Sunshine Porcelain Potteries Proprietary Ltd

v.

Nash

[1961] AC 927; [1961] 3 All ER 203; [1961] 3 WLR 747; 105 SJ 606; (1961) 104 CLR 639

PRIVY COUNCIL

VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER AND LORD HODSON

2, 3, 8 MAY, 17 JULY 1961

LORD REID.

This is an appeal from an order of the High Court of Australia which, by a majority (Dixon CJ McTiernan and Windeyer JJ; dissenting Fullagar and Taylor JJ), on 2 March 1959, allowed an appeal from an order of the Full Court of the Supreme Court of Victoria (Herring CJ and Smith J.; dissenting Gavan Duffy J). The case arises out of an application by the respondent under the Workers Compensation Act claiming compensation from the appellants in respect of the disease of silicosis. On 21 February 1957, the Workers' Compensation Board awarded compensation at the rate of £2 2s per week, and thereafter, at the request of the present appellants the board stated a Case for the determination of the court. The following facts were therein set out as being admitted or proved:—

"(a) Between the years 1931 and 1938 the [respondent] worker was employed by the [appellants] as an insulator cleaner. She was about fifteen years of age when her employment began. (b) The [respondent] married in December, 1937, and ceased to work for the [appellants] in May, 1938. Since that time she has been supported by her husband. (c) At no time since she ceased to work for the [appellants] has she worked for wages and at the time of hearing of this application she had no intention of again taking up any employment. At the date of the hearing she had two children under the age of sixteen years and was fully engaged in the domestic duties involved in being a housewife. (d) During her employment with the [appellants] she was exposed to dust containing silica and as a result of this exposure she developed the disease of silicosis although it was not known to her nor manifested by any signs or symptoms until within the last few years. The first symptom noticed by her was breathlessness from about 1950 onwards. (e) On Dec. 20, 1955, DrK J Grice certified that the [respondent] was disabled from earning full wages by reason of silicosis. It was admitted by the [appellants] that the [respondent] had been physically totally disabled for work by reason of the disease for the last twenty-four months preceding the date of hearing. By reason of the disease the [respondent] has incurred expenses for medical treatment since 1953, and she was in Fairfield Hospital for about a month in 1956. (f) No notice of injury nor claim for compensation was given or made before Jan. 5, 1956, and the [appellant] employer has not paid any sums by way of compensation."

The question of law submitted for the opinion of the Full Court was: "Whether upon its findings of fact the board was justified in law in making the said award or any part of it."

The Act in force during the period of the respondent's employment by the appellants was the Workers' Compensation Act, 1928 (No 3806). Under s 18 of that Act, compensation was only payable in respect of certain scheduled industrial diseases which did not include silicosis. By an amending Act of 1946 (No 5128), which was to be read and construed as one with the Act of 1928, it was provided, by s 8, that for s 18 of the principal Act there should be substituted the following section:

"18. Where—(a) a medical practitioner certifies that a worker is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed; or (b) the death of a worker is caused by any disease—and the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of the disablement, then subject to the provisions hereinafter contained the worker or his dependants shall be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of or in the course of that employment and the disablement shall be treated as the happening of the accident."

In 1951, the Workers' Compensation Acts were consolidated by Act No 5601, Section 12(1) of this Act reproduces from the Act of 1946, s 18 as quoted above. This section differs from s 18 of the Act of 1928 in two respects material to the present case. In the first place, it is not restricted to scheduled diseases and, admittedly, it covers silicosis, and, secondly, whereas under the Act of 1928 the disease had to be due to the nature of employment in which the worker was employed within the twelve months previous to the date of disablement, after 1946 it was sufficient if the disease was due to the nature of the employment in which the worker was employed at any time prior to the date of disablement. It should also be noted that, whereas under the Act of 1928 injury by accident had to arise out of and in the course of the employment, it was sufficient under the Act of 1946 and subsequent Acts if it arose out of or in the course of the employment. By an amending Act of 1953 (No 5676) s 12, the word "injury" was substituted for the phrase "injury by accident" throughout the principal Act and, by a consequential amendment, the last part of the section which has been quoted now reads "the disablement shall be treated as the happening of the injury." Section 20 of the Act of 1951 provides that the date of disablement shall be deemed to be such date as the medical practitioner certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given. The certificate in this case was given on 20 December 1955. In it the medical practitioner states, "I certify that the disablement commenced about 1950, according to the history given." It is unnecessary to determine whether on this certificate the date of disablement is 1950 or 1955.

The respondent's contention is that the section quoted clearly applies to her case. Her disablement—the happening of the "injury" to her—occurred after it came into operation; her disablement and the disease which caused it were admittedly due to the nature of her employment by the appellants; and the

long interval which elapsed between the termination of her employment and the onset of her disease and disability is immaterial because the Act, by using the words "at any time", expressly entitles a worker to relate his disablement to past employment no matter how long that interval may be.

The appellants rely on the strong presumption that an Act is not intended to be retrospective, and contend that this section can and should be construed so as to avoid retrospectivity; the general rule of construction is

"… that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act"

(per Cockburn CJ in R v Ipswich Union ((1877), 2 QBD at p 270)). Generally there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that. So, if a worker has already sustained injury or contracted a disease at a time when the employer is under no statutory liability to him arising out of that injury or disease, there would in general be a presumption that an Act bringing that injury or disease within the scope of compensation would not apply to that case; otherwise there would be liability on the employer arising out of a state of things which existed before the Act was passed. But this presumption may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it. In their Lordships' judgment, the circumstances of this case clearly prevent its application at least in so wide a form. Notoriously, silicosis is a disease of slow onset; it may result from the inhalation of noxious matter over a long period of years, there is no certainty when that inhalation reaches the danger point, and, after the damage has been done, a long period may elapse, as it did in this case, before the disease manifests itself. It cannot be supposed that the legislature intended that every worker disabled by this disease after 1946 must prove that the disease was contracted or that the damage was done to him after 1946, because that would involve there being a period of many years of uncertainty; there would be doubt in the case of many workers disabled long after 1946 whether their disablement resulted from a state of things already in existence in that year, and there is no provision in the Act to deal with a case where the disease was contracted before 1946 but aggravated by further exposure to noxious inhalation after that date. None of the learned judges in Australia supported the appellants' argument to this extent. So the Act of 1946 must be held retrospective in substance at least to this extent, that all those who were working in noxious employment after 1946 will get compensation when disablement occurs even if it is clear that the disease was contracted or the whole or most of the damage was done before the Act of 1946 was passed.

The appellants' main argument was directed to a much more limited application of the presumption that a statute is not retrospective. Admitting that a worker may be entitled to compensation although the disease had manifested itself and the whole or substantially the whole of the damage had been done before the Act of 1946 came into operation, the argument is that a line must be drawn between those who ceased to be workers (or workers in noxious employment) before that date and those who continued in such employment thereafter. That means that, if two workers both contracted the disease before 1946 and both only suffered disablement after 1946, one, who happened to remain in employment for a short time after the Act of 1946 was passed, would get compensation, but the other, who ceased to be employed just before the Act was passed, would not. An examination of the various statutory provisions and of the authorities may show that that result cannot be avoided, but it is not a result which would seem to follow naturally from an application of the broad principle which gives

rise to the presumption—that it is not reasonable to suppose that a legislature intends to impose a new liability in respect of something which has already happened. Moreover, the success of this argument would lead to a further difficulty. Section 14 of the Act of 1951, which took the place of similar earlier provisions, entitles the employer who last employed the disabled worker, and who is primarily liable to pay him compensation, to seek relief against earlier employers if he can show that the disease was contracted while in their employment, or that, the disease being contracted by a gradual process, a contribution should be made by an earlier employer. So, an employer who employed a disabled worker for a short time after 1946 may be able to show that the disease was due in whole or in part to earlier employment before 1946. But counsel for the appellants rightly admitted that, if his argument is correct, it must mean that, in such a case, the last employer must pay the compensation, but is deprived of the relief which s 14 appears to give him because this argument must absolve an employer who ceases to employ a worker before the Act of 1946 was passed from any liability to pay compensation in respect of his disablement by silicosis.

Their Lordships must now consider the relevant sections of the statutes, and it will be convenient to take the section of the Act of 1951, since the argument is the same whether one takes those sections or the corresponding sections of the earlier Acts. The main difficulty is the proper correlation of s 5 and s 12. Section 5(1) provides:

"If in any employment personal injury [by accident] arising out of or in the course of the employment is caused to a worker his employer shall … be liabl to pay compensation … "

Section 12 has already been quoted; in cases to which it applies the worker is entitled to compensation

"as if the disease were a personal injury [by accident] arising out of or in the course of that employment and the disablement shall be treated as the happening of the injury [accident]."

The words in square brackets occurred in the Act of 1951; as already noted, they are now omitted by reason of the amendments made in 1953. But it was not argued that this change was material in the present case. In the ordinary case under s 5, it would seem clear that the injury must be sustained while the worker is still in the employment, but the position under s 12 is far from clear. The appellants argue that s 12 merely adapts s 5 to apply it to diseases; s 5 is the leading section and s 12 follows it in requiring that, here again, the injury must happen or be sustained during the employment while the claimant is still a worker. On this view, the question at once arises—what is the injury; is it the contracting of the disease or the first manifestation of the disease, or the disablement resulting from the disease? The respondent answers that, in the case of some diseases, including silicosis, it is often impossible to discover when the disease was contracted, that the date of the first manifestation of the disease may be very doubtful, and that the legislature has foreseen and avoided the difficulty by enacting expressly in s 12 that the disablement shall be treated as the happening of the injury. The next step in the argument is that the legislature cannot have intended that the right to compensation should depend on whether or not disablement occurred while the claimant was still in employment; under s 20, the date of disablement may be the date on which the medical certificate is given, and it would be absurd to suppose that a claimant can lose his compensation merely because he does not get a certificate while he is still in employment. Therefore, it must be held that s 12 does not follow s 5 in requiring that the injury must happen or be sustained during the employment. Before proceeding to deal with these arguments their Lordships must consider the authorities.

Victoria Insurance Co Ltd v Junction North Broken Hill Mine was an action to recover from an insurance company compensation paid to certain workers in respect of the disease of nystagmus. It was admitted that they contracted this disease during the period covered by the insurance, but their disablement did not occur until after that period. The insurance company was held liable under its policy. Their Lordships' ground of judgment, if of general application, would probably enable the present appellants to succeed. Lord Wrenbury said ([1925] AC at p 357):

"The date of contraction of the disease and not the date of its ascertainment or its certification is the date for fixing liability … The disablement or suspension establishes the happening of the accident, but not the date at which it happened … It is an accident to be attributed in point of date so far as liability is concerned to the time at which the disease was contracted, but subject to 'modification' as mentioned in s. 12(1) (a), that is to say as regards 'compensation' … , the accident is to be taken as having happened when disablement or suspension supervened … The liability to pay arose so soon as the disease was contracted."

Their Lordships did not consider what the position would be if, in a case of a disease of gradual onset, it was impossible to say when the disease was contracted, and they appear to have been influenced by a view that, unless liability arose during the period of employment, there would be no valid claim for compensation. This case arose under New South Wales legislationb which is in general similar to the British legislation and to the Victorian legislation. Blatchford v Staddon and Founds was an English case. Here quite a different view was taken of similar provisions, the Victoria Insurance Co case not having been cited. The disease in this case was lead poisoning. Viscount Sumner pointed out that such diseases ([1927] AC at p 467)

b Wormen's Compensation Act (No 71 of 1916, NSW)

"… come on gradually; their first steps may not be perceptible for some time; their rate of progress may vary widely … If there was to be an effective remedy, much more had to be done than simply to declare the disease to be an accident. Means had to be found for enabling the workman to recover compensation from an employer even though he could not prove the precise time when the disease was contracted."

He then dealt with the provision entitling the workman to sue his last employer and said that they ([1927] AC at p 468)

"… provide a means, perhaps rough and ready, of enabling a suffering workman to get compensation from some one certain, in respect of a disease contracted at a wholly uncertain time."

He said in a later passage ([1927] AC at p 470):

"The difficulty of proving the date when the disease was contracted is met by treating the date of the disablement as the date of the happening of the accident."

Lord Wrenbury said ([1927] AC at p 478) that the Act

"… says that the disease or suspension is to be considered as the personal injury by accident. Does this mean that the contraction of the disease is the accident, or does it mean that the

ascertainment in a defined way of the fact of the disease having been contracted is the accident? On the whole from that which I have to say further, I think it must mean the latter."

Ellerbeck Collieries Ltd v Cornhill Insurance Co Ltd was, like the Victoria Insurance Co case, an action under an insurance policy. The

[1961] 3 All ER 203 at 208

Court of Appeal followed the decision in Blatchford. Scrutton LJ was unable to reconcile this decision with that in the Victoria Insurance Co; their Lordships cannot regard the attempt of Greer LJ to reconcile them as successful. Richards v Goskar and Walder v Mono Concrete Co Ltd dealt with a different question, the recurrence of a disease after the initial disability caused by it had ceased. They indicate that the date of the onset of a disease may be relevant if ascertainable, but the argument in Blatchford's case was not dealt with and their Lordships have derived little assistance from these two cases.

In considering these authorities, their Lordships note that two of the three members of the Board in the Victoria Insurance Co case, Lords Atkinson and Wrenbury, concurred in the decision in Blatchford's case. Moreover, it is impossible to apply the grounds of decision in the Victoria Insurance Co case without radical modification to a case, where owing to the gradual onset of a disease, no particular date can be held to be the date of its contraction. Accordingly, in their Lordships' view, the Victoria Insurance Co case cannot be regarded as establishing a principle of general application.

Their Lordships can deal more briefly with the other authorities cited. There are many cases, Australian and British, a leading example being Clement v D Davis & Sons Ltd, where it has been held that an amending Act does not apply to cases where the injury or injury by accident occurred before the Act was passed. So, if the "injury" in this case occurred before 1946, the appellants must succeed. But these cases do not help in determining when the injury must be held to have occurred. The other authorities dealt with the particular point in this case to which their Lordships must return after completing their consideration of s 12. That point is whether it is fatal to the respondent's case that she was never in employment after the Act of 1946 was passed.

In their Lordships' judgment, s 12 does not follow s 5 in requiring that the injury must occur during the employment. It could only be held to do so if (first), notwithstanding the express provision that "the disablement shall be treated as the happening of the injury", it could be held that contracting the disease is the injury, and (secondly) it could be assumed that the disease is always contracted while still in the employment. Their Lordships are unable to assume that, where a long interval has elapsed, as in this case, between the last inhalation of noxious material and the first manifestation of the disease, it is a medical fact that the disease was contracted before that inhalation ceased, and then lay dormant for many years. They have no reason to exclude the possibility that the noxious material remaining in the claimant's body may only have brought on the disease after a long time. If that be a possibility, then it is quite unreasonable to suppose that the legislature intended the success of a claim for compensation to depend on whether or not the claimant could prove by medical evidence that his disease was in fact contracted before he left the employment. But if s 12 requires that the injury must occur during the employment, that would have to be proved. No one has said that the inhalation of the noxious material is itself the injury, and that is the only thing that certainly occurs during the employment.

The appellants submitted an argument to the effect that the requirement of compulsory insurance by s 72 is unworkable if an injury can occur long after a worker has left the employment. That requirement is in very general terms, and their Lordships express no opinion whether it could cover a case like the present. But, even if it could not, that is not, in their Lordships' view, a sufficient reason for giving to s 12 an interpretation open to the grave objections which have been stated.

[1961] 3 All ER 203 at 209

The particular point in this case is whether the Act of 1946 can apply to a person who was not in employment after it was passed. That Act amended and has to be read with the earlier Act under which the respondent was a worker. The point must be considered in light of the conclusions already reached. Section 12 does not require that a person shall still be in employment when he sustains an injury arising out of his employment, and the respondent did sustain an injury arising out of her employment after the Act of 1946 was passed. Further, it is no answer to a claim to show that the real cause of the injury was inhaling noxious material before the Act was passed. In these circumstances, the presumption against a statute being retrospective can have little weight, if, indeed, it can apply at all. The question becomes one of construction of the Act of 1946. Their Lordships were referred to a majority decision of the Full Court of the Supreme Court of New South Wales, Bellambi Coal Co Ltd v Clark, where the grounds of judgment of the majority were similar to those of the minority in the High Court in the present case. Their Lordships were also referred to a decision of the First Division of the Court of Session, Greenhill v "Daily Record", Glasgow Ltd, in which the facts were not unlike those of this case. The man had left his employment disabled by disease before the Workmen's Compensation Act, 1906, came into operation, and died later. That Act for the first time made his disease, lead poisoning, a subject for compensation. The statutory provisions were rather different, but the reasoning of the short judgment of the Lord President, Lord Dunedin, would apply to the present case. He regarded the claim as an attempt to make the Act retrospective, but the considerations which have been developed at length in later cases and in the present case were not before him, and their Lordships, with all deference to the importance of any opinion of Lord Dunedin, are for that reason unable to accept it.

Their Lordships recognise the strength of the arguments adduced by the learned judges who have taken a different view and regard this as a narrow and difficult case. But, in the end, they must return to the words of the new s 18 enacted by the Act of 1946. Those words apply exactly to the present case. The certificate and disablement were subsequent to its passing. The disease was "due to the nature of any employment in which the worker was employed at any time prior to the date of the disablement". In their Lordships' judgment, there is nothing in the context or in the circumstances to require that any restricted meaning should be given to the words of this section.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: Nicholas Williams & Co (for the appellants); Markby, Stewart & Wadesons (for the respondent).