the Supreme Court or this Court in such circumstances; among those cases are Merchant Service Guild of Australasia v. Newcastle and Hunter River Steamship Co. Ltd. (No.1) (1913) 16 C.L.R. 591; Schumacher Mill Furnishing Works Pty. Ltd. v. Smail (1916) 21 C.L.R. 149; Boese v. Farleigh Estate Sugar Co. Ltd. (1919) 26 C.L.R. 477; Mack v. Commissioner of Stamp Duties (N.S.W.)(1920) 28 C.L.R. 373; Alexander v. Menary (1921) 29 C.L.R. 371.

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See also Fisher v. Deputy Commissioner of Taxation (1966) 40 A.L.J.R. 328 and Driver v. War Service Home Commissioner (1) (1924) V.L.R. 515.

Misunderstanding on this point can readily arise. For example the cases of Commonwealth v. Ockenden 99 C.L.R. 215 and Kavanagh v. Commonwealth 103 C.L.R. 547 (decisions on the Commonwealth Employees Compensation Act) where the High Court as an appellate tribunal drew inferences of fact, were not appeals by way of case stated, but were full appeals on law and fact.

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In the instant case, there was no finding that the pulmonary oedema was an inevitable step

in the progress of the disease from which the deceased worker was suffering and accordingly there is no foundation for the appellant's argument.

"INJURY" HAD ACQUIRED AN ESTABLISHED MEANING

10 18. Courts of the highest authority have laid it down that identifiable physiological changes for the worse occurring in the course of a disease are personal injuries. These decisions were in no way dependent on a statutory definition of injury which made reference to disease. They were given under the English Workmen's Compensation Act and other such statutes which contained no definition of injury and no definition of disease. There are many decisions to the like effect under the Victorian Act both before and after the definition of injury contained a reference to disease.

20 As used in Workers' Compensation legislation the word "injury" by a long course of judicial decisions has acquired a particular and well established meaning. In Hetherington v. Amalgamated Collieries (1939) 62 C.L.R. 317 Dixon J. (as he then was) said at p. 332:-

30 "Surprising as it may seem, such cause of death falls within the definition of injury by accident arising out of the employment. As a matter of common speech, the expression 'injury by accident' appears inappropriate and inapplicable. But a long course of judicial decisions has extracted from the expression latent implications which make the test of the employer's liability independent of such things as external mishap, traumatic injury and unusual or unexpected incidents of work or duty. There may be personal injury by accident even though the employee's work has proceeded in the normal way and even though the injury is due to the presence of a special condition in the employee's body" (per Lord Tomlin, Walker v. Bairds & Dalmellington (1935) 153 L.T. 332 at p. 325).

40 Very early (1903) in workers' compensation legislation and certainly in 1965 it was beyond

RECORD

question that an identifiable physiological change for the worse which occurred in the course of a disease was a physical injury. The amending Act was carefully framed to safeguard that position.

The respondent adopts the analysis made by Sholl J. in Sharpe v. James Patrick & Co. Pty. Ltd. (1953) V.L.R. 206 which was approved by the Privy Council (1955) A.C. 1 at 20. In James Patrick & Co. Pty. Ltd. v. Sharpe (1953) V.L.R. 206 at page 219 Sholl J. said:-

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"In England, the phrase 'if ... injury by accident arising out of and in the course of the employment is caused to a workman' was from at least 1903 held to mean 'if accidental injury - i.e. injury not expected or designed by the worker is occasioned to a workman by reason of the work he is employed to do, and when he is doing something in discharge of the duties imposed by his contract of service.' it followed from the words which I have italicised that the conjunction of circumstances postulated the whole expression would always include as a direct contributing cause the workman's work, which must, of course, be external to him. Even from the requirement involved in the words 'in the course of the employment', as interpreted in e.g. Charles R. Davidson and Co. v. McRobb (1918) A.C. 304 and St. Helens Colliery Co. Ltd. v. Hewitson (1924) A.C. 59, it followed that the conjunction of circumstances would include action by the workman in discharge of the duties of his service. But so far as "injury" was concerned, it came to be established that an internal physiological occurrence, unexpected by the workman, if for the worse, and defined and separable, was enough. When in Victoria and other jurisdictions the word "and" was changed to "or", it might have been argued that that alone was enough to produce the result that the unexpected conjunction of circumstances need no longer include anything external to the worker, save that he should

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be at the time doing something in discharge of the duties imposed by his service. But the amendment, in Victoria at all events, was not limited to the substitution of "or" for "and". The Act of 1946 added to section 5 of the Act of 1928 provisions which, with certain further additions, now appear as section 8 of the Act of 1951. They in effect enacted that, in respect of "injuries by accident" occurring while the worker was at his place of employment, or was absent therefrom during certain other protected periods, the conjunction of circumstances should be deemed to include the circumstances that a direct contributing cause was the worker's work or the circumstances that at the material time he was doing something in discharge of the duties imposed by his contract of service. Neither circumstances need actually exist - i.e., neither the original postulate of a direct contributing cause in the work itself, nor the originally cumulative but now alternative postulate of a temporal relation between the injury and the performance of duties required by the service. Both elements, including any necessary connection of the accidental injury with external circumstances so far as those elements imported it, disappeared as actual requirements in such cases, and were supplied by mere fiction. As to injuries occurring while the worker was at the place of employment, a temporal coincidence was enough; so also as to injuries occurring when away from that place during other protected periods. During a protected period (and this case and Willis's case are both cases of journeys, being protected periods), the worker might be, under what is now section 8(2)(a)(ii), at home or anywhere else, and under section 8(2)(b), on a journey of the character there described. Since section 8 appears to exhaust almost the whole possible time of the worker's protection, whether at his place of employment, or travelling, or, in cases under section 8(2)(a)(ii) anywhere else, the only external circumstances (if any) which in such cases it could now be said are included in the unexpected conjunction or circumstances required to constitute injury by accident are those constituting the general

environment of the worker at the relevant time. In other words, the requirement of section 5 may now wherever section 8 applies be expressed,

if accidental injury - i.e. injury not expected or designed by the worker - is occasioned to a workman while at his place of work, or travelling on (certain specified) journeys, or (in certain cases) anywhere.

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That states the need for nothing external to the worker except his then environment during the protected period. Certainly it states the need for no actual "contributing cause" (in the sense of direct cause) in the shape of any specific separable or identifiable incident distinguishable from the environmental circumstances, still less any such incident involved in the worker's work, or even in his journey. Given the unexpected injury - e.g. a distinct and separate lesion or functional failure of his body, even though entirely internal to him, and the temporal environment postulated by Section 8 - the remainder of the concept referred to in section 5(1) is now supplied by statutory fiction."

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The opening words of the definition of injury in the amending Act are "'Injury' means any physical or mental injury".

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Originally the phrase was injury by accident. In commenting upon the passage previously quoted Sholl J. continued:-

"This brings me to consider whether that tentative proposition (which I have previously set out in this judgement) should be now adopted. In my opinion it should. If English authority as to what is injury by accident is applicable to the Victorian Act, there is ample authority in no less than five decisions of the House of Lords that mere sudden failure of the functions of a bodily organ, or of bodily mechanism, producing incapacity or death, is

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compensatable. In Falmouth Docks and Engineering Co. Ltd. v. Treloar (1933) A.C. 481, the deceased, when at work, raised his arm above his head, fell forward, and died. His dependant recovered. Lord Buckmaster, at pp. 484-5, said this:-

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Now that the man had heart disease is not in dispute. What the form of heart disease was has never been made clear, because there never was a post-mortem examination. It might have been myocarditis; it might have been an aneurysm; or it might have been angina; it is not quite clear which it was; but that he had one form or other of heart disease and died as the result of that disease that morning is beyond controversy.

And again:-

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He (the arbitrator) was not bound to find what particular form of heart disease the man died from

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In Partridge Jones & John Paton Ltd. v. James (1933) A.C. 501, the worker, who had diseased coronary arteries, carried out a laborious operation, sat down, and shortly afterwards died. The County Court Judge found that the arteries failed to supply the amount of blood necessary for the heart to function when the man was doing his ordinary work in the ordinary way, and that this failure resulted in angina pectoris and in failure of the heart (p.502). Lord Buckmaster, at p.505, after referring to Clover, Clayton & Co. Ltd. v. Hughes (1910) A.C. 242, said:-

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There appears to me to be no possible ground of distinction between this case and that, excepting that in that case the work that the man was doing caused his arteries to rupture, and in this case produced the condition described by the learned county court judge which caused his heart to fail to function and produced the attack of angina pectoris which resulted in his death.

At p.506, after referring to Lord McLaren's words in Stewart v. Wilsons & Clyde Coal Co. (1902), 5 F, 120 at p. 122, viz:-

If a workman in the reasonable performance of his duties suffers a physiological injury as the result of the work he is engaged in This is accidental injury in the sense of the Statute -

he went on -

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My Lords, with that as a guidance to this House, it seems to me that, when the learned county court judge has held that the result of the work was the failure of the blood supply, resulting in angina pectoris, and that it was because he was engaged in doing his ordinary work in this diseased condition that this failure arose, and that the work and the disease together contributed to the death, it would be impossible to deny that this case is within the actual meaning of the words I have quoted.

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In Walker v. Bairds & Dalmellington Ltd. (1935) S.C. (H.L.) 28, a worker, after standing in cold water, contracted a chill which developed, within a short period, into broncho-pneumonia, from which he died. His dependants were held entitled to recover. Lord Tomlin, at p. 33, said this:-

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.... the Sheriff-substitute was bound to hold that Walker's death was caused by personal injury by accident arising out of and in the course of his employment. The disease resulted from the sudden and unexpected onset of a chill contracted in conditions normal in carrying out the workman's job in the accustomed manner, and frequently experienced by him on previous occasions without ill results. The onset of the chill, the direct result of doing the work, was

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"an untoward event" and not "expected" or "designed". In my view, based upon the previous pronouncements of your Lordship's House, the disease which was the injury was in these circumstances the result of accident, and it is not questioned that the injury by accident (if such it be within the meaning of the Act) arose out of and in the course of the employment.

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In Walkinshaw v. Lochgelly Iron & Coal Co. Ltd. ib., 36, a worker who suffered from arteriosclerosis, enlarged heart, and kidney trouble, suffered at work a sudden attack of "cardiac insufficiency". The finding of the Sheriff-substitute (at p.37) was as follows:-

There was a definite change in the condition of the workman from the night of 29th-30th April 1933. He had suffered an attack of cardiac insufficiency - that is to say, the reserve capacity of his heart had broken down. Although he had a diseased condition of the heart and arteries which was unknown to himself or his medical attendant, and although that condition was progressive and would in time gradually show evidence of cardiac insufficiency, that cardiac insufficiency was suddenly manifested while the claimant was engaged in strenuous physical exertion, notwithstanding that the disease was only moderately advanced. The capacity of the heart was severely damaged.

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The House of Lords held the worker entitled to recover. Lastly, in Fife Coal Co. Ltd.v. Young (1940) A.C. 479 the worker suffered "dropped foot", i.e., paralysis of the muscles of the leg, due to pressure on a nerve, which had been occasioned by his work over a period of a month, but which only resulted at last in the 'dropped foot' on a particular and definable day. Viscount Caldecote L.C. at pp. 484-5, said this:-

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When the workman's claim is in respect of a progressive disease the difficulty

of pointing to a definite physiological change which took place on a particular day is, in general, likely to be almost insuperable, and in 1906 Parliament, in the case of certain diseases and later by an enlargement of the schedule of industrial diseases, relieved the workmen in the specified cases of this obligation. But if the circumstances of any claim in respect of incapacity due to disease are such as to make it possible to discharge this burden, I see no reason for thinking that what is called a disease is different in principle from a ruptured aneurysm as in Clover, Clayton & Co. Ltd. v. Hughes or heart failure as in Falmouth Docks and Engineering Co. Ltd. v. Treloar.

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Lord Atkin, at pp. 488-9, said:-

It is necessary to emphasise the distinction between "accident" and "injury" which in some cases tend to be confused. No doubt the more usual case of an "accident" is an event happening externally to a man. An explosion occurs in a mine, or a workman falls from a ladder. But it is now established that apart from external accident there may be what no doubt others as well as myself have called internal accident.

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A man suffers from rupture, an aneurysm bursts, the muscular action of the heart fails, while the man is doing his ordinary work, turning a wheel or a screw, or lifting his hand. In such cases it is hardly possible to distinguish in time between "accident" and "injury"; the rupture which is accident is at the same time injury from which follows at once or after a lapse of time death or incapacity. But the distinction between the two must be observed.

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He added the last sentence because, since he

was speaking in an English case, he went on to say that the "accident" must be related to the employment. The worker was held entitled to compensation. The four earlier cases in the House of Lords which I have previously quoted were referred to with approval and applied."

10 Lord Simonds in Roberts v. Dorothea Slate Quarries Co. (1948) 2 All E.R. 201 quoted passages from the opinion of Viscount Caldecote L.C. in Fife Coal Co. v. Young (1940) A.C. 479 and said at p. 208:-

"The passage that I have cited - to which I would add the pertinent observation of Lord Romer ((1940) A.C. at 480)

'The question is, was there a physiological change for the worse in the respondent's condition on a particular occasion while he was at work?'

20 show that the ratio decidendi in Fife Coal Co. v. William Young was that the workman could there point to a particular physiological change on a particular day."

30 The respondent here can not only point to a particular physiological change on a particular day, namely pulmonary oedema on July 7, 1965 but can point to an express finding to that effect by the Board, Thus the respondent can answer the test of injury by accident, a higher test against her than physical injury. Of necessity injury (without accident is a more embracing concept than injury by accident particularly in remedial legislation and having regard to social and historical considerations in Victoria. It cannot be a narrower concept than injury by accident. Hume Steel Ltd. v. Peart 75 C.L.R. 242. In Darling Island Stevedoring and Lighterage Co. Ltd. v. Hussey 102 C.L.R. 482 at 497 Fullagar J. said:

p. 8
pp.15-16

40 "That the contracting of a disease is an 'injury by accident' though it may perhaps be thought to represent an artificial and unintended extension of the scope of the Acts, must be regarded as long established principle of the law relating to workers'

compensation. Under statutes which omit the words 'by accident' the case is, of course, a fortiori. It is much easier to say that to contract a disease is to suffer an 'injury' simpliciter than to say it is to suffer an 'injury by accident'."

The meaning of injury by accident is fully discussed in Fife Coal Co. v. William Young (1940) A.C. 479 and the authorities are there reviewed. The respondent submits that the reasoning in that case demonstrates the correctness of the proposition that the deceased worker suffered injury, namely pulmonary oedema, within the meaning of the words "any physical injury" and fully supports the finding of the Board to that effect. The Australian cases of Hetherington v. Amalgamated Collieries of W.A. 62 C.L.R. 317 and McGuire v. Union Steamship Co. of N.Z. 27 C.L.R. 570 are to the like effect.

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That the injury may be purely internal to the worker has been established since Fenton v. Thorley (1903) A.C. 443. Note too particularly the judgement of Isaacs and Rich JJ. in McGuire's case (supra). The very argument put against the respondent in the instant case was put by counsel for the appellant in Patrick v. Sharpe (1955) A.C.1 (pp. 4-7) and it was rejected by their Lordships. The reasoning of the learned Chief Justice in the instant case adopts the arguments rejected by their Lordships.

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pp.45-46

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In Kavanagh v. Commonwealth 103 C.L.R. 547 (as previously indicated a full appeal on fact and law) the High Court held that the rupture of the oesophegus was injury by accident within the meaning of the Commonwealth Employees' Compensation Act. Dixon C.J. said (p.553):-

"The first question is whether the rupture of the gullett in these circumstances is to be considered an injury by accident. In my opinion it must be so considered. It is a sudden destruction of tissue by force or pressure. It is true that the force or pressure was not exerted from without the body, but that, I think makes no difference, nor does it make any difference if it

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occurred, as it may have done, as a consequence of another organ of the body, namely the stomach, responding to a virus infection: Clover, Clayton & Co. Ltd. v. Hughes per Lord Loreburn L.C., per Lord Macnaghten, per Lord Collins; McArdle v. Swansea Harbour Trust; Flanagan v. Ackers Whitby & Co."

10 See too Fullagar J. at 558, Taylor J. at 562, Menzies J. at 569, Windeyer J. at 578.

The proposition that an incident in a disease cannot be an injury (or even more an injury by accident) cannot be sustained. The respondent repeats the statement of Viscount Caldecote L.C. in Fife Coal Co. v. William Young (1940) A.C. 479 at 484-5:-

20 "When the workman's claim is in respect of a progressive disease the difficulty of pointing to a definite physiological change which took place on a particular day is, in general, likely to be almost insuperable, and in 1906 Parliament, in the case of certain diseases and later by an enlargement of the schedule of industrial diseases, relieved the workman in the specified cases of this obligation. But if the circumstances of any claim in respect of incapacity due to disease are such as to make it possible to discharge this burden, I see no reason for thinking that which is called a disease is different in principle from a ruptured aneurysm as in Clover, Clayton & Co. Ltd. v. Hughes ((1910) A.C. 242), or heart failure as in Falmouth Docks & Engineering Co. Ltd. v. Treloar ((1933) A.C. 481)."

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His Lordship said at p. 487:-

40 "The claimant sustained a definite physiological injury in the reasonable performance of his duties, and as the result of the work he was at the time of the injury engaged in."

The Victorian Act removes the necessity for the words used by his Lordship "in the reasonable performances of his duties and as the result of the

work he was at the time of the injury engaged in" because those words are directed to the word accident (not in the Victorian Act) and to the words "arising out of and in the course of the employment" irrebuttably presumed to operate in Victoria by Section 8(2). See Sholl J. supra.

It has been said that the breaking of an artery cannot be distinguished from the breaking of a leg. Hume Steel Ltd. v. Peart 75 C.L.R. 242 (particularly per Latham C.J. and Dixon J.). 10
Accordingly, in summary, cases may be found where liability has arisen where such things as coronary occlusion, pneumonia, auricular fibrillation, ruptured aneurysm, ruptured oesophagus, constituted injury by accident. As previously submitted, it is easier to discharge a burden of establishing injury simpliciter than injury by accident. The amending Act speaks of any physical injury. Hence on the facts as admitted here it was open to the Board to find 20
that the pulmonary oedema was physical injury. It in fact so found.

PRESERVATION OF ESTABLISHED
MEANING OF INJURY

The alteration made by the amending Act to the definition of injury included the removal of the word 'disease' from the phrase "'Injury' means any physical or mental injury or disease .." as in the Principal Act. Then the amending Act dealt with disease in limbs (a) and (b) of the amending definition. This is simply to define more precisely the entitlement to compensation for certain diseases and has nothing to do with the meaning of "injury" in its primary sense. 30

The word injury had therefore acquired a particular meaning in Workers' Compensation law. When the present definition says "'injury' means any physical or mental injury and without limiting the generality of the foregoing" it is expressly preserving the generality of the meaning of injury. "Without limiting the generality of the foregoing" could have no meaning other than that. 40

In Mixnan's Properties Ltd. v. Chertsey U.D.C.

(1964) 1 Q.B. 214 at 233 Danckwerts L.J. said:-

"The words 'without prejudice to the generality of the foregoing' prevent the particular considerations (a)(b)(c)(d)(e) and (f) which are thereafter mentioned in the section, having any restrictive effect, and exclude the ejusdem generis rule"

and at p. 802 Diplock L.J. enunciated similar views.

10 In The King v. Brewer Ltd. 66 C.L.R. 535 at 554 Rich J. said of expressions such as "and includes"

20 "It is necessary, therefore, to consider the effect of the definition section. It is to be noted that in the relevant part of it the word 'includes' is employed. In Dilworth v. Commissioner of Stamps (1899) A.C. 99 at pp. 105-6 it was pointed out by the Privy Council that: 'That word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions". In the Act now under consideration section 3

30 provides its own dictionary. When 'includes' is the sense intended, that word is used, but it is dropped, and the word 'means' adopted, when an exhaustive explanation is intended."

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19. The appellant contends that there is authority against these submissions.

Broadly speaking this authority may be placed in 2 classes. The first is authority decided upon the provisions of the Commonwealth Employees' Compensation Act, and the second, authority decided upon the provisions of the New South Wales Workers' Compensation Act. The Respondent submits that neither line of authority is against her. The authorities by implication support her submissions. The features in the legislation present in those 2 Acts are absent from the Victorian Acts. After the first passage quoted from Sholl J. (supra) His Honour in commenting upon the special provisions of the Victorian Act said:

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"No such situation has ever been considered in England, nor, I believe, in any of the cases from other jurisdictions which have reached the High Court. There is nothing in the curious development of the law in Victoria to warrant the Courts in now attributing to the words "by accident" or "is caused" (which never had the role before) the function of importing as a requirement a defined and separable external incident, however trivial, and not necessarily connected with the work or the journey of the worker."

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CASES UNDER THE COMMONWEALTH
EMPLOYEES' COMPENSATION ACT

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20. The first line of authority said to be against the respondent commences with Commonwealth v. Ockenden 99 C.L.R. 215. But the phrase in the Commonwealth Employees' Compensation Act under which that case arose was "injury by accident". The word "accident" in the context of the phrase "arising out of or in the course of the employment" was critical to the judgement. Moreover as previously pointed out cases under the Commonwealth Employees' Compensation Act are full appeals on fact and law and are not by way of case stated.

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In Ockenden's case, the Court, in commenting

on Patrick v. Sharpe (1955) A.C. said at p.233:-

10 "The acceptance in Sharpe's case of the view that in Victoria it is now no longer necessary to find an external event of some kind associated with a sudden physiological change rested, essentially, of course, upon the special provisions of the amendments introduced into the Workers' Compensation Acts of that State by the amending Act of 1946. But the decision does not justify acceptance of the same view in cases where it must be established that the so called injury by accident arose in the course of the worker's employment. In such cases the traditional view must still prevail that a physiological change, sudden or otherwise, is not an injury by accident arising in the course of the employment unless it is associated with some incident of the employment. Indeed, to hold otherwise would be to strip the word 'accident' of all meaning by treating as such any distinct physiological change which is nothing more than the sole and inevitable result of the ravages of a disease."

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This statement supports the respondent. It is in line with other authorities including what was said in Fife Coal Co. v. William Young (supra), Kavanagh v. The Commonwealth (supra), and Commonwealth v. Hornsby (103 C.L.R. 588). But it is clear the word "accident" is critical to the decision as is the phrase "arising in the course of the employment".

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And the case of Patrick v. Sharpe (1955) A.C.1 confirms (quite aside from the definitions of injury and disease in the Victorian Act) the meaning of the word injury contended for by the respondent. Moreover the provisions of Section 8(2) of the Principal Act which remain unaffected by the amending Act, put the situation on a plane entirely different from the Commonwealth Employees' Compensation Act. See Sholl J. supra. Note too that in Kavanagh v. The Commonwealth 103 C.L.R. 547 at 561 Taylor J. commented upon Patrick v. Sharpe (1955) A.C.1 and the distinction from the Commonwealth Employees' Compensation Act by saying:-

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RECORD

"It is unnecessary to repeat what was then said (i.e. in The Commonwealth v. Ockenden 99 C.L.R. 215) except to say that the Commonwealth Act does not contain any provisions analogous to Section 5(5) (now Section 8(2) of the Victorian Act) as it then stood and that liability to pay compensation does not arise unless it be shown that personal injury by accident arising out of or in the course of his employment has been caused to an employee." 10

Any restrictive implications which come from the words "arising out of or in the course of the employment" are removed by the Victorian Act. Section 8(2) provides:-

"Without limiting the generality of the provisions of sub-section (1) of section 5 of this Act but subject to the provisions of sub-section (1) of section 6 of this Act an injury to a worker shall be deemed to arise out of or in the course of the employment if the injury occurs - 20

(iii) while the worker is travelling between his place of residence or place of employment and any other place for the purpose of obtaining a medical certificate or receiving medical surgical or hospital advice attention or treatment or of receiving payment of compensation in connection with any injury for which he is entitled to receive compensation or for the purpose of submitting himself for examination by a duly qualified medical practitioner pursuant to any provision of this Act or any requirement made thereunder, or is in attendance at any place for any such purpose;" 30 40

It has so provided in substance since 1946. It has no parallel in any comparable legislation.

As has been submitted, Patrick v. Sharpe (1955) AC.1 demonstrates that the Privy Council

accepted the meaning of injury (contended for by the respondent) from the authorities and irrespective of the definitions of injury and disease in the Victorian Act. (See particularly the judgement of Menzies J. in Kavanagh v. The Commonwealth 103 C.L.R. 547 at 569 et seq.) See also the Victorian cases of Willis v. Moulded Products (1951) V.L.R. 58 and Sharpe v. James Patrick & Co. Pty. Ltd. (1953) V.L.R. 206. The Privy Council expressly approved the judgements in these latter 2 cases. (See also Flinn v. Wood 2 Victorian Workers Compensation Board Reports 120; and Willis v. Moulded Products ibid 219).

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In the present case the pulmonary oedema occurred in hospital and by virtue of Section 8(2) was deemed to arise out of or in the course of the employment. The Board so found. That again concluded the matter.

p. 8

pp.15-16

CASES UNDER THE NEW SOUTH WALES ACTS

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21. The second line of authority relied on is concerned with a very different definition of injury. The New South Wales Workers' Compensation Act has given rise to a series of decisions on the definition of injury in that Act. Slazengers (Australia) Pty. Limited v. Burnett (1951) A.C.13 considered the question. Injury was then defined:-

Section 6(1). "In this Act, unless the context or subject-matter otherwise indicates or requires

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'Injury' means personal injury arising out of or in the course of employment and includes a disease which is contracted by the 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 but does not, save in the case of a worker employed in or about a mine to which the Coal Mines Regulations Act, 1912-41, applies, include a disease caused by silica dust."

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Their Lordships said:

"But this at least is clear, that in the Act the word 'injury' (unless the context or subject matter otherwise indicates or requires)

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must bear a very artificial meaning in that it is to include a disease which satisfies certain conditions and must, therefore, according to ordinary rules of construction, exclude any other disease."

It is clear from this statement that in its non-artificial meaning "injury" would have been taken by their Lordships to have included disease. This principle was followed in the cases of Darling Island Stevedoring & Lighterage Co. Ltd. v. Hussey 102 C.L.R. 482, Australian Iron & Steel v. Connell 102 C.L.R. 522.

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In the cases under the New South Wales Act it must be remembered that the N.S.W. definition has very significant differences from the Victorian Act. In the first place the present New South Wales Act provides:-

"'Injury' means personal injury arising out of or in the course of the employment, and includes -

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(a) a disease which is contracted by the 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 aggravation acceleration exacerbation or deterioration of any disease, where the employment was a contributing factor to such aggravation acceleration exacerbation or deterioration ..."

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Thus the word "injury" occurs as part of the expression "arising out of or in the course of the employment" whereas the Victorian Act Section 8(2) in a wide range of circumstances irrebuttably presumes that the injury does arise out of or in the course of the employment. This makes inapplicable in Victoria much of the reasoning of the dissenting judges in Kavanagh v. The Commonwealth 103 C.L.R. 547 and of the majority judges in The Commonwealth v. Hornsby 103 C.L.R. 588. As previously indicated very great importance attaches to Section 8(2), a section which has no

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parallel in the New South Wales Act (or in the Commonwealth Act).

10 In the second place the New South Wales Act contains no words akin to "without limiting the generality of the foregoing and includes". It is almost a necessary implication that the presence of those words in the Victorian definition (comparable as it is in limbs (a) and (b) with the New South Wales definition) is designed to offset any reading down of the meaning the words "personal injury" had acquired in workers' compensation law. It offsets such decisions as Slazenger v. Burnett (1951) A.C. 13 Darling Island Stevedoring & Lighterage Co. Limited v. Hussey 102 C.L.R. 482 and Australian Iron & Steel v. Connell 102 C.L.R. 522.

20 In the present appeal dicta of some of the judges apply the principles of these cases (Hussey's case and Connell's case being cases where the Court could review the evidence) to restrict the meaning of injury in the amending Act. These are only dicta. They are dicta too which impermissibly substitute the appeal judges' own views of the facts for the findings of the Board. It is submitted that they are incorrect and give no effect to the words "without limiting the generality of the foregoing and includes". These words preserve and reinforce the general meaning in workers' compensation law of "injury" and say that it shall not be cut down. 30 These dicta also ignore the word any. In this context the word "any" supports the proposition that the generality of injury is to be preserved. The words "and includes" couples with the words "without limiting the generality of the foregoing" are words clearly of extension. They are remedial and not restrictive. Thus the effect of the amending Act was to preserve the previously understood meaning of injury. (Even in the far more restricted definition in New South Wales set out above the words "and includes" are treated as words of extension - see Darling Island Stevedoring & Lighterage Co. Limited v. Hankinson 40 A.L.J.R.544)

pp.46;57-60;
72-73;
89-91

40 Darling Island Stevedoring & Lighterage Co. Ltd. v. Hankinson 40 A.L.J.R. 544 dealt with the concept of injury in the New South Wales definition.

RECORD

On the following facts:

"A worker while lifting a heavy package at work felt an acute pain in his back which, according to medical evidence accepted by the Workers' Compensation Commission (N.S.W.), was caused by the collapse of one or two vertebral bodies in his spine. During the following fortnight he became progressively worse and he finally became paralysed. It was established to the satisfaction of the Commission that, unknown to himself, the worker had for some considerable time been suffering from an infection in his back which had partially destroyed some of the spinal structure and that the incident at work had caused the vertebrae to collapse and that there was a causal relationship between the collapse of the vertebrae and the paralysis. The consensus of medical opinion was that the infection would, unless the condition had been discovered and treated successfully, in the ordinary course of events have continued and extended and that this would ultimately have produced a collapse of the vertebrae and incapacity. The Workers' Compensation Commission found that the worker suffered at work an aggravation, acceleration, exacerbation and deterioration of a pre-existing disease, an infection of the dorsal spine, and that the worker was totally incapacitated thereby to date and continuing. It made a continuing award at a specified weekly sum commencing on the date of the collapse of the vertebrae.

the High Court held:

that the proper conclusion from the evidence established to the satisfaction of the Commission was that the collapse of the vertebrae was "injury" in the ordinary sense without resort to Section 6(1)(b) of the Workers' Compensation Act, and the worker was entitled to hold his award on this basis.

Taylor J. at 549 said of the collapse of the vertebrae:

"....it was a personal injury of a physical nature notwithstanding that the respondent was suffering from a disease which made it probable that if the injury had not occurred and the disease had run its course, undetected and untreated, a like condition would at some time or other, have been produced."

Menzies J. at 550 said:

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"The collapse of one of the bodies of the vertebrae was 'injury' in the ordinary sense without resort to the provisions of the Workers' Compensation Act (N.S.W.) introduced by Act No. 30 of 1960, Section 2(1)(a) which brings within the definition of 'injury' what is there described as 'the aggravation, acceleration, exacerbation or deterioration of any disease' in circumstances where 'the employment was a contributing factor to such aggravation, acceleration, exacerbation or deterioration."

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Owen J. at 550:

"I do not, however, understand why the learned Commissioner found it necessary to go to the extended meaning of the word 'injury'. The collapse of the vertebrae was as much an 'injury' in the ordinary sense of the word as would have been the fracture of a bone in the respondent's leg, a bone which had been weakened or 'honeycombed', as one doctor put it, by some infective process."

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This once more demonstrates that even with a definition far more restricted than the Victorian definition "injury" retains its meaning as established by a long course of decisions. (See also Taylor J. in Hussey's case). Any restrictions put upon the concept "injury" in New South Wales because of its juxtaposition with "arising out of or in the course of the employment" are removed in Victoria by the irrebuttable presumption that it arose out of or in the course of the employment established by Section 8(2) of the Victorian Act.

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The question whether or not the pulmonary oedema was an injury was a question of fact. It was on the Board to find the facts. No appellate

RECORD

tribunal can substitute for that finding its own view of the facts. (supra)

The practical effect of the respondent's submission on the primary meaning of the word "injury" is that a worker is entitled to compensation in respect of incapacity or death resulting from an injury which is an inevitable step in the progress of a disease where that injury arose out of or in the course of his employment. This result is completely in accordance with the objects sought to be achieved by this type of legislation. As early as 1903 in Fenton v. Thorley (1903) AC. 443 at 446-7 Lord Macnaghten said:

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"It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the Act some injuries ordinarily described as "accidents" which beyond all others invest favourable consideration in the interest of workmen and employers alike. A man injures himself by doing some stupid thing, and it is called an accident, and he gets the benefit of the insurance. It may even be his own fault, and yet compensation is not to be disallowed unless the injury is attributable to 'serious and wilful misconduct' on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that that is right. I do think that if such were held to be the true construction of the Act, the result would not be for the good of the men, nor for the good of the employers either, in the long run. It would lead men to shirk and hang back, and try to shift a burden which might possibly

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prove too heavy for them on to the shoulders of their comrades."

In Wilson v. Chatterton (1946) 2 K.B. 360 Scott L.J. said at

10 "The general purpose of the legislation was, beyond all doubt, to put upon the employer an obligation to pay to his workman or the workman's representatives compensation for the result of personal injuries incidental to his employment, for which no action for damages law either at common law or for breach of statutory duty. In this sense it made the employer an insurer, and the insurance respect is important, for it helps to guide interpretation where the statutory language is open to doubt. The object of the legislation was essentially social, and it was no part of the purpose of Parliament to make the economic burden rest finally on the back of the individual employer. It was realised from 20 the start that the risk would be re-insured, as in fact happened and through the insurance premiums, as an item in the cost of production or of services rendered, the community at large of course has had to carry the ultimate burden of the social reform in the price of goods or services."

30 The judgement of Isaacs and Rich JJ. in McGuire v. Union Steamship Company 27 C.L.R. 570 at pp. 576-590 contains a careful historical and social treatment of workers' compensation.

The social and legislative development of workers' compensation law in the State of Victoria encourages the worker to attend regularly at his work where without such legislation he may be inclined to absent himself. Lord Macnaghten spoke in an analogous sense as long ago as 1903.

40 It is therefore submitted that in present day social conditions in Victoria it is entirely consistent with the object of the legislation that the Workers' Compensation Acts of Victoria should continue to operate as they have done for many years to make such injuries compensable.

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Put shortly the history of workers' compensation legislation in Victoria has shown a progressive extension of the benefits conferred upon workers and their dependants. That legislation derived from the English Act of 1897. Initially the English legislation itself was confined to particular employments. It was extended to cover all employment. As early as 1903 Fenton v. Thorley (1903) A.C. decided that the scope of the Act extended to cover injuries by accident arising fundamentally by disease but to a pathological incident of which disease there was an employment contribution. On any real view the employment contribution was almost notional. But this view was progressively applied and extended. The cases have been reviewed in summary above. In 1946 the legislation in Victoria codified the stage that had been reached in the law. (It is to be noted that this was very shortly before there ceased to be a Workers' Compensation Act in the United Kingdom.) The Victorian Act gave legislative force to the historical development of the law. It presumed in favour of the worker the notional work contribution (Section 8(2)). It altered the phrase "arising out of and in the course of the employment" to "arising out of or in the course of the employment". It defined "injury" and "disease" in terms that the Courts had given them. Accordingly, instead of looking for what had become artificial notions of causation all this was established by the Act.

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It may be said that the effect of this was to provide a system of social security with arbitrary limits. No doubt that was one reason why in the United Kingdom the legislation gave way to general social security provisions.

But in Victoria the legislature continued to extend workers' compensation law. In 1953 the word "accident" went out of the Act. It was removed because it was shown in practice to have an artificiality which had no place in the Act.

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Given that background, the 1965 Act was a maintenance of the position up until then reached, and an extension of it.

There was in short a progressive extension of the law occasioned by social and industrial necessities in the State of Victoria, and their pressure against restrictive interpretations of the law. This is quite a natural and logical development. It is in that background that the instant problem must be approached.

SUMMARY

10 On this branch of the case the respondent submits:

1. The pulmonary oedema was found by the Board to be injury. That finding cannot be disturbed.
2. That finding entitled the respondent to an award looking at the pulmonary oedema either as an injury within well established principles (and deemed to arise out of or in the course of the employment) or being an injury arising out of the employment.
- 20 3. Looking at the whole disease process as described in the statement of facts it was an injury till death and employment contributed to it not only before July 1, 1965 but after July 1, 1965.
4. Social and legislative history fully supports the respondent's submissions.

CORRECTNESS OF JUDGEMENT
OF FULL COURT OF VICTORIA

pp.17-26

30 22. By the amending Act injury was defined to include the aggravation and acceleration of any pre-existing disease where the employment was a contributing factor to such aggravation and acceleration. The Board found that the pulmonary oedema, which occurred after the amending Act was a work contributed aggravation of the underlying disease. It so found on the agreed facts that the work done before the 18th February contributed to the occlusion and infarction from the 18th February and to the occlusion and infarction of 30th June and through them to the oedema.

p. 16

p. 8

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RECORD

,pp.17-26

p. 8

The judgement of the Full Court of Victoria upheld these findings and was correct. On the admitted facts the pulmonary oedema was the aggravation or acceleration of a pre-existing disease and the employment was a contributing factor to that aggravation or acceleration. Once more it must be remembered that the Workers' Compensation Board is the tribunal of fact. The question is simply whether it was open to the Board to find as a fact that the pulmonary oedema was the aggravation or acceleration of a pre-existing disease, and if it were, then the next question is whether it was open to the Board to find that the employment was a contributing factor. It is submitted that it clearly was and that the reasoning of the Full Court is compelling. What Barwick C.J., Kitto and Windeyer JJ. do on this aspect of the case is to substitute their own view of the facts for that of the Board. This is impermissible.

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pp.23-26

pp.45; 58-60;
88-91

Neither Taylor J. nor Owen J. deal with this aspect of the case in the instant case. It was unnecessary to the decision of Windeyer J. Kitto J. said that the respondent had made out a case which literally complied with the definition but he was of opinion that "The Board construed the Act with a literalness that misses its true meaning". Such an approach is not correct.

pp.58-59

p. 60

pp.15-16

p. 25

The result is that the findings of the Board on this branch of the case should stand, upheld as it was by the Court to which the case is primarily stated.

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p. 26

pp.6-7

That there can be separate titles to compensation as the Full Court said is beyond question. In the instant case the respondent conceded that each of the coronary occlusions was an injury (if need be by accident) and each of them would have entitled the worker to compensation. This too is the assumption of the learned judges in the High Court. It is submitted that the Board's finding puts the pulmonary oedema on a footing exactly similar to the coronary occlusions.

pp.60, 91

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The Board's view gave no retrospective operation to the Act. The employment

contribution required by the definition was literally complied with. This is in full accord with the spirit of the legislation. The Full Court was correct in holding that it was open to the Board to find that the pulmonary oedema was an aggravation of a pre-existing disease which occurred after the amending Act came into operation. and that there was nothing in the Act which required the employment contribution to be an employment contribution after the amending Act came into operation. (Cf. Sunshine Porcelain Potteries v. Nash 104 C.L.R. 639).

p.24

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If the injury were looked at as one disease injury the death resulted from or was materially contributed to by an injury to which the employment was a contributing factor. That is so whether the period of the injury before July 1, 1965 is taken or the period after. As previously submitted it is nothing to the point that the employment is said to have ceased.

SUMMARY

On this branch of the case the respondent submits:

1. By their statement of agreed facts the parties agreed that the pulmonary oedema arose out of the work aggravated and accelerated myocardial degeneration and of two earlier coronary occlusions and myocardial infarctions.
2. The Board found that the pulmonary oedema was an aggravation or acceleration of a pre-existing disease and that the pulmonary oedema was contributed to by the employment. That finding cannot be disturbed.
3. Looking at the whole disease process as described in the statement of facts it was an injury till death and employment contributed to it not only before July 1, 1965 but after July 1, 1965.

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IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

OGDEN INDUSTRIES PTY.
LIMITED

Appellant
(Respondent)

- and -

HEATHER DOREEN LUCAS

Respondent
(Applicant)

CASE FOR RESPONDENT

RADCLIFFES & CO.,
10 Little College Street,
Westminster. S.W.1.

Solicitors for the Respondent.