

IN THE PRIVY COUNCIL

No. 30 of 1972

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O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

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B E T W E E N

FINEMORE TRANSPORT PTY LIMITED

Appellant  
(Respondent)

and

KATHLEEN MARY CLUFF ...

Respondent  
(Applicant)

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CASE FOR THE RESPONDENT

Record

1. This is an appeal from the judgment of the Supreme Court of New South Wales Court of Appeal (Jacobs J.A., Taylor and Hardie A-JJ.A, reserved), dismissing the Appellants' appeal from the determination of His Honour Judge Wall sitting in the Workers Compensation Commission of New South Wales whereby the Respondent was awarded Ten thousand Dollars (\$10,000) and in addition an amount of Five dollars (\$5) per week from the 25th day of March, 1970 to the 2nd day of December, 1970 and Six Dollars Twenty-five Cents (\$6.25) per week from the 3rd day of December, 1970 in respect of each of the dependent children of Kenneth Leonard Cluff, deceased (hereinafter referred to as "the deceased"), namely Charmain Marie Cluff, Patrice Suzanne Cluff, Daniel James Cluff and Simon Michael Cluff, until such child dies or attains the age of 16 years. The said determination and award was made in favour of the Respondent and the said children as dependants of the deceased and was made pursuant to the provisions of the New South Wales Workers Compensation Act, 1926.

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p.25 to p.26

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line 10

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UNIVERSITY OF LONDON  
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LEGAL STUDIES  
28 MAY 1974  
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LONDON W.C.1

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line 4-5  
Page 28  
line 28
2. On the 27th February, 1970 the deceased received fatal injuries whilst employed by the Appellants for the purposes of the Appellants' trade and business and died in consequence thereof on 25th March 1970. The learned Trial Judge found as a fact that up until the deceased's death and at all relevant times, he was also a member of the Police Force being a Police Officer in the New South Wales Police Force. The deceased's employment by the Appellant was employment entered into and carried out by the deceased in addition to the execution of his duty as a police officer and was work done by the deceased during his police force holidays and on his days off. 10
- Page 29  
line 10
- Page 9  
line 20
3. In addition it was proved in evidence before the learned trial Judge that, apart from his "steady" employment as a police officer and his "casual" periods of employment by the Appellants the deceased was a professional Rugby League player and that that fact was known to the police authorities. It is explained and averred that in New South Wales Rugby League football has a very substantial public following and that as a player in the County League the deceased would be well known to the public, at least in the area of the Riverina division in which he played. 20
- Page 8  
lines 3-8
- Page 19 lines  
29-32
4. There was no evidence one way or the other before the learned trial judge as to whether or not apart from his professional Rugby League, the police authorities knew of the deceased's periods of casual employment with the Appellants. There is no evidence that they ever objected to his being a professional Rugby League player or that they did or would have objected to his periods of casual employment with the Appellants. 30
- Page 9  
lines 5-8
5. The Appellants were at all times aware that the deceased was a member of the police force.
6. S. 7 (1) (a) of the New South Wales Workers Compensation Act, 1926, (hereinafter called "the Act") provides as follows :- 40
- "A worker who has received an injury whether at or away from his place of employment (and in the case of the death of the worker, his dependants) shall receive compensation from his employer in accordance with this Act".

By S. 6 (1) of the Act a worker means "any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing, but does not include -

- 10 (a) (any person whose remuneration exceeds £2,000 per year, exclusive of payment for overtime, bonuses and special allowances) (repealed by No. 22, 1957, S. 3 (a) (i)).
- (b) (an outworker) (repealed by No. 97, 1967, S. 3 (1) (a) (i)).
- (c) a member of the police force; or
- (d) a person whose employment is casual (that is for one period only of not more than 5 working days) and who is employed otherwise than for the purposes of the employers trade or business; or
- 20 (e) an officer of a Friendly Society whose remuneration from such Friendly Society does not exceed \$700 per year; or
- (f) an officer of a religious or other voluntary association who is employed upon duties for the Association outside his ordinary working hours, so far as the employment upon such duties as concern, provided his remuneration from the Association does not exceed \$700 per year; or
- 30 (g) a member of the police reserve appointed under Part IIa of the Police Regulations Act, 1899 - 1939, employed upon duties as such member, so far as the employment upon such duties is concerned."

S.40 of the Act provides :-

40 "If on any proceedings for the recovery under this act of compensation for an injury, it appears to the Commission that the contract of service or apprenticeship under which the injured person was engaged at the time when the injury happened was illegal, the Commission may, if, having regard to all the circumstances of the

case, the Commission thinks it proper so to do, deal with the matter as if the injured person had at the time aforesaid been a worker under a valid contract of service or apprenticeship".

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line 11

S. 7 (2) of the Police Regulation Act, 1899 of New South Wales provides that :-

"Any constable of police who is or becomes a bailiff, sheriff, parish clerk or hire servant, or acts in any of the said capacities, or sells any beer, wine, or spirituous liquors by retail, and shall forfeit his appointment as such constable, and all authority, privileges, salary, and gratuity payable to him as such". 10

7. The learned trial Judge found that the deceased was a "worker" within the meaning of S. 6 (1) of the Act but found that the contract of service under which the deceased was engaged at the time when the injury happened was illegal. However, the learned trial Judge, pursuant to the provisions of S. 40 of the Act, dealt with the matter as if the deceased had at the time of injury been a worker under a valid contract of service and made the determination and award as aforesaid. 20

8. The Appellants appealed to the Supreme Court of New South Wales Court of Appeal by way of Case Stated and the following question of law was referred for the decision of the Court of Appeal :- 30

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line 23

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

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The said Court of Appeal was unanimous in holding that the question asked should be answered "no" and that the Appellant should pay the Respondent's costs. 40

Page 36,  
line 19

Jacobs J.A. (with whose reasons Taylor and Hardie A-JJ.A concurred) said that the real question was whether the deceased was

10 a worker within the true construction of S.6(1)  
of the Act because if he was not the question  
of illegality and the exercise of discretion  
under S.40 would not arise. His Honour held  
that the exclusion of a person from the  
definition of a worker who was a member of the  
police force is made in a context which places  
emphasis upon the contract of service entered  
into by him as a member of the police force and  
that it does not describe the status which  
attaches to him at all material times and which  
for all purposes excludes him from the  
definition. His Honour held that the deceased  
being a member of the police force, was not  
thereby wholly removed outside the scope of the  
definition of worker but that he was only  
outside that definition in respect of his  
contract of service as a member of the police  
force. In these premises he was therefore a  
20 "worker" at the time of his injury and it was  
open to the Commission to exercise the power  
conferred by S. 40 of the Act.

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line 25

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lines 23-29

30 In concurring with Jacobs J.A. Hardie A.J.A.  
rejected the Appellants' argument that the  
portion of the definition of "worker" in S. 6  
which expressly excludes from the defined class  
a member of the police force was an over-riding  
paramount provision of the Act to which the  
Discretionary power conferred by S. 40 had to  
yield. His Honour held that the subject matter  
excluded by the definition are "persons having  
a particular contractual relationship with other  
persons (i.e. a work relationship)". Thus he  
held that "the relevant exception provision  
does not extend to work relationships between a  
person who is a police officer and other persons  
which are unrelated to his status or duties as a  
member of the police force".

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line 5

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40 6. On behalf of the Respondent it will be  
contended that the determination and award of  
compensation is right and should be upheld for the  
following and other

#### R E A S O N S

(1) A Member of the police force or his  
dependants is or are only excluded from obtaining  
compensation under S. 7 of the Act by virtue of  
the provisions of S. 6 (1) of the Act if his injury  
is received when he is working or carrying out his

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duty as a member of the police force. He is not so excluded if his injury is received when he is working in some other capacity.

In support of this contention the Respondent will rely, inter alia, upon the judgment of Fletcher-Moulton L.J. in Skailles v. Blue Anchor Line Limited (1911) 1 K.B. 6360 when construing the definition of the English Workers Compensation Act, 1906, and also the decision of the Court of Appeal in Blandy v. Owners of S.S. Brandy v. Owners of S.S. Raphael (1911) 1 K.B. 376 and the House of Lords on Appeal, (1911) A.C. 413.

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(2) A member of the police force can, both in fact and in law, act and be employed in a capacity other than as a policeman. That the deceased had so acted been employed and was so acting and being employed was certainly known to and accepted by the police authorities so far as the deceased's professional Rugby League employment was concerned and was not disproved so far as those "casual" but not infrequent periods of employment by the Appellants were concerned. The Appellants were aware of the deceased's status as a member of the police force.

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(3) Insofar as it is necessary so to argue, the Respondent will contend that by virtue of the provisions of S. 7 (2) of the Police Regulations Act, 1899, the deceased was not and/or was not to be regarded as, a member of the Police Force at the time of the injury.

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(4) Insofar as it is necessary so to argue, the Respondent will contend that vis a vis his periods of casual employment by the Appellants did not constitute him a "hired servant" within S. 7 (2) of the Police Regulations Act, 1899.

(5) The Respondent will also rely upon the reasons for judgment of Jacobs J.A. and Hardie A-J.A. and upon the reasons for judgment of His Honour Judge Wall.

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BRUCE COLES

No. 30 of 1972

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CASE FOR THE RESPONDENT

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