

IN THE PRIVY COUNCIL

No. 40 of 1981

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

B E T W E E N :

A.M.P. FIRE & GENERAL INSURANCE
CO. LIMITEDAppellant & Cross
Respondent

(Defendant)

10

- and -

MARINUS MILTENBURG

Respondent & Cross
Appellant

(Plaintiff)

CASE FOR APPELLANT

A.M.P. FIRE & GENERAL INSURANCE CO.LTD.

INTRODUCTORY

RECORD1.00 This case is organised in the following
sections.THE APPEAL

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2. The question for decision.
3. Concurrent liability for worker's compensation and damages.
4. The prescribed form of the policy.
5. The policy is to be construed in the light of the Act.
6. The history of Section 63.
7. Payments of worker's compensation discharge the employer's liability for damages to the extent of their amount.

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8. It follows that payment of compensation by the present appellant discharged by the amount of such payments its maximum liability of \$150,000 for damages.
9. The foregoing construction of the policy is necessary to avoid an intolerable anomaly.
10. Errors in the Court below.
11. Conclusion.

THE CROSS APPEAL

12. The policy does not indemnify against liability for the worker's costs other than within the limit of \$150,000 for liability independently of the Act. 10

THE APPEAL

2.00 THE QUESTION FOR DECISION

2.01 This appeal turns on the construction of the form of Employer's Indemnity Policy prescribed by regulation under the Workers' Compensation Act, 1926, as amended (N.S.W.).

23(14) -
24(2) 2.02 Relevant parts of the policy are extracted in the judgment of Samuels, J.A. For the full text of the prescribed form of policy see Appendix 1 to this Case. 20

2.03 The policy provides for cover against liability for workers' compensation and liability for damages.

4(5) 2.04 At the relevant time the prescribed form of policy provided for unlimited cover in respect of workers' compensation but a limit of \$100,000 was specified for cover against liability for damages. In the present case the minimum prescribed cover of \$100,000 for damages had been extended by agreement to \$150,000 30

2.05 The question is whether payments of compensation by the insurer discharged in part its liability to indemnify in relation to damages, so that the insurer's maximum liability in relation to damages was \$150,000 less the compensation paid, or whether the insurer was liable, after the payment of compensation, for up to \$150,000 for damages over and above the compensation paid. 40

2.06 The appellant's case is as follows :

(a) Where liability for worker's compensation and for damages arise in connection with the same injury, payments of worker's compensation have a dual character, operating to discharge the liability for worker's compensation and, at the same time, to discharge the liability for damages to the extent of their amount.

10 (b) From this it follows that where the policy provides for cover to a limit of \$150,000 for damages, payments of compensation by the insurer reduce by their amount the sum of \$150,000 which the insurer may thereafter be called upon to pay for damages.

20 2.07 By statute, an insurer may become liable to pay damages directly to a worker, but subject to the limit of cover specified in the policy. In this instance, there is no question concerning the worker's right to recover directly from the insurer, the only question being as to the amount which may be recovered from the insurer.

6(24)

3.00 CONCURRENT LIABILITY FOR WORKERS' COMPENSATION AND DAMAGES

30 3.01 In New South Wales an injured worker may, as of right, recover first worker's compensation and later damages. There is no provision for election between the two remedies as was the case in the English legislation and before 1953, in the New South Wales legislation.

40 3.02 The Workers' Compensation Act, 1926 as amended, Section 63, provides that if compensation is paid and damages are later recovered, the damages are to be reduced by the amount of the compensation paid, and judgment for damages extinguishes unsatisfied rights to worker's compensation, past and prospective. Detailed consideration to the section follows later in this Case.

4.00 THE PRESCRIBED FORM OF THE POLICY

4.01 Insurance against liability for workers' compensation and against liability for damages to the specified limit is made compulsory by Section 18 of the Act which, at the relevant time, provided, so far as is material, as follows :

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18(1)... every employer shall obtain... a policy of insurance or indemnity... for the full amount of his liability under this Act to all workers employed by him and for an amount of at least \$100,000 in respect of his liability independently of this Act for any injury to such worker.

4.02 Regulation 1 of the regulations made pursuant to the Act provides that policies issued pursuant to the Act shall be in the form appearing in Appendix 1 of the regulations. At the relevant time, the prescribed form of policy was as appears in Appendix 1 to this Case. 10

5.00 THE POLICY IS TO BE CONSTRUED IN THE LIGHT OF THE ACT

5.01 The Act is expressly incorporated in the policy by reference.

5.02 The policy is to be construed taking into account the provisions of the statute. 20

State Mines Control Authority v. Government Insurance Office of N.S.W. (1964) 65 S.R. (N.S.W.) 258, 261

Followed in -
Dillingham Engineering Pty. Ltd. v. National Employers' Mutual General Insurance Association Ltd. (1971) 1 N.S.W.L.R. 578, 585.

5.03 The relevant provisions of the statute are Section 18 (see 4.01 above) and Section 63 (now to be considered). 30

6.00 IN THE HISTORY OF SECTION 63 PAYMENTS OF COMPENSATION HAVE ALWAYS DISCHARGED LIABILITY FOR DAMAGES TO THE EXTENT OF THEIR AMOUNT

6.01 Section 8 of the Workmen's Compensation Act, 1910 (N.S.W.) provided as follows :

8. In every case where the injury is caused by the personal negligence or wilful act of the employer, or some person for whose act or default the employer is responsible, the following provisions shall apply :- 40

(a) Nothing in this Act shall affect any

civil liability of the employer independently of this Act.

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- 10 (b) The workman may, at his option, either claim compensation under this Act, or take such proceedings as are open to him independently of this Act: Provided that the employer shall not be liable to pay compensation or damages, both independently of and also under this Act, and shall not be liable to pay compensation or damages independently of this Act except in case of such personal negligence or wilful act as aforesaid.

This was materially identical to the English legislation; see Willis's Workmen's Compensation, 37th Edn., p.527, where Section 29 of the consolidating 1925 Act appears.

20 6.02 In New South Wales the 1910 Act was replaced by the Workers' Compensation Act 1926 in which Section 63 provided as follows :

63(1) Nothing in this Act shall affect any civil liability of the employer where the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible.

30 (2) In such case the worker may, at his option, proceed under this Act or independently of this Act, but he shall not be entitled to compensation under this Act, if he has obtained judgment against his employer independently of this Act.

Further subsections were added later.

40 6.03 These provisions gave rise to a plethora of case law in the United Kingdom and in New South Wales as to the meaning of the phrase "at his option" which governed the circumstances in which the receipt of compensation would bar an action at law for damages. Under the New South Wales 1926 statute there was the additional question of whether the worker had "proceeded under the Act". The cases are collected and reviewed in Willis (supra) at p.529-53 and in Mills: Workers' Compensation (New South Wales), 2nd Edn., p. 486, para. 401.

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6.04 Under the principles developed in these decisions there were circumstances where compensation was paid but an action for damages could still be brought; for example, where there was no "informed election", or where the compensation was received "without prejudice", or where, in the case of the New South Wales, 1926 Act, the worker had not "proceeded under the Act".

6.05 In such cases double payment was avoided on common law principles. It was held that the payment of compensation satisfied in part the employer's liability for damages and, accordingly, where damages were recovered after compensation had been paid, the damages which would otherwise have been awarded were reduced by the amount of compensation paid. 10

6.06 The judicial reasoning on this point was part of the ratio of these decisions. On behalf of employers a strict view about election to take compensation was proffered in an endeavour to bar actions for damages. In support of that view it was submitted that there would otherwise be the anomaly of double payment because the worker who had received compensation representing part of his wages would then receive damages for loss of the whole of his wages. It was in response to this submission that the Courts held that double payment would not occur because the damages were properly to be reduced by the amount of compensation which had been paid. 20 30

6.07 The relevant authorities and extracts from the judgments appear in Appendix 2 to this Case. See particularly Brown v. William Hamilton & Co. (1944) S.L.T. 282 per Lord Patrick at 286; approved in Young v. Bristol Aeroplane Co.Ltd. (1946) A.C. 163 per Viscount Simon at 171-172 and Lord Russell at 176 -

When the workman sues at common law if the sum awarded in name of damages exceeds the sums already paid to him in name of workmens' compensation, these sums will form a good set-off or will have to be taken into account in diminution of damages. 40

The Australian cases show that in New South Wales this common law principle was implemented in practice at the trial of actions for damages; see for example, O'Connor v. S.P.Brays Ltd. (1936) 56 C.L.R. 464. 50

6.08 Thus, before there was any express provision for avoiding double payment where compensation was paid before damages were recovered, the law was well settled that compensation discharged in part the liability for damages and was, accordingly, to be taken into account in reducing the damages which would otherwise have been awarded.

10 6.09 In 1938 subsections were added to Section 63 of the New South Wales 1926 Act. These included the following subsection.

(5) Where judgment is obtained from an employer independently of this Act, any payments by way of compensation under this Act in respect of the injury ... shall be, to the extent of such payments, a satisfaction of the judgment.

20 6.10 In view of the settled law that payments of compensation reduced the liability for damages on common law principles the purpose of this amendment is not certain. There are several possible reasons for it.

30 (1) The amendment may have been in response to Avery v. London & North Eastern Railway Co. (1938) A.C.606, which approved the splitting of dependants' claims for death benefits so that some claimed damages and others compensation. In Medaris v. Lars Halvorsen & Sons Pty. Ltd. (1943) 44 S.R. (N.S.W.) 71 the new subsection (5) was construed as requiring that compensation recovered by any one dependant had to be deducted from damages recovered under Lord Campbell's Act on behalf of other dependants because both proceedings related to the same "injury".

40 (2) It may have been intended to avoid problems relating to the precise calculation at the trial of the compensation received by the worker: see O'Connor v. S.P. Bray Ltd. (1936) 56 C.L.R. 464 in Appendix 2 to this Case, leaving it to the parties to make the adjustment out of Court.

50 (3) It may have been thought to be unfair to plaintiffs to give the defendant an opportunity of emphasising the prior payment of compensation at the trial. Conformably, mention of

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compensation by the defendant was prohibited by Section 64A of the Act, introduced in 1944, but since repealed.

6.11 Whatever may have been the reason for Section 63(5), apart from its possible effect on split dependants' claims, the effect of the amendment was purely procedural. In the ordinary case, the amount recovered by way of damages was precisely the same; all that was changed was that the deduction of compensation was made after judgment rather than in the assessment of damages before judgment. 10

6.12 A further amendment in 1953 abolished election between the alternative remedies of worker's compensation and damages. By that amendment Section 63(2) provided as follows:

In such case the worker may proceed both under this Act and independently of this Act but where he obtains judgment against his employer independently of this Act he shall not be entitled to any compensation under this Act other than compensation paid to him before such judgment. 20

Subsection (5) was not amended after its introduction in 1938 until 1970. The 1953 amendment to Section 63(2) did not therefore affect the way in which prior payments of compensation were dealt with pursuant to Section 63(5). 30

6.13 Section 63 was further amended by the Supreme Court Act, 1970. This was the statute which introduced the Judicature System into New South Wales. The material parts of Section 63 are set out in Appendix 3 to this Case; words repealed are shown there in brackets and underlined, and words added are in block letters.

6.14 The operation of the section as so amended was governed by Section 89(2) of the Supreme Court Act, 1970 which, so far as is material, provides as follows : 40

89(2)... issues of fact on a defence arising under... subsection five of section sixty-three of the Workers' Compensation Act, 1926... shall be tried without a jury.

Part 77, Rule 37, of the Supreme Court Rules,

introduced at the same time, provided as follows :

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37. Proof of payments. A defendant pleading a defence under section 63(5) of the Workers' Compensation Act, 1926

(a) need not, in his pleadings, or in any document filed with his pleading, state the amount of the payments made under the Act.

10 (b) may, by affidavit filed and served in accordance with Part 38, rules 6 and 7 but in any event not later than three days before the date for which the proceedings are set down for trial, adduce evidence of those payments.

20 Thus, since the 1970 amendment, "total damages" are assessed (at a jury trial, by the jury) without regard to the compensation paid, the amount of compensation paid is determined (by the trial judge, at a trial with or without a jury), and judgment is entered for the nett amount.

30 6.15 The effect of the 1970 amendment was purely procedural. Indeed, the amendment, in broad terms, restored the pre-1938 position, where the compensation was taken into account at the trial in reduction of damages on common law principles. There were slight differences in that the judge and not the jury made the deduction of compensation and the payment of compensation could be proved by affidavit. But, so far as is material to the present argument, the position would have been no different if subsection (5) had simply been repealed altogether.

40 6.16 The purpose of the 1970 amendment appears to have been to determine the amount of the workers' compensation deduction with finality at the trial rather than have to resolve any dispute later by a motion to stay execution on the judgment. The deduction of compensation was reserved for the trial judge presumably to avoid distracting the jury with that task.

7.00 PAYMENTS OF WORKER'S COMPENSATION
DISCHARGE THE EMPLOYER'S LIABILITY FOR
DAMAGES TO THE EXTENT OF THEIR AMOUNT.

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7.01 That this was so throughout the history of Section 63 has been demonstrated in the previous section of this Case. The only variation has been the procedural means by which the principle has been effectuated: namely on common law principles in England and, before 1938, in New South Wales, by credit against the judgment in New South Wales after 1938, and by codification of the common law position in New South Wales after 1970. 10

7.02 The dual character of worker's compensation payments which continued after the 1970 amendment was affirmed both at first instance and by the Court of Appeal of the Supreme Court of New South Wales in Australian Iron & Steel Pty. Ltd. v. Government Insurance Office of New South Wales (1977) 2 N.S.W.L.R. 446, (1978) 2 N.S.W.L.R.59. It is submitted, with respect, that this case was correctly decided and, if followed by the Court of Appeal, would necessarily have led them to the opposite result. The decision is analysed as follows. 20

7.03 AIS became liable for both worker's compensation and damages when injury was received by an employee in the course of his employment. The injury also arose out of the use of a motor vehicle. AIS was self-insured under the Workers' Compensation Act, but was insured by the GIO under a policy in statutory form issued pursuant to the Motor Vehicles (Third Party Insurance) Act, 1942 against liability arising out of the use of the vehicle which was involved. AIS paid worker's compensation and "accident pay" (being the difference between the worker's compensation and the employee's award rate of pay payable under an agreement between AIS and the employee). 30

7.04 The employee then sued AIS for damages. The GIO took over conduct of the defence. The claim for damages was settled by the GIO on terms that judgment would be entered for an amount "clear of worker's compensation and accident pay". Judgment was entered accordingly. 40

7.05 AIS then claimed indemnity from the GIO in respect of the moneys paid by way of compensation and accident pay. It was held by Yeldham, J. at first instance and subsequently by the Court of Appeal that AIS was entitled to succeed.

7.06 The statutory third party policy covered 50

the owner of a vehicle "against all liability except a liability referred to in subsection (2) of section 10 of the... Act". That section provided that a third party policy did not extend to cover the owner of the vehicle against liability to pay compensation under the Workers' Compensation Act or under an agreement unless the liability would have arisen irrespective of the agreement.

10 7.07 Before Yeldham, J. (1977) 2 N.S.W.L.R. 446, it was conceded (450E) that before the 1970 amendment to the Workers' Compensation Act the third party policy would indemnify the insured against moneys paid by way of compensation when damages were subsequently recovered. It was submitted however (450D) that after the amendment the same policy would not provide such cover, because the compensation was no longer deemed to have been paid in part satisfaction of the judgment for damages. Yeldham, J. in rejecting this submission, said (450G - 451E) -

20 I regard the amendment to s.63(5) as effecting a change in procedure only, notwithstanding the submissions of Mr. O'Keefe, to which I have briefly referred, to the contrary. In Parr v. Rural Agents Pty. Ltd. (1975) 2 N.S.W.L.R. 347

30 I had occasion to discuss in another connection some of the authorities which deal with the distinction between procedural and substantive enactments. Although it is true, as Mr. O'Keefe pointed out, that a new defence is now provided where one did not previously exist, in reality the rights and liabilities of the parties (except, perhaps, as to costs in a limited class of case, although such costs are within the discretion of the court) are in no way different, since the amendment, from what they previously had been. The negligent employer is required to pay the same amount, and the insured worker is entitled to receive the same sum, whether s.63(5) is in its present form or as it appeared before 1970. Section 63(1), which preserves the civil liability of the employer to pay damages, which liability arises at the moment of injury, has in no way been affected by the 1970 Act. The effect of s.63(5), in my opinion, is to provide a defence analogous to a plea of partial payment

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or to a set-off, and it is because portion of the liability for payment of the "total damages" has been previously satisfied by workers' compensation payments made that judgment is entered for the lower amount. Those payments are deemed to have been made in part satisfaction of the worker's entitlement to damages, and their effect is to reduce the amount which, if they had not been made, would have been payable by the insured (and, therefore, in a case like the present, by the third party insurer) by way of damages. It is not the amount of the judgment, where there is one, which necessarily indicates the extent of the "liability incurred" and so gives the measure of indemnity. That indemnity is for the total liability of the insured to pay damages, whether or not compensation has previously been paid, save and except for the items which fall within the exclusions provided for by s. 10(2).

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AIS also succeeded in relation to the accident pay. Yeldham, J. said (451F):

Such moneys constitute merely an advance of those which, if he succeeded, would in any event be included in his total award of damages.

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7.08 On appeal: (1978) 2 N.S.W.L.R. 59, it was submitted (62A-B) that, on the true construction of the Third Party Policy "liability" meant only liability under a judgment, and that liability under the judgment did not include liability to pay compensation or accident pay. Glass, J.A. (with whom Moffitt, P. and Reynolds, J.A. agreed) rejected both submissions. He held that "liability" in the policy meant liability incurred when the claimant's cause of action accrued, not "held liable". As to the second submission, Glass, J.A. assumed for the purpose of the argument that AIS incurred no liability until the entry of judgment (63A). On this assumption he said (63B-G):

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The defendant's submission depends upon the proposition that the liability of a defendant to pay both compensation and damages to the same plaintiff involves not only the existence of two distinct heads of obligation, but also that the

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satisfaction of each is measured by evidentiary factors which can be kept in separate compartments. But a consideration of the way in which principles of assessment bring the relevant evidence into operation demonstrates that such is not the case, and that they are in truth interdependent, in fact and law. It cannot be denied that, if the action had been tried, the damages recoverable by the worker for impairment of earning capacity would not be limited to the excess over and above the compensation due to him from the defendant. Proof of any sums received by way of compensation would have been inadmissible before a jury: Supreme Court Act, 1970, s.89(2). After damages had been assessed by it without regard to compensation, it would have been the function of the judge to make an appropriate reduction to the amount of the verdict before entering judgment: *ibid.* When the action for damages was settled, the terms of settlement are to be understood within the framework of principle governing the assessment of the plaintiff's damages. The damages which the worker recovered under it consisted, not only of the liquidated sum which according to customary parlance was clear in the plaintiff's "pocket" or "hand". They included, as well, an additional sum equal to all sums paid by way of compensation - and accident pay - in order to ensure that the deduction which the law would otherwise require would not be made.

It was conceded by Mr. McHugh, Q.C. for the third party insurer that, if a defendant being sued for damages had made a contribution to the plaintiff's medical expenses and a settlement had been later arrived at clear of that sum, it would be proper to say that the parties were treating the subvention as an advance payment on account of damages. But he argued that the compensation and accident pay were impressed with the character they bore by the Act and agreement respectively. The defendant was liable to pay them, and had paid them. All the settlement did was to extinguish the worker's liability to

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make a refund. They were never a part of his damages. But for the reasons already given I consider the proper analysis is that the payments had a dual character. They were, it is true, referable to an independent head of liability. But they were also stamped with another character, viz. that they were payments on account of damages for which credit would have to be given if damages were later recovered. 10

The effect of this passage is that, if "liable" in the policy meant "held liable", the payments made by way of compensation or accident pay were, after judgment, nonetheless to be regarded as having been paid on account of damages and were therefore part of the moneys for which AIS had been held liable by the judgment.

7.09 It is unnecessary for the purposes of this appeal to resolve whether "liability independently of the Act" in the prescribed form of policy issued pursuant to the Workers' Compensation Act means liability incurred at the time of the injury or liability determined by judgment. On the authority of Australian Iron & Steel Pty. Ltd. v. Government Insurance Office of New South Wales (1978) 2 N.S.W.L.R. 59, even if the latter is the case, the liability determined by the judgment is a liability for "total damages" against which payments of compensation are credited by way of accord and satisfaction. 20 30

8.00 IT FOLLOWS THAT PAYMENT OF COMPENSATION BY THE PRESENT APPELLANT DISCHARGED BY THE AMOUNT OF SUCH PAYMENTS ITS MAXIMUM LIABILITY OF \$150,000 FOR DAMAGES

8.01 If, as has always been the position under Section 63 and as was affirmed in Australian Iron & Steel Pty. Ltd. v. Government Insurance Office of New South Wales, supra, the payment of compensation by the employer discharged in part his liability for damages, the payment of such compensation by an insurer discharges in part the insurer's liability to indemnify the employer against his liability for damages and the insurer's direct liability to the worker for such damages. 40

8.02 In the present case, the appellant's liability in respect of damages was limited to \$150,000. Since the payments of compensation 50

operated to discharge that liability to the extent of their amount, the insurer's liability for damages initially limited to \$150,000 was reduced by the amount of such payments.

9.00 THE FOREGOING CONSTRUCTION OF THE POLICY IS NECESSARY TO AVOID AN INTOLERABLE ANOMALY

10 9.01 If the Court of Appeal's judgment stands, in every case where the assessment of total damages (i.e. the damages before deduction of worker's compensation) exceed the policy limit the insurer will be better off if it has avoided the payment of compensation due to the worker than it would be if it had met its obligation to pay the compensation as it fell due.

20 9.02 The anomalous result may be demonstrated by taking a case where total damages are assessed at \$200,000 and there is a policy limit of \$150,000 for damages. Assume compensation amounting to \$50,000 has become payable before judgment. If the compensation has not been paid, there will be judgment for \$200,000 and the insurer will pay \$150,000 in all. But if the insurer has honoured its obligations by paying the compensation due to the worker there will be judgment for \$150,000 (\$200,000 less \$50,000 compensation) and the insurer will have paid \$200,000 in all, being \$50,000 as compensation and \$150,000 for damages.

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9.03 This would encourage delay and obstruction in the payment of compensation and would not have been intended by the legislature.

9.04 If the Court of Appeal is right, the present appellant would be \$63,709.10 better off if it had managed to avoid altogether the payment of compensation by delay and obstruction, or better off by whatever amount of compensation it did manage to avoid paying prior to the trial.

40 9.05 In Christopherson v. Lotinga (1864) 33 L.J.C.P. 23, Willes, J. commented upon what had been said by Lord Wensleydale in Grey v. Pearson (1857) 6 H.L.C. 61 at 106 as follows :

The general rule is stated by Lord Wensleydale in these terms, viz., to adhere to the ordinary meaning of the words used, and to their grammatical construction, unless that is at variance with the intention of the

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legislature to be collected from the Statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further.' I certainly subscribe to every word of the rule except the word 'absurdity', unless that be considered as used there in the same sense as 'repugnance' - that is to say, something which would be so absurd with reference to the other words of the Statute as to amount to a repugnance. 10

9.06 If the words of the statutory form of policy do not clearly bear the meaning for which the appellant contends, an ambiguity arises as to whether the phrase "any other amount in respect of (the employer's) liability independently of the Act" means the amount of the employer's liability for damages arising at the time of injury or the amount of such liability after allowing for payments of compensation paid thereafter which have discharged that liability to the extent of their amount. 20

9.07 The latter construction would be absurd and repugnant in the relevant sense having regard to the legislative intention inherent in the code when considered as a whole. This is so because on that construction the employer's and the worker's rights against the insurer would fluctuate with the fortuitous circumstance as to whether the worker had claimed and recovered compensation to which he was entitled before judgment for damages was obtained, and the insurer's liability would be reduced by the fortuitous circumstance that it had managed by delay and obstruction to avoid the payment of compensation to which the worker had become entitled before such judgment for damages was obtained. 30 40

10.00 ERRORS IN THE COURT BELOW

24(25) -
25(16) - 10.01 Samuels J.A. referred to the way in which Section 63 operated to prevent double payment both before and after the 1970 amendment. He then went on to say -

25(17-18) In either case (that is, before and after the amendment) it is correct to say that the employer's liability is to pay only the nett amount (that is, total damages less the compensation). 50
The words in brackets are added.

This statement is, with respect, erroneous and is contrary to the decision in Australian Iron & Steel Pty. Ltd. v. Government Insurance Office of New South Wales (supra). Liability for damages accrues at the time of the injury and the method by which credit is given for worker's compensation payments does not affect the amount of the liability which accrued at that time.

10 10.02 Samuels, J.A. said -

The defendant's argument is that its total liability under the policy to indemnify the employer (and thus its liability to the plaintiff) for both compensation and damages does not exceed the sum of \$150,000

25(21-24)

This understanding of the appellant's argument is repeated.

20 ... it does not at all follow that the employer's liability both for compensation and damages, is restricted to the amount of the indemnity (if limited in the Policy) which is stipulated only in respect of liability independently of the Act, that is, for damages at common law.

26(8-12)

30 And is again repeated later in the judgment. The appellant did not submit that in all circumstances the insurer's total liability under the policy was limited to \$150,000. These passages show, with respect, that his Honour failed to address himself to the question in issue, namely, whether payments of compensation reduce the insurer's maximum liability for damages in a case where damages are recovered. The extent of the insurer's liability under the policy in other circumstances, for example, where damages are not recovered, does not arise.

27(24-27)

10.03 When his Honour said -

40 It is, I think, evident that the policy provides protection to an employer... under two quite distinct heads

25(25-28)

his Honour, with respect, failed to take into account, as had been held in Australian Iron & Steel Pty. Ltd. v. Government Insurance Office of New South Wales (supra), that payments of compensation discharged the liability for

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damages to the extent of their amount.

26(15) -
27 (23)

10.04 When his Honour gave hypothetical situations to illustrate that no anomaly arose from the construction of the policy which he supported, his Honour, with respect, failed to complete the series which would have demonstrated the anomaly; see paragraph 9.02 of this Case.

11.00 CONCLUSION

11.01 The appellant therefore submits that the appeal should be allowed for the following (amongst other) 10

R E A S O N S

(1) The liability of an employer for damages is satisfied by the prior payment of compensation to the extent of the amount of such payments.

(2) It follows that the liability of an insurer in respect of damages under the form of policy prescribed pursuant to the Workers' Compensation Act, 1926 as amended is discharged by the amount of compensation paid by it. 20

(3) Where such policy limits the amount payable in respect of damages the insurer's liability for that limited amount is discharged and reduced by the payment of compensation to the extent of such payments.

(4) The Court of Appeal erred in holding that the policy provided cover under two distinct heads, compensation and damages, so that the payment of compensation by the insurer did not reduce its liability in respect of damages. 30

(5) The Court of Appeal should have held that the appellant's liability in respect of damages, limited by the policy to \$150,000, was discharged and reduced by the sum paid as compensation.

(6) The Court of Appeal ought accordingly to have rejected the respondent's claim for the sum of \$63,709.10 being the amount which the appellant had paid as workers' compensation.

THE CROSS APPEAL 40

12.00 THE POLICY DOES NOT INDEMNIFY AGAINST LIABILITY FOR THE WORKER'S COSTS OTHER THAN WITHIN THE LIMIT OF \$150,000 FOR LIABILITY INDEPENDENTLY OF THE ACT

12.01 The express provision in the policy concerning costs relates only to the employer's costs.

12.02 That provision does not apply to the worker's costs for the following reasons:

- (a) The worker's costs are not "incurred" by the employer, although he may incur a liability for them.
- (b) The worker's costs are not incurred "in connection with the defence of any legal proceedings by the employer" but in the prosecution of such proceedings by the worker.
- (c) The worker's costs cannot be incurred by any act of the employer to which the insurer might consent.

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12.03 The insurer's position in this respect is supported by MacGillivray & Parkington on Insurance Law, 6th Edn., paras. 2262-2264.

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12.04 The appellant therefore submits that the cross-appeal should be dismissed for the above (amongst other) REASONS.

Counsel for the Appellant
H.D. SPERLING

J.E. MACONACHIE

APPENDIX 1

APPENDIX 1

WORKERS' COMPENSATION ACT 1926, AS AMENDED

EMPLOYER'S INDEMNITY POLICY

ESTIMATED Earnings, \$——. Premium, \$——. (Subject to adjustment as provided below)

WHEREAS by virtue of the Workers' Compensation Act 1926, as amended (hereinafter called the Act), it is provided that every employer shall obtain from an Insurer licensed under the Act to carry on business in the State a policy of insurance or indemnity for the full amount of his liability under the Act to all workers employed by him and for an amount of at least one hundred thousand dollars in respect of his liability independently of the Act for any injury to any such worker and shall maintain such policy in force and

WHEREAS —— of —— (hereinafter called the Employer) is carrying on the business of —— and no other for the purpose of this indemnity at —— in the State of New South Wales, and has made to —— an Insurer licensed under the Act (hereinafter called the Insurer) a written Proposal and Declaration dated the —— day of ——, 19——, containing certain particulars and statements which it is hereby agreed shall be the basis of this contract and be considered as incorporated herein.

NOW THIS POLICY WITNESSETH that in consideration of the payment by the Employer to the Insurer of the above-mentioned Premium (which Premium is subject to adjustment as hereinafter provided) IF, between the —— day of ——, 19—— and four o'clock in the afternoon of the —— day of ——, 19—— and thereafter to four o'clock in the afternoon of the last day of any subsequent period in respect of which the Premium shall have been paid to and accepted by the Insurer, the Employer shall be liable to pay compensation under the Act to or in respect of any person who is or is deemed by the Act to be a worker of such Employer or to pay any other amount not exceeding one hundred thousand dollars in respect of his liability independently of the Act for any injury to any such person,

THEN, and in every such case the Insurer will indemnify the Employer against all such sums for which the Employer shall be so liable; the Insurer will also pay all costs and expenses incurred with the written consent of the Insurer in connection with the defence of any legal proceedings in which such liability is alleged.

PROVIDED that this Policy shall not extend to any business or occupation other than that described herein, unless and until particulars thereof shall have been supplied to and accepted by the Insurer and the acceptance of such extension endorsed hereon by the Insurer. AND it is hereby further agreed that the above indemnity is made subject to the due and proper observance and fulfilment by the Employer of the conditions hereunder, and the Insurer shall be (a) directly liable to any worker and in the event of his death, to his dependants, to pay the compensation or other amount for which the Employer is liable and in respect of which the Employer is indemnified under this Policy; and (b) bound by and subject to any judgment, order, decision, or award given or made against the Employer under the provisions of the Act or in respect of his liability independently of the Act and in respect of which the Employer is indemnified under this Policy. Provided lastly that this Policy shall be subject to the Act and the Rules and Regulations made thereunder, all of which shall be deemed to be incorporated in and form part of this Policy.

NOTES

1. The above is reproduced from Mills: Workers' Compensation (New South Wales), 2nd edn., p.633.
2. Conditions appended to the policy are not reproduced.
3. In the present case the limit of \$100,000 in respect of liability independently of the Act had been increased to \$150,000.

APPENDIX 2

CASES SHOWING THAT COMPENSATION IS TO BE
TAKEN INTO ACCOUNT IN ASSESSING DAMAGES
ON COMMON LAW PRINCIPLES

Erickson v. Australian Steamships Ltd. (1919)
19 S.R. (N.S.W.) 132 at 138-9 per Gordon, J.

10 There was no necessity to legislate for
the converse case of the employee having
first recovered compensation under the Act
and then having brought an action against
the employer for damages. In such case,
without any statutory enactment, the
employer could set up the recovery of that
compensation from him by the plaintiff in
bar or in mitigation at least of the claim
for damages in respect of the same injury.

20 (The reference to the compensation being in bar
would be to a case where the damages were no
higher than the amount of compensation which
had been paid).

Latter v. Muswellbrook Corporation (1936) 56
C.L.R. 422 at 435-6 per Latham, C.J.

30 A question arises as to the exact amount
for which judgment should be given. In
my opinion, the sum of 425 pounds receivable
(and in part received) under the Act should
be deducted from the damages otherwise
obtainable at common law. It is payable as
compensation for the same injury as that in
respect of which the verdict has been given
and the jury, I think rightly, said that it
should be taken into account.

(The word "receivable" was used here to denote
moneys which had in the view of Latham, C.J.
vested in the plaintiff pursuant to an order of
the Workers' Compensation Commission and not as
denoting merely a right to receive compensation).

Per Evatt and McTiernan, JJ. at 449:

40 We agree there is no objection in principle
to taking into account in reduction of a
common law verdict the amount of payments
to a worker or a dependant, providing that
those payments have been made in respect
of the same injury as that in respect of
which the plaintiff is suing.

O'Connor v. S.P. Bray Ltd. (1936) 56 C.L.R. 464
at 490 per Evatt & McTiernan, JJ.

The jury also found that the plaintiff was entitled to recover in respect of injuries the sum of 950 pounds, but that, as the plaintiff had received in respect of workers' compensation payments £398/14/6 the verdict entered should be for the difference, viz. £551/5/6. A further question was raised as to the amount of hospital and medical expenses under the Workers' Compensation Act of which the plaintiff in fact received the benefit. At the trial, counsel for the plaintiff offered to have the verdict reduced by the sum of about 38 pounds in respect of such expenses, and, in our view, the verdict for the plaintiff should be restored, but only to the amount of £551/5/6 less the agreed amount in respect of hospital and medical expenses.

Unsworth v. Elder Dempster Lines, Ltd. (1940 1 K.B. 658 at 670-671 per MacKinnon, L.J.

I have been assisted by some remarks made in the course of this case by Goddard, L.J. I think that he is right in pointing out that, if an action at common law had been allowed to proceed, the man's damages would have had to be assessed. Part of those damages would have been his loss of wages. In so far as he had received his weekly payments for his employers, those receipts would pro tanto have diminished the amount of his damages under the head of loss of earnings. Therefore, there would be no question of claiming back the amount, or setting it off against the amount which in the hypothetical common law action he would recover, because he would only recover his loss of wages less what he had received from his employers.

Per Goddard, L.J. at 674 -

Where the payment has been made in circumstances in which it is held, as we are now holding, that an action at common law would lie, it is clear, I think that the employer would not pay twice over, because, when the damages came to be assessed, the only damages which the man could recover, in addition to pain and suffering, would be what he had actually lost, which would be

not the whole but only half his wages. Therefore I think that that presents no difficulty. It is not a question either of set-off or recovery of what has been paid, but simply a matter of giving him only the damages which he has suffered.

Brown v. William Hamilton & Co. (1944) S.L.T. 282 at 286 per Lord Patrick.

10 I think the Court of Appeal was influenced against accepting such a construction of the subsection by the view that, if the workman first received any weekly payment under the Act and thereafter sued for damages at common law, there would no right to set off the compensation already paid against the damages proved to have resulted from the injury. Now the moment the subsection is construed to mean that 20 the employer is not to be liable to pay in the end of the day both compensation under the Act and independently of it, this difficulty disappears. Any sums already paid as compensation under the Act will therefore form a proper set-off against the damages proved. The consideration which led the Court to prefer construction A to construction B disappears if construction B is preferred.

30 It follows that the construction of the subsection which I favour never can involve the employer in liability to pay in the end of the day "compensation" both under the Act and independently of it. When the workman sues at common law, if the sum awarded in name of damages exceeds the sums already paid to him in name of workmen's compensation, these sums will form a good set-off or will have to be taken into 40 account in diminution of damages. In the result the employer will have been compelled to pay only the amount of the award of damages, and that is precisely the result which the opening words of the subsection declare was still to be reached.

Young v. Bristol Aeroplane Co. Ltd. (1946) A.C. 163 at 171-172 per Viscount Simon,

50 If, before the workman can be regarded as having really exercised his option, he receives one or more weekly payments under the Act, and he then opts to issue a writ and recovers damages, the damages in the

action would be reduced by the amounts already received. This view secured what Lord Greene M.R. in Perkins Case described as the effect of the final words, namely, that "the employer is not to be made to pay twice over to the same person". I cannot agree that the deduction from damages of a sum already paid in respect of the same injury is contrary to any "principle of law". On the contrary, I would adopt Lord Patrick's statement that "when the workman sues at common law, if the sum awarded in name of damages exceeds the sums already paid to him in name of workmens' compensation, these sums will form a good set-off or will have to be taken into account in diminution of damages". 10

Per Lord Russell of Killowen at 176 -

In coming to this conclusion I find myself in substantial agreement with the views expressed by Lord Patrick in the case of Brown v. William Hamilton & Co. 20

APPENDIX 3

SECTION 63 BEFORE AND AFTER 1970 AMENDMENT

NOTE: Words deleted are in brackets and underlined. Words added are in block letters.

10 63(1) Nothing in this Act shall affect any civil liability of the employer where the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible.

20 (2) In such case the worker may proceed both under this Act and independently of this Act but where (he obtains judgment against his employer independently of this Act) IN PROCEEDINGS INDEPENDENTLY OF THIS ACT HE ACCEPTS MONEY BROUGHT INTO COURT BY HIS EMPLOYER OR HE OBTAINS JUDGMENT AGAINST HIS EMPLOYER he shall not be entitled to any compensation under this Act other than compensation paid to him before (such judgment) SUCH ACCEPTANCE OR JUDGMENT.

(3)

(4)

30 (5) (Where judgment is obtained against an employer independently of this Act, any payments by way of compensation in respect of the injury, whether made before or after the date upon which the assent of His Majesty to the Industrial Arbitration and Workers' Compensation (Amendment) Act, 1938 is signified, shall be to the extent of such payments, a satisfaction of the judgment). WHERE ANY PAYMENT BY WAY OF COMPENSATION UNDER THIS ACT HAS BEEN MADE, THE PAYMENT SHALL, TO THE EXTENT OF ITS AMOUNT, BE A DEFENCE TO PROCEEDINGS AGAINST THE EMPLOYER INDEPENDENTLY OF THIS ACT IN RESPECT OF THE INJURY.

IN THE PRIVY COUNCIL No.40 of 1981

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH
WALES COURT OF APPEAL

B E T W E E N :

A.M.P. FIRE & GENERAL
INSURANCE CO. LIMITED

Appellant & Cross
Respondent

(Defendant)

- and -

MARINUS MILTENBURG

Respondent & Cross
Appellant

(Plaintiff)

CASE FOR APPELLANT
A.M.P. FIRE & GENERAL INSURANCE
CO.LTD.

SHARPE PRITCHARD & CO.,
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For:

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Solicitors for Appellant and Cross
Respondent
