28, 1968

IN THE PRIVY COUNCIL No. 12 of 1968

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :-

OGDEN INDUSTRIES PTY. LIMITED Appellant

- and -

HEATHER DOREEN LUCAS Respondent

RECORD OF PROCEEDINGS

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Solicitors for the
Appellant.

RADCLIFFES & CO.,
10 Little College
Street,
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Solicitors for the
Respondent

IN THE PRIVY COUNCIL No. 12 of 1968

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B E T W E E N :-

OGDEN INDUSTRIES PTY. LIMITED Appellant

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RECORD OF PROCEEDINGS

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No. 1.

CASE STATED AS AMENDED BY WORKERS COMPENSATION BOARD

In the Supreme Court of Victoria

No. 1.
Case Stated as amended by Workers Compensation Board.
4th October, 1966.

1. This claim for compensation was made on behalf of the Applicant HEATHER DOREEN LUCAS and her two children under the age of 16 years namely Jennifer Lucas and Raymond Douglas Lucas. In accordance with the provisions of Section 44 of the Workers' Compensation Act the said claim was referred to the Workers' Compensation Board by notice dated the 28th day of October 1965. A copy of the said notice is hereto annexed and marked with the letter "A".

2. The claim came on for hearing before the said Board on the 24th day of November 1965. On the said hearing the said Board pursuant to Section 29(2) of the Workers' Compensation Act 1958 (as amended by Section 8 of the Workers' Compensation Act 1965) made an interim award in favour of the Applicant of four thousand eight hundred dollars ($4800.00) and reserved for argument the question as to whether the amount of the award should be nine thousand four hundred dollars ($9400.00). A copy of the said Award is hereto annexed and marked with the letter "B".

3. The said question reserved for argument came on for hearing before the said Board on the 18th day of February 1966 and was part heard. The hearing was completed on the 4th day of May 1966. Both parties were represented by Counsel.

4. No evidence was called by either party but a statement of agreed facts was filed with the said Board and adopted by it. A copy of the said statement of agreed facts is hereto annexed and marked with the letter "C".

5. After consideration of the said statement of agreed facts and the submissions of Counsel the said Board on the 30th day of June 1966 made an award in favour of the Applicant of nine thousand four hundred dollars ($9400.00). A copy of the said award is hereto annexed and marked with the letter "D". On the same day the said Board

In the Supreme Court of Victoria

No. 1.
Case stated as amended by Workers Compensation Board.(Cont'd) 4th October, 1966.

delivered reasons for its said decision. A copy of the said reasons for decision is hereto annexed and marked with the letter "E".

6. The question of law submitted for the opinion of the Full Court is:-

Was it open to the Workers' Compensation Board on the material before it to award the Applicant $9400.00.

10

SIGNED AND SEALED by me at the Direction of the Workers' Compensation Board this 4th day of October 1966.

Geo. T. Smith

REGISTRAR

Amended by the Workers Compensation Board on the 20th February 1967.

No. 2.

ANNEXURES TO CASE STATED

ANNEXURE "A"

IN THE MATTER OF THE WORKERS' COMPENSATION ACTS

1965 No. 6613

IN THE MATTER OF AN APPLICATION BY

HEATHER DOREEN LUCAS — Applicant

- and -

OGDEN INDUSTRIES PTY. LTD. — Respondent

NOTICE BY EMPLOYER THAT CLAIM FOR COMPENSATION HAS BEEN MADE (WHERE DEATH HAS RESULTED FROM THE ALLEGED INJURY)

LIABILITY ADMITTED

TO: The Registrar,
Workers' Compensation Board,
160 Queen Street,
Melbourne.

TAKE NOTICE that a claim for compensation has been made on behalf of HEATHER DOREEN LUCAS of 6 Leigh Street South Oakleigh Claimant and Applicant to OGDEN INDUSTRIES PTY. LIMITED an Employer and the Respondent in respect of the death of REGINALD GEORGE LUCAS late of 6 Leigh Street South Oakleigh deceased.

In the Supreme Court of Victoria

No. 2.
Annexures to Case stated.
Annexure "A"
Notice of Employer with Admission of Liability.
28th October, 1965.

PARTICULARS

1. The claim was made on the 28th day of September 1965.

2. The claim is for compensation for the death of the deceased.

3. The deceased was a male aged 39 years.

In the Supreme Court of Victoria

No. 2.
Annexures to Case stated.
Annexure "A" Notice of Employer with Admission of Liability.(Con'd)
28th October, 1965.

4. The claim was made by the Applicant's Solicitors whose name and address is Messrs. Slater & Gordon, 127, William Street, Melbourne.

5. The claim is for compensation for the death of the deceased caused by or materially contributed to by personal injury namely coronary occlusion, congestive heart failure and the aggravation and acceleration of coronary artery and myocardial degeneration arising out of or in the course of his employment with the Respondent.

6. Death occurred on the 7th day of July 1965 at St. Vincent's Hospital, Fitzroy.

7. No payment of compensation or otherwise was made to the worker.

8. (a) The deceased left a widow namely the Applicant, HEATHER DOREEN LUCAS.

(b) the deceased left the following children under 16 years of age,

(i) JENNIFER LUCAS

(ii) RAYMOND DOUGLAS LUCAS

ADMISSION OF LIABILITY

The employer admits liability to pay such compensation as it is lawfully obliged to pay the amount of which is to be ascertained by the Board.

The name and address of the Employer's Solicitors are Messrs. Maurice Cohen & Co. of 473, Bourke Street, Melbourne.

DATED the 28th day of October, 1965.

Maurice Cohen & Co.

Solicitors for the Employer

TO: The Registrar,
Workers' Compensation Board.

ANNEXURE "B"

WORKERS' COMPENSATION ACT 1958

SUMMARY LIST

BEFORE THE WORKERS' COMPENSATION BOARD

Number 6613/65

IN THE MATTER of a claim for compensation made by

HEATHER DOREEN LUCAS — the Claimant

to OGDEN INDUSTRIES PTY. LTD. — the Employer

in respect of the death of REGINALD GEORGE LUCAS the Deceased

---

INTERIM AWARD

The Board having found that the deceased left HEATHER DOREEN LUCAS, his widow, JENNIFER ANNE LUCAS, RAYMOND DOUGLAS LUCAS children under 16 years of age at time of accident other dependants wholly dependent upon his earnings

- -

dependants in part dependant upon his earnings DOTH AWARD the sum of £2400/-/- to be paid into the custody of the Board, the amount of the Award being limited to the said sum unless and until it is shown that the deceased left a child or children under 16 years of age as aforesaid other than the above-named children; AND DOTH FURTHER AWARD the sum of £ -- being the amount of unpaid weekly payments payable to the deceased before his death in respect of his incapacity resulting from his injury. LEAVE being reserved to the Claimant to prove such matters as the Claimant is entitled to prove in respect of costs of medical, hospital, nursing or ambulance services or of burial.

Amount of Award £2400/-/-. LIBERTY TO APPLY

DATED the 24th day of November 1965.

By Order of the Workers' Compensation Board.

(Seal) Geo. T. Smith. Registrar.

In the Supreme Court of Victoria

No. 2
Annexures to case stated (Cont'd.)
Annexure "B"
Interim Award of Workers Compensation Board.
24th November, 1965.

ANNEXURE "C"

IN THE WORKERS COMPENSATION BOARD AT MELBOURNE 1965 No. 6613

IN THE MATTER of the Workers Compensation Acts

- and -

IN THE MATTER of an Application by

HEATHER DOREEN LUCAS — Applicant

against

OGDEN INDUSTRIES PTY. LTD. — Respondent

STATEMENT OF AGREED FACTS

In the Supreme Court of Victoria

No. 2
Annexures to Case stated (Contd.)
Annexure "C" Statement of Agreed Facts. 18th February, 1966.

1. REGINALD GEORGE LUCAS (referred to as the worker) was employed by Ogden Industries Pty.Ltd. as a process worker from the 19th day of November 1959 and at all material times. The work in which he was employed was of a heavy physical nature.

2. In and after the month of December 1964 personal injuries arising both out of and in some instances in the course of his employment were caused to the worker.

3. These personal injuries consisted of

(a) Coronary occlusion

(b) Myocardial infarction

(c) Aggravation and acceleration by the effect of work of coronary artery disease

(d) Aggravation and acceleration by the effect of work of myocardial degeneration.

4. The coronary occlusion was the sudden detachment of an atheromatous plaque in a coronary artery with consequent formation of blood clot which

wholly blocked a coronary artery. Myocardial infarction was the death of heart muscle which occurred as the result of interference by the coronary occlusion with the blood supply to the heart muscle. Each of these events (coronary occlusion and myocardial infarction) is a sudden unexpected (by the worker) physiological change for the worse. The coronary artery disease was coronary atheroma which resulted in the deposition of foreign matter in the walls of the arteries and their consequent narrowing and hardening thus reducing the blood supply to the heart. The myocardial degeneration consisted of the degeneration of muscle fibres as a consequence of the restricted blood supply. The worker's work aggravated and accelerated all these processes and caused coronary occlusion and myocardial infarction on the 18th day of February 1965.

5. As the result of the injuries of coronary occlusion and myocardial infarction sustained on the 18th day of February, 1965 and as the result of the aggravation and acceleration by work of both coronary artery disease and myocardial degeneration the worker was totally incapacitated and pursuant to Sections 5 and 9 of the Workers Compensation Act 1958 became entitled to weekly payments of compensation at the rate prescribed by the said Act. Payments of compensation were in fact made for the period from the 18th day of February 1965 until the 7th day of July 1965. (See award of Board dated the 24th day of November 1965.)

6. In March, 1965 the worker was admitted to St. Vincents Hospital for a short time for treatment of his work aggravated and accelerated coronary artery disease and work aggravated and accelerated myocardial degeneration and of the consequences of the said coronary occlusion and myocardial infarction. He was in Hospital for the purpose of receiving medical and hospital advice, attention and treatment in connection with the injuries for which he was entitled to compensation and was in attendance at the said hospital for that purpose within the meaning of Section 8 of the said Act.

7. On the 19th day of June 1965 the worker was again admitted to St. Vincents Hospital for further

In the Supreme Court of Victoria

No. 2
Annexures to Case stated (Contd.)
Annexure "C" Statement of Agreed Facts. 18th February, 1966.

treatment of his aggravated and accelerated coronary artery disease and aggravated and accelerated myocardial degeneration and of the consequences of the said coronary occlusion and myocardial infarction.

8. The worker was in attendance at St. Vincents Hospital from the 19th day of June 1965 to the 7th day of July 1965 for the purpose of receiving medical and hospital advice, attention and treatment for the compensable injuries of coronary occlusion, myocardial infarction with aggravated and accelerated coronary artery disease and with aggravated and accelerated myocardial degeneration aforesaid.

9. Shortly before the 30th day of June 1965 whilst in Hospital for the said purposes the worker suffered a further coronary occlusion and myocardial infarction. The pathological changes were similar to those described in paragraph 3 hereof. The said coronary occlusion and myocardial infarction resulted in further damage to the worker's arteries and heart muscle and indicated that a further sudden physiological change for the worse had taken place in his coronary arteries and heart muscle. The underlying pathological basis for the said coronary occlusion and myocardial infarction was the degeneration of the coronary arteries and myocardium to which the work aggravation of such degeneration contributed.

10. On the 7th day of July 1965 whilst in hospital for the said purposes 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 the 7th day of 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 out of the employment.

11. The deleterious effects of the aggravation and acceleration of coronary artery disease and of the myocardial degeneration continued in existence from the initial aggravation and acceleration which occurred in the course of the employment and arose out of the employment.

10

12. The worker left his widow Heather Lucas and two children under the age of 16 years - Jennifer Anne and Raymond Douglas wholly dependant upon him.

13. The Workers Compensation Board made an interim award of £2,400.0.0. in favour of the said dependants and reserved for argument the question whether the dependants were entitled to the compensation fixed by Act No. 7292.

DATED the 18th day of February, 1966.

ANNEXURE "D"

IN THE WORKERS COMPENSATION BOARD AT MELBOURNE 1965 No. 6613

IN THE MATTER of the Workers' Compensation Act

- a n d -

IN THE MATTER of an Application by

HEATHER DOREEN LUCAS — Applicant

- and -

OGDEN INDUSTRIES PTY. LTD. — Respondent

In the Supreme Court of Victoria.

No. 2 Annexures to case stated (Contd.) Annexure "D" Award of Workers Compensation Board. 30th June, 1966.

HAVING DULY CONSIDERED the matters raised in these proceedings in respect of the death of REGINALD GEORGE LUCAS and the Board having found that the deceased left his widow HEATHER DOREEN LUCAS and children Jennifer Lucas and Raymond Douglas Lucas of 6 Leigh Street, South Oakleigh dependent upon the deceased the Board doth Award as follows:-

1. IT IS ORDERED that the Respondent pay into the custody of the Workers Compensation Board the sum of NINE THOUSAND FOUR HUNDRED DOLLARS ($9400.00) as compensation on behalf of the dependants of the said Reginald George Lucas who died on the 7th day of July 1965 from personal injuries arising out of or in the course of his employment with the Respondent leave being reserved to the Applicant to prove such things as she is entitled to prove in relation to funeral medical and like expenses.

2. IT IS FURTHER ORDERED that the Respondent pay to the Applicant's Solicitors the costs of this Application such costs to be taxed in accordance with Scale "E" of the County Court Scale of Costs. CERTIFY for appropriate items under Rule 53 Counsel's attendance on Summons for Directions, Certify refresher fee for Counsel and fee to Counsel on Judgment.

3. IT IS FURTHER ORDERED that the Respondent pay

interest at the rate of 8% as from the date hereof on the difference between the sum of $4800.00 which sum has already been paid into the custody of the Workers Compensation Board and the amount of the Award herein and that there be a stay of 28 days.

DATED the 30th day of June, 1966.

By order of the Board,

Geo. T. Smith

REGISTRAR

(Seal)

In the Supreme Court of Victoria.

No. 2
Annexures to case stated (Contd.)
Annexure "D"
Award of Workers Compensation Board.
30th June, 1966.

ANNEXURE "E"

JXO'D

LUCAS v OGDEN INDUSTRIES PTY. LTD. 6613/1965

REASONS FOR DECISION

In the Supreme Court of Victoria

No. 2 Annexures to case stated (Contd.) Annexure "E" Reasons for Decision of Workers Compensation Board. 30th June 1966.

In this case the Applicant seeks to recover compensation in respect of the death of her husband Reginald George Lucas who had been employed by the Respondent as a process worker from 19th November 1959. The facts have been agreed upon and are set out in the "Statement of Agreed Facts" filed on the hearing. We adopt such Statement which it is unnecessary to re-read at this stage but is to be treated as part of the judgment.

Part 1 of the Workers Compensation Act 1958 deals with "Employers' Liability" and is divided into several divisions.

Division 1 is headed "Liability to Pay Compensation" and Section 5 provides that

> "If in any employment personal injury arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of this Act."

Unlike the New South Wales Act, the Victorian Act contains no direct statement that either the worker or his wife or his child is entitled to receive compensation. There is simply the liability to pay compensation in accordance with the Act imposed on the employer if and when the stated injury is caused to a worker.

Division 2 is headed "Compensation Generally and for Specified Injuries" and Section 9 provides:-

> "(1) Where the worker's death results from or is materially contributed to by the injury the compensation shall be a sum in accordance with the provisions of the clauses appended to this Section.

(2) Except as is provided in Section eleven of this Act, where the worker's total or partial incapacity for work results from or is materially contributed to by the injury the compensation shall be a weekly payment during the incapacity in accordance with the provisions of the said clauses unless the Board in its absolute discretion, upon the application of either party in any proceedings before the Board relating to the compensation, awards a lump sum in redemption of the employer's liability for future weekly payments, and any lump sum so awarded shall be of such amount as appears to the Board to be just and reasonable having regard to the probable duration of the incapacity and to such other factors as the Board thinks relevant."

"The Clauses referred to" are

"1. The amount of compensation shall be ascertained as follows:-

(a) Where death results from or is materially contributed to by the injury:-

(i) If the worker leaves a widow or any children under sixteen years of age at the time of the death or leaves any other dependants wholly dependent upon his earnings, the amount of compensation shall be the sum of Two thousand two hundred and forty pounds together with an additional sum of Eighty pounds in respect of each such child.

(ii) (iii) (iv) .....

(b) Where incapacity for work results from or is materially contributed to by the injury:-

(i) (ii) (iii) (iv) (v) (vi) ....."

The liability of the Employer is thus to pay during the period of incapacity of the worker weekly payments or on the death of the worker the lump sum ascertained as set out in the clauses.

In the Supreme Court of Victoria

No. 2
Annexures to case stated (Contd.)
Annexure "E"
Reasons for Decision of Workers Compensation Board.
30th June 1966.

In our view that liability attached to the employer as from the happening of "the injury" - VANKOOTEN v HASLINGTON (1964) 64 N.S.W. S.R. 387. Difficulties may arise in cases where "the injury" alleged is a disease or a continuing process so that the actual date of occurrence of "the injury" or the happening of the incapacity may be difficult to define - see VANKOOTEN v HASLINGTON (Supra) at pp. 391-3 per Walsh and Macfarlan J.J. as to the possible difference between "Traumatic" injury and "Disease" injury; per Fullagar, J. - FISHER v HEBBURN 105 C.L.R. 188 at 193-6. Kitto and Menzies J.J. 198-9.

It is to be noted that under the 1958 Act on the Death of a worker the lump sum was payable if he left (i) a widow or any children under the age of sixteen years or (ii) any other dependants wholly dependent on his earnings but in the ascertainment of the lump sum the extra £80 per child was payable irrespective of whether or not there was a widow or any other dependant surviving the worker.

Act No. 7292 of 1965 which came into force on the 1st July 1965 has substantially altered the mode in which the amount of compensation payable where death results from the injury is ascertained, By that Act sub-clause (i) of Clause 1(a) was deleted and there was substituted therefor a new sub-clause (i) in the following terms:-

> "(i) If the worker leaves any dependants wholly or mainly dependent upon his earnings the amount of compensation shall be the sum of Four thousand five hundred pounds together with an additional sum of One hundred pounds in respect of each child under the age of sixteen years who was wholly or mainly dependent upon the earnings of the worker at the time of the death or would but for the incapacity have been so dependent and who is a claimant in the proceedings for an award of compensation in respect of the death."

As from the 1st July 1965 the fact that a deceased worker left a widow or children under sixteen is no longer a test in ascertaining whether or to what extent compensation is payable on his death, the sole test being whether the deceased left any dependants wholly or mainly dependent on his earnings at the

time of his death. If he left a widow who was not wholly or mainly dependent on his earnings her existence is not to be taken into account and she is entitled to nothing.

If he left a child under 16 who was in fact dependent on his earnings and that child is a claimant in the workers compensation proceedings the child's right to compensation is established and his or her existence results in an award of £100 in addition to the base sum of £4,500.

By the 1965 Act the definition in Section 3 of "injury" which previously read "'Injury' means any physical or mental injury or disease and includes the aggravation acceleration or recurrence of any pre-existing injury or disease as aforesaid" was deleted and in its place was substituted a new definition in the following terms:-

> "'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 or acceleration - .....

The 1965 Act prima facie has a prospective operation only and ordinarily such an amendment would apply only to future accidents or injury - KRALJEVICH v LAKE VIEW AND STAR LTD. 70 C.L.R. 647, 650, 652; FISHER v HEBBURN 105 C.L.R. 158.

In the present case it is agreed that on the 7th 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

In the Supreme Court of Victoria

No. 2
Annexures to case stated (Contd.)
Annexure "E" Reasons for Decision of Workers Compensation Board 30th June, 1966.

pulmonary oedema was admitted to be a sudden physiological change for the worse, unexpected and not designed by the worker, and was therefore an "injury by accident" within the definition - SHARP v PATRICK 1955 A.C.1. 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 Section 5 the employer therefore became liable on 7th 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 named children of the deceased under the age of sixteen years were wholly dependent upon the earnings of the deceased and they are therefore entitled to an award of £4,700. Stay of 28 days. The sum of £2,400 has already been paid under the interim award and there will be an order for interest at the rate of 8% per annum as from this date on the balance of the award over the sum of £2,400.

The Respondent will pay the Applicant's costs on Scale "E" with a certificate for Rule 53 items, counsel on the summons for directions one refresher and for brief to hear judgment.

30th June, 1966.

No. 3.

COPY REASONS FOR JUDGMENT OF SUPREME COURT OF VICTORIA (FULL COURT) (WINNEKE C.J., SMITH J., PAPE J.)

Delivered 28th February 1967

In the Supreme Court of Victoria

No. 3
Reasons for Judgment Supreme Court of Victoria (Full Court) 28th February 1967.

Case stated by the Workers' Compensation Board for the determination by the Full Court of a question of law arising in proceedings between the parties before the Board upon a claim for compensation in respect of the death of a worker.

At the hearing before the Board no evidence was called but the following facts were agreed on by the parties and found by the Board:-

"1. REGINALD GEORGE LUCAS (referred to as the worker) was employed by Ogden Industries Pty. Ltd. as a process worker from the 19th day of November 1959 and at all material times. The work in which he was employed was of a heavy physical nature.

2. In and after the month of December, 1964 personal injuries arising both out of and in some instances in the course of his employment were caused to the worker.

3. Those personal injuries consisted of

(a) Coronary occlusion

(b) Myocardial infarction

(c) Aggravation and acceleration by the effect or work of coronary artery disease

(d) Aggravation and acceleration by the effect of work of myocardial degeneration.

4. The coronary occlusion was the sudden detachment of an atheromatous plaque in a coronary artery with consequent formation of blood clot which wholly blocked a coronary artery. Myocardial infarction was the death of heart muscle which

In the Supreme Court of Victoria

No. 3
Reasons for Judgment Supreme Court of Victoria (Full Court) (Contd.)
28th February 1967.

occurred as the result of interference by the coronary occlusion with the blood supply to the heart muscle. Each of these events (coronary occlusion and myocardial infarction) is a sudden unexpected (by the worker) physiological change for the worse. The coronary artery disease was coronary atheroma which resulted in the deposition of foreign matter in the walls of the arteries and their consequent narrowing and hardening thus reducing the blood supply to the heart. The myocardial degeneration consisted of the degeneration of muscle fibres as a consequence of the restricted blood supply. The worker's work aggravated and accelerated all these processes and caused coronary occlusion and myocardial infarction on the 18th day of February 1965 .....

5. As the result of the injuries of coronary occlusion and myocardial infarction sustained on the 18th day of February, 1965 and as the result of the aggravation and acceleration by work of both coronary artery disease and myocardial degeneration the worker was totally incapacitated and pursuant to Sections 5 and 9 of the Workers' Compensation Act 1958 became entitled to weekly payments of compensation at the rate prescribed by the said Act. Payments of compensation were in fact made for the period from the 18th day of February, 1965 until the 7th day of July, 1965. (See award of Board dated the 24th day of November, 1965).

6. In March, 1965 the worker was admitted to St. Vincents Hospital for a short time for treatment of his work aggravated and accelerated coronary artery disease and work aggravated and accelerated myocardial degeneration and of the consequences of the said coronary occlusion and myocardial infarction. He was in hospital for the purpose of receiving medical and hospital advice, attention and treatment in connection with the injuries for which he was entitled to compensation and was in attendance at the said hospital for that purpose within the meaning of Section 8 of the said Act.

7. On the 19th day of June, 1965 the worker was again admitted to St. Vincents Hospital for further treatment of his aggravated and accelerated coronary artery disease and aggravated and accelerated myocardial degeneration and of the consequences of

the said coronary occlusion and myocardial infarction.

8. The worker was in attendance at St. Vincents Hospital from the 19th day of June, 1965 to the 7th day of July, 1965 for the purpose of receiving medical and hospital advice, attention and treatment for the compensable injuries of coronary occlusion, myocardial infarction with aggravated and accelerated coronary artery disease and with aggravated and accelerated myocardial degeneration aforesaid.

9. Shortly before the 30th day of June, 1965 whilst in hospital for the said purposes the worker suffered a further coronary occlusion and myocardial infarction. The pathological changes were similar to those described in paragraph 3 hereof. The said coronary occlusion and myocardial infarction resulted in further damage to the worker's arteries and heart muscle and indicated that a further sudden physiological change for the worse had taken place in his coronary arteries and heart muscle. The underlying pathological basis for the said coronary occlusion and myocardial infarction was the degeneration of the coronary arteries and myocardium to which the work aggravation of such degeneration contributed.

10. On the 7th day of July, 1965 whilst in hospital for the said purposes 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 the 7th day of 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 out of the employment.

11. The deleterious effects of the aggravations and acceleration of coronary artery disease and of the

In the Supreme Court of Victoria

No. 3
Reasons for Judgment Supreme Court of Victoria (Full Court) (Contd.) 28th February 1967.

myocardial degeneration continued in existence from the initial aggravation and acceleration which occurred in the course of the employment and arose out of the employment.

12. The worker left his widow Heather Lucas and two children under the age of 16 years - Jennifer Anne and Raymond Douglas wholly dependent upon him.

13. The Workers' Compensation Board made an interim award of £2,400. 0. 0. in favour of the said dependants and reserved for argument the question whether the dependants were entitled to the compensation fixed by Act No. 7292.

The Board, it was conceded before this Court, was entitled to infer further facts from the facts so agreed upon; and in the Board's reasons for its decision, the following passages appear:-

"In the present case it is agreed that on the 7th 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 a sudden physiological change for the worse, unexpected and not designed by the worker, and was therefore an 'injury by accident' within the definition - SHARP v PATRICK (1955) A.C.1. 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 Section 5 the employer therefore became liable on 7th 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 named children of the deceased under the age of sixteen years were wholly dependent upon the earnings of the deceased and they are therefore entitled to an award of £4,700."

The question of law submitted for the opinion of the Full Court is:-

"Was it open to the Workers' Compensation Board on the material before it to award the Applicant $9400.00."

It is conceded that personal injury arising out of or in the course of his employment was caused to the deceased worker within the meaning of Section 5 of The Workers' Compensation Act 1958 which rendered the Respondent liable to pay compensation to the Applicant in accordance with Section 9(1) of the Act. This is, however, yet another case in which amending legislation providing increased amounts of compensation has given rise to difficulty in determining whether the amount the Respondent is liable to pay is the lower amount provided by the original legislation or the higher amount provided by the amending Act.

Act No. 7292 of 1965 which came into force on the 1st day of July 1965 increased the amount of compensation payable in the case of death from $4800.00 to $9400.00. It also substituted a new definition of "Injury" for that contained in Section 3 of the 1958 Act. In the latter Act "Injury" was defined as follows:-

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

By Act No. 7292 the following definition was substituted:-

"Injury means any physical or mental injury, and without limiting the generality of the foregoing, includes -

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(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 or acceleration-

and for the purposes of this interpretation the employment of a worker shall be taken to include any travelling referred to in sub-section (2) of section eight of this Act."

Section 3 of the 1958 Act set out, before its definition of "injury" the following definition of "Disease" which remains unamended -

"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."

It will be seen that Act No. 7292 came into force a few days before the said worker suffered the pulmonary oedema in the circumstances above set out.

Mr. Connor for the Respondent, submitted that on the material before the Board the worker could not be held to have suffered any "injury" within the meaning of the Act as amended by Act No. 7292. He contended that on the true construction of the new definition of "injury" no disease, and no physiological change forming merely a stage in the development of a disease, was an "injury" within the meaning of that definition unless it satisfied the requirements of paragraph (a) or paragraph (b) thereof, and he submitted that neither the pulmonary oedema suffered by the worker on the 7th July 1965, nor the conditions giving rise thereto as found by the Board satisfied those requirements.

Mr. Hill for the Applicant, submitted that the pulmonary oedema, being found by the Board to be a sudden physiological change for the worse in the lungs of the worker, unexpected and not designed by

the worker, which occurred on the 7th July 1965 was, as shown by the history of the Victorian legislation and by a long line of authority illustrated by such decisions as FENTON v THORLEY (1903) A.C. 443 and FIFE COAL COMPANY LIMITED v YOUNG (1940) A.C. 479 a "Physical injury" within the meaning of the initial words of the new definition of "injury", notwithstanding the departures, in the new definition, from the form of the previous definition. He further submitted that in any event it satisfied the requirements of paragraph (b) of the new form of the definition.

We find it unnecessary to choose between the rival contentions of Mr. Connor and Mr. Hill as to the meaning of the initial words of the new definition.

If the pulmonary oedema constituted "physical injury" within those initial words in accordance with Mr. Hill's argument, then plainly, having regard to the place at which the worker was when the oedema occurred and the purpose for which he was at that place, that injury must be deemed by virtue of Section 8 of the Act to have arisen out of or in the course of the employment, as it is required to do to satisfy Section 5, the Section by which liability is imposed.

On the other hand, assuming that the pulmonary oedema did not constitute a "physical injury" within the meaning of the initial words of the new definition, upon the view that Mr. Connor is right in his submission that no disease or stage in a disease except one which satisfies the requirements of paragraph (a) or paragraph (b) of the substituted definition of "Injury" is a compensable injury within the Act as amended by Act No. 7292, nevertheless we are of the opinion that the pulmonary oedema, taken with the conditions giving rise thereto as found by the Board, could properly be held by the Board to have satisfied the requirements of paragraph (b). That view, we think, is supported by the consideration that if the opening words of the new definition of "injury" are narrowly construed there is the more reason for adopting a liberal construction of paragraphs (a) and (b).

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We are unable to accept the view that on the findings of the Board the pulmonary oedema was nothing more than a manifestation of the normal progress of the original underlying arterial and circulatory disease from which the deceased was suffering before his first coronary occlusion occurred. On the facts found by the Board we are of opinion that it was open to it to find that the oedema was a work-contributed aggravation of that original underlying disease, and could not be distinguished in this regard from the two occlusions. It was argued that to be an aggravation it must have a cause outside the disease itself. But if that be necessary, there was here such a cause; for the Board has found that the work done before 18th February contributed to the occlusion and infarction of 18th February, and to the occlusion and infarction of 30th June, and through them to the oedema. It was then argued that the external cause must have operated directly to produce the oedema before it can be said to be an aggravation of the original disease. But we can see no justification for this contention in the language of the new definition. Upon the material before the Board the proper conclusion appears to us to be that the deceased suffered, by reason of the work done before 18th February 1965 three successive aggravations of the original disease, namely, the two episodes of occlusion and infarction, and the oedema, each such aggravation being contributed to by the work and by the episode before it.

It follows in our opinion that the worker suffered "injury" on the 7th July 1965, within the meaning of paragraph (b) of the definition of that word in the Act as amended by Act No. 7292, and that inconsequence the Respondent became liable upon his death to pay compensation in the increased amount provided by the latter Act, namely, $9400.00. At least we consider that it was open to the Board, on the material before it, to hold that this was so.

Mr. Connor sought to combat this conclusion by contending that the requirements of the second part of paragraph (b) of the definition of "injury" are not satisfied unless "employment" during the period after the date on which Act No. 7292 came into force, namely, 1st July 1965, is a "contributing factor" to the aggravation; and this he contended

was not the case on the facts found by the Board. He submitted that any other construction would give Act No. 7292 retrospective operation contrary to well-settled principles of the common law.

There are, we think, two answers to this submission.

In the first place, we are of opinion that upon the finding of the Board that the pulmonary oedema 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, the contribution of the employment to the aggravating of the original disease was continuing on 7th July 1965, and that therefore to hold that the requirements of the second part of paragraph (b) were satisfied does not involve that any retrospective operation is given to the legislation.

In the second place, we are of opinion that the words "where the employment was a contributing factor to such aggravation" do not specify an event upon which liability arises; they are descriptive only of the kind of aggravation specified, and upon the findings of the Board that description was satisfied in the present case. Where paragraph (b) is relied upon to support a claim the event upon which liability arises is the "recurrence aggravation or acceleration"; and the cases show that that phrase must be read as though it were followed immediately by the words and figures "after the coming into operation of Act No. 7292". But once the events upon which liability arises have been thus limited to future recurrences aggravations and accelerations the rule against retrospective constructions has been satisfied and there is no necessity, and no justification, for a second implication limiting the expression "the employment" to "the employment in so far as it occurred after the coming into operation of Act No. 7292".

At one stage of his argument Mr. Connor was, it seemed, disposed to rely upon a further argument on the question of retrospectivity. This was that, as the law had imposed on the Respondent, before

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the amendment, a liability to pay compensation at the old rates in respect of the "injuries" of 18th February and 30th June, including compensation at those rates in respect of the worker's death occurring at any time thereafter if it should be contributed to by those injuries or either of them, therefore the amending Act should not be construed as extending this existing liability; and that one would be extending this existing liability if one construed the amending Act as imposing liability upon the Respondent in respect of a death so contributed to, even if it were a death caused also by an injury occurring after the amendment.

After discussion, however, he abandoned this contention, and rightly, we consider.

In our opinion the injury suffered by the worker on 7th July gave a new title to compensation and imposed a new obligation on the Respondent under which the amount payable on death was that fixed by the amending Act. To read that Act in this way does not involve extending the old liability which was imposed by virtue of the earlier injuries. It is inherent in the framework of the Workers' Compensation Acts that there may be a series of titles to compensation conferred by a series of "injuries", each injury creating an obligation to pay compensation in the event of incapacity or death being contributed to thereby. Any one of these liabilities may be selected and enforced by the person entitled; but compensation in respect of one death or incapacity cannot, of course, be recovered twice over.

For these reasons we consider that the Respondent's contentions regarding retrospectivity have not been made out.

In our view the injury suffered on 7th July 1965, on the facts found by the Board, arose out of the employment, and therefore the Respondent was fixed with liability to pay compensation, under the Act as amended, in respect of the death. At least we consider that it was open to the Board so to hold.

The question submitted for the determination of the Court is therefore answered YES.

The Applicant's costs of the case stated and the hearing thereof are to be taxed and paid by the Respondent.

No. 4.

ORDER OF FULL COURT OF SUPREME COURT OF VICTORIA

BEFORE THE FULL COURT THEIR HONOURS THE CHIEF JUSTICE MR. JUSTICE SMITH and MR. JUSTICE PAPE

The 28th day of February 1967

In the Supreme Court of Victoria

No. 4
Order of Full Court of Supreme Court of Victoria.
28th February, 1967.

THIS CASE STATED coming on to be heard on the 15th 16th 17th and 20th days of February 1967 before this Court UPON READING the Case Stated by the Workers Compensation Board dated the 4th day of October 1966 AND UPON HEARING Mr. Connor one of Her Majesty's Counsel and Mr. Costigan of Counsel for the Respondent and Mr. Hill and Mr. Fox of Counsel for the Applicant THIS COURT DID ORDER that this matter should stand for judgment and this matter standing for judgment this day accordingly THIS COURT DOTH ORDER that the question submitted for the opinion of the Court be answered: "Yes" AND THIS COURT DOTH FURTHER ORDER that the costs of the Applicant Heather Doreen Lucas of the Case Stated and the hearing thereof be taxed and when taxed be paid by the Respondent Ogden Industries Pty. Limited to the Applicant Heather Doreen Lucas.

BY THE COURT

SEAL

No. 5.

NOTICE OF APPEAL

In the High Court of Australia

No. 5
Notice of Appeal.
20th March, 1967.

TAKE NOTICE that the High Court of Australia in Full Court will be moved by way of Appeal at the sittings of the Full Court for hearing Appeals appointed to be heard at Melbourne after the expiration of six weeks from the institution of this Appeal or so soon thereafter as Counsel may be heard on behalf of the above named Appellant against the whole of the Order made by the Full Court of the Supreme Court in the State of Victoria constituted by their Honours The Chief Justice, Mr. Justice Smith, and Mr. Justice Pape on the 28th day of February 1967 whereby it was ordered and determined that the question submitted for its opinion in the Case Stated herein by the Workers Compensation Board be answered Yes and that the Appellant should pay the taxed costs of the Respondent of the Case Stated and the hearing thereof, for an Order that the said question be answered No and that the Respondent be ordered to pay the costs of the Appellant of this Appeal, costs of the Case Stated and the hearing thereof and the costs of the hearing before the Workers Compensation Board. AND FURTHER TAKE NOTICE that the grounds on which the Appellant intends to rely are as follows:-

1. That the answer to the said question was wrong in law.

2. That the answer to the said question should have been No.

3. That the Court should have held that upon the statement of agreed facts as set out in the said Case Stated the Board was incorrect in awarding the Respondent the sum of Nine thousand four hundred dollars.

4. That the Court should have held that upon the statement of agreed facts as set out in the said Case Stated the Board was bound to award the Respondent the sum of four thousand eight hundred dollars.

DATED this 20th day of March 1967.

(Sgd.) Maurice Cohen & Co.
MAURICE COHEN & CO.
Solicitors for the Appellant.

No. 6.

REASONS FOR JUDGMENT OF HIS HONOUR THE CHIEF JUSTICE (BARWICK C.J.)

OGDEN INDUSTRIES PTY. LIMITED

v.

LUCAS

JUDGMENT - BARWICK C.J.

In the High Court of Australia

No. 6
Reasons for Judgment of His Honour the Chief Justice (Barwick C.J.)
20th September, 1967.

This appeal is occasioned by the failure of a legislature by the exercise of rudimentary skill in drafting to indicate its relevent intention by express words. An Act amending the Workers' Compensation Act, 1958 of the State of Victoria (the 1958 Act) has amongst other things increased the amount of compensation to be paid in respect of injuries received in employment. The basic question in the appeal is whether the increased payments are to be made in respect of such injuries which had been received before the amendments became operative. With a total lack of consideration for those who must pursue their rights litigiously, the legislature has quite needlessly left the resolution of this question to the general law and the divination of its intention by construction of Workers' Compensation statutes which in any case are rarely notable for clarity.

The respondent's husband, already suffering from disease of the coronary artery and myocardial degeneration, in February, 1965, received at work, and because of it, an injury within the meaning of the definition of "injury" in Sec. 3(1) of the 1958 Act. The injury, according to the statement of facts agreed between the parties, consisted of coronary occlusion and myocardial infarction, being an aggravation and an acceleration of his disease of the coronary artery and of his myocardial degeneration. As a result of this injury, he became totally incapacitated and did not work again. The aggravated and accelerated disease marched onwards at its own accelerated pace until, as part of its

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progress and, indeed, as its terminal phase, pulmonary oedema occurred and the worker died on 7th July, 1965. We are to assume from the agreed statement of facts that "the pulmonary oedema was a sudden physiological change for the worse in the lungs of the worker which occurred on the 7th day of 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 out of the employment.

But for the amendment of the 1958 Act by the Workers' Compensation (Amendment) Act 1965, No. 7292 (the Amendment Act) which became operative on the first day of July, 1965, the facts I have recited would have raised no legal difficulties. The aggravation or acceleration of the pre-existing disease brought about by work in the employment was undoubtedly an injury within the meaning of the 1958 Act arising both in the course of and out of the employment. Resulting incapacity supervened and the injury according to the agreed facts led to death. I can take no more and no less from the wordy sentences which I have quoted from the statement of agreed facts than that the injury of February resulted in the death of July. That statement eliminates any question that the accelerated or aggravated disease might not itself have been the cause of death, though it can be said in a colloquial but, as I think, irrelevant sense that the worker died of its terminal manifestation. The amount payable under the 1958 Act by the Employer would be $4800 and would be payable to those who were the worker's dependants as defined by that Act.

However, when the amendment Act became operative, the worker was in hospital receiving "medical and hospital advice, attention and

treatment" in connection with the aggravated and accelerated coronary and myocardial condition which resulted from the injury he had received at work in February, 1965 (see Sec. 8(2)(b)(iii) of the 1958 Act). It was whilst he was there and after the commencement of the amendment Act that the terminal stages of his disease, including the pulmonary oedema, were reached. We were told in argument, somewhat irrelevantly as I think, that this oedema was "a sudden physiological change for the worse, unexpected and not designed by the worker."

The amendment Act made a number of radical amendments and in reality recast the essential provisions of the 1958 Act, although retaining the broad framework of that Act:-

(a) It altered the definition of dependants so as to confine the class to persons actually dependent in whole or in part on the earnings of the deceased worker.

(b) It altered the definition of injury in a radical respect to which I shall need later to make particular reference.

(c) It altered the definition of worker to embrace a larger group of workers.

(d) It increased the amount of compensation payable on the death of a worker resulting from a compensable injury.

The first three of these changes relate to the fundamental provisions of the Act as a Workers' Compensation statute.

A compensation board upon the agreed statement of facts, liability being admitted, made an award based upon the amount fixed by the amendment Act as payable on the death of the worker from a compensable injury, namely, $9400. At the request of the now appellant, the Board stated a case for the opinion of the Supreme Court of Victoria, asking whether it was open to it to make the award it had made. The Full Court of that Court affirmed the Board's decision and answered the question in the affirmative. The appellant now appeals to this

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Court making the principal submission that its liability to the respondent derived from the receipt by the deceased in February, 1965 of the injury which I have already described and that that liability involved only the payment to the respondent of the amount of compensation then fixed by the 1958 Act as payable on the death of a worker from such an injury, namely, the sum of $4800.

The amendment Act contains no express saving provisions: nor does it contain any provision comparable to Sec. 15 of the Workers' Compensation Act 1953 kept alive as to the Workers' Compensation Act 1951 by Sec. 2(3) of the 1958 Act. But Sec. 7 of the Acts Interpretation Act 1958 applies. Sub-Section (2) of Sec. 7 provides that "where any Act ..... repeals or amends any other enactment, then unless the contrary intention appears the repeal or amendment shall not:-

(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 ..... remedy in respect of any such right privilege obligation liability ..... as aforesaid.

And any such ..... remedy may be ..... enforced ..... as if the repealing or amendment Act had not been passed."

One other provision of the Acts Interpretation Act should be mentioned, namely, Sec. 5(3), which provides:-

"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; and if the Act or provision in question is repealed and not re-enacted then unless the contrary intention appears the reference thereto shall be read and construed as a reference to that Act or provision as in force immediately before the repeal."

Two distinct problems are raised upon these facts in relation to these several statutory provisions. First, it is said that Sec. 9 of the amended Act, that is to say the 1958 Act as amended by the Amending Act, applies in respect of an injury received before the commencement of the Amending Act although that injury when received might not have qualified as an injury within the definition clause of the amended Act had that definition then been operative, or at least that it applies in respect of a death resulting after its commencement from such an injury. Second, it is submitted that in any case the pulmonary oedema which occurred after the commencement of the Amendment Act was itself a distinct injury qualifying under the definition of injury in the Amending Act.

The first of these contentions involves the consideration of the position of an employer whose workman has received a compensable injury when the compensation provisions of the Workers' Compensation Act which was operative at the date of the receipt of the injury are subsequently amended without any other legislative provisions bearing on the question than those of the Acts Interpretation Act. In considering the matter, it is necessary in this case to examine whether or not there is any relevant significance in the extent of the amendments made by the Amending Act, that is to say, to examine whether the employer's position is any different under the actual provisions of the Amending Act than it would have been had the Amending Act done no more than amend the amount specified in Sec. 9 as payable on the death of a worker. In considering what the position would be under such a provision, it is necessary to consider the terms of Sec. 5(3) of the Acts Interpretation

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Act which is in a form not usually found in such statutes.

Section 5(1) of the 1958 Act says that "upon receipt by the worker of a 'compensable' injury his employer shall ..... be liable to pay compensation in accordance with the provisions of this Act." No other Section of the Act in terms imposes liability on the employer. In particular, Sec. 9 does not in terms do so; it merely particularises the extent of the liability imposed by Sec. 5(1) by prescribing the amount of compensation to be paid in the various events which may supervene upon receipt of the injury by the worker. Generally, apart from Sec. 5(1) the Act spells out the amount or manner of computation of the compensation to which that Section refers in the various situations which may arise. A crucial question, therefore, is whether the employer's liability to pay the worker compensation arises only upon the occurrence of incapacity and his liability to pay compensation to the worker's dependants arises only upon the death of the worker. In considering this question and in reading cases decided on Workers' Compensation Statutes, a clear distinction must, in my opinion, be constantly kept in mind between a liability "to pay compensation in accordance with the Act" as and when the events for which it provides occur and a liability to pay a specific, or calculable, sum of money to some specific person or persons. The opposing submissions of the parties appear to be on the one hand that no liability of any kind of the employer comes into existence until incapacity or death, as the case may be, occurs and on the other that a liability to pay the worker or his dependants according to the event is imposed at the time of the receipt of the qualifying injury. The matter is not free from authority: indeed, for my part, I consider the question to have been long since determined and legislatures to have acted upon the footing of the latter submission. I shall first consider the matter, however, apart from the decided cases.

It is quite apparent that a considerable time may elapse before any of the events consequential upon the receipt of an injury for which the Act makes provision may occur. Even if incapacity immediately or soon supervenes on the receipt of the injury, death as a consequence of the injury may be

long delayed, possibly for many years. When received, the injury is an accomplished fact and because any relevant incapacity or death must be casually related to it, the nature and extent of the injury is definitive of the extent of the compensation which may possibly be recovered. If the injury is attributable to serious or wilful default or is deliberately self-inflicted, no compensation is payable (Sec. 6). Thus the circumstances of the receipt of the injury also immediately assist to determine the liability of the employer.

These considerations, the possible delay in the onset of incapacity and the possibility of the remoteness of resulting death are, it seems to me, good reasons for safeguarding the worker and those who may become his dependants by creating an immediate liability in the employer to endure throughout whatever interval may elapse between injury and incapacity or injury and death. Probably it is for this reason that Workers' Compensation legislation is generally though not universally constructed expressly around the liability of the employer to pay, rather than about the right of the worker to be paid, compensation. The present Act follows that pattern. The receipt of the injury is the central circumstance on which the Act operates.

Thus, in Secs. 7 and 7A the entitlement to compensation both of the worker or his dependants is expressly related to the receipt of the injury.

Again, when it is desired to provide for compensation for injuries received on a periodic journey, or in hospital during treatment, the legislative mechanism is not to create a separate liability but to deem such an injury to arise in the course of the employment so as to attract to it the operation of Sec. 5(1).

Even in the case of industrial disease, the disease is approximated to physical injury so that the entitlement to compensation is derived from Sec. 5(1) (see Sec. 12): and the employer to whom Sec. 5 shall in that case refer is specified by Sec. 14.

In providing for compensation for medical and like services to an injured worker, Sec. 26(1)(c)

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includes the case of an injured but not incapacitated worker. In such a case it is said that the employer shall be liable to pay as compensation certain specified sums. This section, in my opinion, is not creating a liability but expressing as a provision of the Act with respect to compensation what compensation the employer of an injured worker is by Sec. 5(1) liable to pay. The terms of sub-Sec. (3) of Sec. 26 seem to me to accord with this view: and the terms of sub-Sec. (6) are not in reality, in my opinion, inconsistent with it.

It is also noticeable in Sec. 15 that injury or disease is expressed as giving rise to the right to compensation. And it is the injury and not incapacity or death which must be notified (Sec. 41).

It is therefore understandable that Sec. 5(1) says the employer is "liable" to pay compensation according to the other provisions of the Act which spell out the occasions and amounts of the payment to be made.

No doubt the use of the word "liable" can in some contexts cause difficulty and there may be significant differences in the sense which the word may convey: but its meaning must be resolved in the light of the language, structure and purpose of the statute by which it is used. It is here used in a statute which as I have indicated is designed to protect a worker against the consequences of injury received in an employment. In this context I am of opinion that the word "liable" is used in Sec. 5(1) to impose an immediate obligation to pay compensation when and to those persons whom and in the amounts which the Act specifies in relation to incapacity or death which may thereafter occur no matter how remote in point of time from the receipt of the injury so long as the event, whether incapacity or death, is the consequence of the injury.

Of course, that obligation does not mature into an enforceable liability to pay a specific sum or a specifically calculable sum until either incapacity for work or death results. The amount to be paid and in the case of death the persons to whom it is to be paid must in any case await the event. But, in my opinion, the liability to pay compensation in accordance with the provisions of

the Act has earlier arisen on the receipt of the injury. When a liability to pay a specific sum accrues it does so, in my opinion, merely as the quantification of the liability "to pay compensation in accordance with the Act" which was incurred on the receipt of the qualifying injury and not as a distinct liability wholly imposed for the first time.

It was submitted that because the identity of the worker's dependants cannot be known till his death no liability to pay them compensation could arise until that death occurs. Of course, it is true enough as I have said that regarded merely as a liability to pay specific persons a specific sum of money, that liability of the employer to the dependants themselves did not arise until the worker's death. But, in my opinion, the liability of the employer to pay the dependants should the worker die of his compensable injury did none the less accrue on the receipt by the worker of that injury. There is nothing strange to my mind in the concept of such a liability thus attaching, the injury having been received by an identified worker in known circumstances. This is so, even though persons at at the date of the death of the worker satisfy the statutory description of dependants would not have done so had death occurred immediately upon receipt of the injury either because they did not then exist, or because they did not then bear the requisite relationship to the worker. Thus the widow of a worker who was married to him after the receipt of his injury may, in my opinion, qualify as one of his dependants. It was to this result, deriving from the construction of the statute then in question, that reference is made in Gammage v. The Metropolitan Meat Industry Commissioner (1948) 48 S.R. (N.S.W.) 99 at p.101. Sir Frederick Jordan was not, in my opinion, suggesting that the liability to dependants had a different origin to that of the worker himself. He was merely contrasting the express provisions of the statute as to the extent or ambit of the compensation payable in the case of incapacity with that payable on death. But this conclusion does not to my mind deny the possibility of the employer carrying a liability towards dependants as from the receipt of the injury. The significant thing is that the

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compensation which the Act provides should be secured to the worker from the time of the injury includes the payment to be made to his dependants on his death from that injury when death occurs. I find no difficulty myself in regarding Sec. 5(1) as aptly expressed to impose an immediate obligation on the employer to pay that compensation which the Act specifies in the events which it describes if and when they occur.

But although these events must occur before the employer is bound to pay a specific or calculable sum of money, his liability to pay compensation in accordance with the Act consequent on receipt of the injury is, in my opinion, not properly designated as a contingent liability. As an obligation, it depends only on the receipt of the injury, though the amount of the liability expressed in terms of money depends on events which may or may not occur.

If statements of high judicial opinion are needed to support what, to my mind, is the expressed intention of the Act, they may be found in Lord Dunedin's speech in Clement v. D. Davis & Sons Ltd. (1927) A.C. 126 and in Lord McNaughton's speech in United Collieries Limited v. Simpson (1909) A.C. 55. Other speeches in the latter case were concerned with the consequential liability to pay a specific sum to some specific person and are not, in my opinion, inconsistent with the principles enunciated by Lord McNaughton. The decision and reasoning in Lysons v. Andrew Knowles & Sons Limited (1901) A.C. 79 is the same sense. Further, in my opinion, both Moakes v. Blackwell Colliery Company Limited (1917) 1 K.B. 565 and Clement v. D. Davis & Sons Ltd. (supra) decided that the liability of the employer to pay compensation calculated in a specified manner attached upon the receipt of the injury. I also think that such a conclusion was fundamental to the decisions of this Court in Fisher v. Hebbern Ltd. (1960) 105 C.L.R. 188 and in Kraljevich v. Lake View and Star Ltd. (1945) 70 C.L.R. 647. Indeed, in the former case my brothers Kitto and Windeyer specifically expressed that conclusion and my brother Windeyer expressly agreed with them. I find no need to refer to or discuss the decisions of the Supreme Court of New South Wales upon comparable provisions. Suffice it to say

that that Court has of recent times accepted and acted upon a construction of the New South Wales statute which conforms to the several expressions of judicial opinion to which I have referred, and which, with respect, in my opinion, is the correct construction of Sec. 5(1) and the Act generally.

Further, such a construction has so far been recognised that an injured but not incapacitated worker may obtain an order from an appropriate Tribunal which, upon the facts as to the worker's injury being established, in substance declares the existence of a liability in the employer to pay compensation in accordance with the Act where the probability of resulting incapacity is shown: see King v. Port of London Authority (1920) A.C.1. The qualification made in this and other cases following it as to the necessity for there to be a probability of resulting incapacity before such an order will be made, does not, in my opinion, cast any doubt upon the existence of a liability in the employer as from receipt of the injury. The necessity to show such a probability merely goes to the question of the exercise of the Court's discretion to make a declaratory order. Indeed, in my opinion, any other view than the construction which I would put upon Sec. 5(1) and which I think the authorities support, would not only be contrary to the general purpose of the statute but would introduce uncertainty into the scheme of compulsory insurance by which the attainment of that purpose is intended to be supported.

In my opinion, therefore, upon the receipt by this worker of the injury of February, 1965 the appellant came under an immediate liability which extended not merely to the payment of compensation to the worker should incapacity ensue but also to the payment to his dependants of compensation should his death result from that injury.

It is now necessary to consider the effect, if any, which Sec. 5(3) of the Acts Interpretation Act has upon the situation of an employer so placed. Usually an interpretation act provides for the reference in one Act to another to include a reference to that other as amended from time to time. But the Victorian Acts Interpretation Act expressly says that a reference in an Act to itself shall be

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read as a reference to itself as amended. There are competing views as to the precise application of this provision in relation to such circumstances as the present. On the one hand, it may be said that by reason of Sec. 5(3) of the Acts Interpretation Act, Sec. 5(1) should be read before its amendment as if it imposed upon the employer a liability to pay compensation in accordance with the provisions of the Act as amended from time to time. On the other hand, it may be said that Sec. 5(3) only refers to the Act as amended after its amendment and applies only with respect to matters which fall within the operation of the Act after its amendment. If the former view were adopted, there would be no need to consider whether Sec. 7 of the Acts Interpretation Act applies to the liability which the employer incurred on the receipt of the injury because Sec. 5(3) would on that view constantly co-relate the employer's liability to the current provisions with respect to compensation of the Act as amended. If on the other hand the latter view is accepted, it becomes necessary to consider whether Sec. 7 has kept on foot the provisions of Sec. 9 in the 1958 Act in relation to this worker's injury. In my opinion, the latter view of the operation of Sec. 5(3) is the correct one. It merely enables the amended Act to be applied to those facts and circumstances to which it is intended upon its true construction to apply as if all references in the Act in its unamended form were to the Act as amended. The sub-section has no bearing, in my opinion, on the facts of the instant case unless upon its true construction the amendment Act applies to injuries received before its commencement.

Consequently I now turn to the question whether the liability to pay compensation according to the provisions of the Act is a liability incurred within the meaning of Sec. 7 of the Acts Interpretation Act. In my opinion, it is. Quite clearly, as a result of the injury the worker is not left with a mere right of resort to the general law as in Abbott v. Minister for Lands (1895) A.C. 425. In my opinion, Sec. 5(1) is not a mere anticipatory statement of a liability which may be imposed in the future. Indeed, as I have already indicated, to my mind what it creates is not merely a contingent liability. But, even if contrary to my own opinion it should properly be regarded as creating a contingent liability, Sec. 7

is not limited in its operation to accrued liabilities in the nature of debts or presently enforceable obligations; contingent liabilities may be included in its sweep.

In my opinion, therefore, the liability which Sec. 5(1) imposed on the appellant was a liability "incurred" within the meaning of Sec. 7 of the Acts Interpretation Act and consequently survived and was not affected by the amendment made by the Amendment Act. It extended to the payment of compensation to the dependants of the worker ascertained according to the definition of dependants in the Act as it stood at the date of the receipt of the injury and the amount of compensation payable was the amount which Sec. 9 as it stood at the date of the receipt of the injury prescribed. Indeed, as I will later mention, the employer's liability which was saved by the Acts Interpretation Act included the obligation to pay compensation which Sec. 8(2)(b)(iii) provided if in the event the worker should suffer a further injury whilst under treatment for the injury received in February, 1965.

Also, insofar as Sec. 5(1) inferentially creates in the worker suffering incapacity, and in his dependants should he die of the injury, commensurate rights, those rights are in my opinion "acquired" within the meaning of Sec. 7 at the time of the receipt of the injury, notwithstanding that in the case of death the particular persons who will be comprised in the class of dependants and who can enforce the right can only be identified at the date of death. The right is acquired by the worker for himself and for those who will be his dependants.

Indeed, it is, in my opinion, quite clear and fully consonant with principle and the purposes of the statute that had the 1958 Act been wholly repealed after the receipt by this worker of his compensable injury and before his death, those who at his death could qualify as his dependants according to the definition of "dependants" in the repealed Act could have recovered from the employer the amount of the compensation fixed by Sec. 9 of that Act in the event of death unless some express provision of the repealing statute provided to the contrary. The same would be true, in my opinion,

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in relation to the worker himself if the Act were repealed after injury and before incapacity. In my opinion, under an Act such as the 1958 Act an employer of a worker injured in his employment does not remain under a liability to pay his dependants whatever sum of compensation is fixed by successive amendments over what may be a space of even twenty years or more of the Workers' Compensation Act current when the injury was received. It seems to me, particularly with regard to a statute which centres round the liability of the employer, that his liability remains to be measured by the Act as it was when the injury which is the foundation of the liability and which qualified under the terms of that Act, was received. If Parliament desires to provide otherwise, it should say so by clear and unambiguous words.

Consequently, in my opinion, the method of computation of the liability of the appellant, which extended to the payment of compensation to the dependants of the deceased should he die from the injury, according as the event should prove, was fixed at the time the compensable injury was received by the worker, that is, in February, 1965: and, unless the amendment Act evinces a contrary intention, is unaffected by the amendment of the 1958 Act.

I can find no contrary intention in the amending statute: rather, properly understood, I think the amendment Act is constructed on the assumption that its provisions will only apply in respect of injuries received after its commencement. The critical section in the Act as amended is still Sec. 5(1). It is in the identical language in which it was expressed before the amendment but, in reality, it enacts a different provision. Because of the changed definition of injury, the amended section addresses itself to a radically different situation. The 1958 Act contained a definition of injury in terms which led to the decision of James Patrick & Co. Proprietary Ld. v. Sharps (1955) A.C.1: see particularly pp.16 and 18. But the amended definition, notwithstanding the odd use of the expression "without limiting the generality of the foregoing", in my opinion, requires the employment to be a contributing factor in the case of a disease or the recurrence, aggravation or acceleration of a disease.

Further, the compensation payable "in accordance with the provisions of this Act", i.e. the Act as amended, where death results, is payable to a different class of dependants both in the description of dependancy and in the description of the class of worker on whom the dependancy must have existed. The Section therefore creates an obligation to pay compensation which may be calculable in a significantly different way to that payable under the 1958 Act in respect of the receipt of an injury which must satisfy different criteria to those contained in the 1958 Act. These considerations made it, in my opinion, most unlikely that the legislature intended to supplant the former rights and liabilities, which had accrued under a different definition of injury, of worker, and of dependant. Certainly nothing in the amendment Act suggests it.

I ought here to refer again to the application of Sec. 5(3) of the Acts Interpretation Act. Earlier I dealt with this matter in relation to a mere amendment of Sec. 9: but, as I have just pointed out, the amending Act does so much more than that. If the changes made to Sec. 5(1) by the alteration of the definition of the words it employs are kept in mind, it clearly appears, in my opinion, that Sec. 5(3) cannot be so applied as to make the liability of the employer for an injury which conforms to the definition in the unamended Act extend to whatever compensation may subsequently be fixed by an amendment of the Act in respect of injuries which satisfy some other definition. But though this special case raised by the extensive nature of the amendments made by the amending Act is a clear example of the inapplicability of Sec. 5(3) of the Acts Interpretation Act, in my opinion, as I have already indicated, a mere amendment to Sec. 9 by the alteration of the amount of compensation payable on death would be in the same case. Section 5(3) of the Acts Interpretation Act would not, in my opinion, make the altered amount applicable in respect of death caused by an injury received before the commencement of the amending Act.

I have so far approached the first problem by ascertaining what effect the amending statute has upon the liability which the 1958 Act imposed. But the matter may also be approached by considering if

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any relevant new rights are created by the amendment Act in respect of events which have already occurred. As I have indicated when speaking of the absence of any relevant contrary intention in relation to Sec. 7(2) of the Acts Interpretation Act, the amendment Act ought to be read as applying to events which occur after its commencement and not retrospectively to events which have occurred theretofore. As will have been gathered from what I have so far said, it is not the death but the injury which attracts liability though resulting death is an indispensable element in the establishment of the claim of a dependant to the payment of a specific sum of money. Thus, if the amending Act is to apply to the instant case, it must be because it is intended to operate retrospectively even though the death of the worker occurred after its commencement. It would be otherwise if the employer's liability was initiated by the death.

"The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events:" Maxwell v. Murphy (1956-57) 96 C.L.R. 261 per Dixon C.J. at 267. The instant case is to my mind abundantly clear for not only is there no discernible intention to operate upon past events but, as I have said, the event upon which Sec. 5(1) is to operate under the amended statute is a different event to that upon which its predecessor had worked. Consequently, in my opinion, in terms, sec. 9 of the 1958 Act as amended ought not to be read as applicable to the death of a worker from an injury which had occurred before the commencement of the amendment Act.

In the present case the respondent's injury would have qualified under both definitions of injury: but this fortuitous circumstance should not be allowed to obscure the statutory position. As I have indicated elsewhere, a "Patrick v. Sharpe" injury would satisfy the 1958 definition but, as I shall point out, not that of the amending Act.

I turn now to the second problem which is raised. It is said that the deceased suffered a

new physical injury, namely, the pulmonary oedema, after the commencement of the amendment Act; and that of this injury he died. The use sought to be made of this "new injury" is that it occurred in hospital in circumstances which it is said satisfied the terms of Sec. 8 (2)(b)(iii) of the Act as amended and thus was deemed to arise out of or in the course of the employment. An alternative submission is that, viewed as a disease within the definition of disease in Sec. 3(1) of the Act as amended, the work done, that is, the work done on or before February, 1965, contributed to it, thus satisfying one of the paragraphs (a) or (b) of the definition of injury in the Act as amended. In truth, as I shall point out, both these submissions involve the proposition that the employment contributed to the oedema, regarded either as itself a disease as defined, or as an aggravation or acceleration of such a disease.

I am unable to accept either of these submissions. As I read the agreed facts, the oedema was but a phase of the aggravated or accelerated cardiac disease: that is to say, it was a manifestation of the injury received in February, 1965, and indeed part of it, so much so that the causation of death by that injury was an unbroken chain.

The oedema was not, in my opinion, a physical injury within the opening words of the new definition of injury properly construed. It was, as the agreed facts require us to assume, a physiological change for the worse. Its sudden and unexpected character is of no significance, for we are not here concerned with the accidental quality of an injury and the definition of disease applies equally to gradual as to sudden development. It was autogenous in the sense that nothing but the accelerated disease of which it was a manifestation caused it to occur, either at the time it did or at all: as I have said, it was no more than a phase in that accelerated disease.

In James Patrick & Co. Proprietary Ltd. v. Sharpe (supra), their Lordships were faced with definitions which expressly included disease as itself an injury and which widely defined disease. Because of these definitions, and, as I read their Lordships' reasons, only because of them and the

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presumption attaching by the statute to injuries received on the journey to or from work, they held that an autogenous fibrillation of the heart occurring on such a journey was an injury as defined received in the course of employment: see Secs. 3 and 5(5) of the Workers' Compensation Act 1928. This Court has already indicated its view of what that case decides: see The Commonwealth v. Ockenden (1958) 99 C.L.R. 215 at pp. 221-222. It does not decide, in my opinion, that apart from the compulsion of such a definition of injury as that with which it dealt, each autogenous physiological change for the worse in the body if capable of identification, is a physical injury, either in the generally accepted sense of those words, or when they are used in Workers' Compensation legislation without the aid or control of a special definition. Moreover that case did not deal with a change occurring in the course of and as a new phase in the progress of a disease which was itself a compensable injury. If the fibrillation in that case was an incident in the progress of a disease, that disease was not already a compensable injury.

Further, the definition of injury in the amendment Act is, in my opinion, radically different from that dealt with the dominant in James Patrick & Co. Proprietary Ltd. v. Sharpe (Supra) and seems to have been enacted to remove the consequences of that decision. Disease simpliciter is expressly removed by the amendment from the definition of injury and only such disease as defined to which the employment contributes is, in my opinion, included. If the employment must contribute to disease for it to be an injury, quite clearly autogenous changes in the course of a disease cannot in themselves be injuries, whether or not the disease is itself a compensable injury.

The appellant in the first place in order to maintain the submission that the oedema was itself a physical injury and to avoid the requirements of paragraphs (a) and (b) of the new definition insisted on the words "without limiting the generality of the foregoing" as they appear in the definition of injury as indicating a generality in the opening words which would embrace autogenous physiological changes of a deleterious kind as physical injuries. But, unless autogenous diseaseas defined is itself

a physical injury, no operation of the words quoted can, in my opinion, avoid the limitations of paragraphs (a) and (b) of the new definition: and I have already indicated my view that in this legislation disease itself is not a physical injury. Consequently, only those diseases as defined to which the employment is a contributing factor are brought within the definition of injury. No matter how wide the definition of disease is regarded, the progression of a disease, whether regular or irregular, and whether or not its advancing stages are "identifiable", unless contributed to by the employment, is, in my opinion, outside the bounds of that injury of which Sec. 5(1) and Sec. 8(2)(b)(iii) of the amended Act speak.

It has been assumed in argument and, although the expression "in attendance at any place" seems somewhat inapt, I think rightly assumed, that an injury to a worker occurring whilst in hospital under treatment for some earlier compensable injury, satisfies the requirements of Sec. 8(2)(b)(iii). But, in my opinion, if the compensable injury is one in respect of which liability has been incurred under the 1958 Act, that liability will extend to include the liability for injuries which may subsequently arise under Sec. 8(2)(b)(iii) of the 1958 Act notwithstanding the amendments effected by the amendment Act. Or put another way, for reasons already given the compensable injury to which Sec. 8(2)(b)(iii) in the Act as amended refers is a compensable injury received after the commencement of the amendment Act.

Thus, even if the deceased were regarded as suffering an injury in hospital within the operation of Sec. 8(2)(b)(iii) of the 1958 Act, the award made by the Compensation Board in the instant case would not be justified.

Under the 1958 Act, kept in operation as I think in relation to the worker in the present case by Sec. 7(2) of the Acts Interpretation Act, an injury satisfying Sec. 8(2)(b)(iii) could consist of an autogenous physiological change: see James Patrick & Co. Proprietary Ltd. v. Sharpe (Supra) and definition of "injury" in the 1958 Act: but not, in my opinion, if it were merely a phase in

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the progress of a disease injury even if that injury be the acceleration of a pre-existing disease in respect of which liability had already been attracted. The stages in the development of a disease which is itself a compensable injury, although those stages may be identifiable physiological changes for the worse, cannot in any case, in my opinion, be in themselves injuries within Sec. 8(2)(b)(iii).

Also, in my opinion, the injury to which paragraph 8(2)(b)(iii) refers must be a different injury to that for which the worker is being treated in hospital. If it were otherwise, then the daily progress of the injury for which the worker was under treatment, if for "the worse", would give rise to new and perhaps different liabilities to those already incurred upon receipt of the injury for the treatment of which he entered hospital. But by the very concession that the "new injury" is a stage in the progress of the already compensable injury, albeit the acceleration of an existing disease, it must follow, in my opinion, that the consequences of the so called "new injury" are already comprehended in the liability which has attached to the employer in respect of that compensable injury itself.

Further, if the oedema, regarded as something occurring after the commencement of the amendment Act, is to qualify as an injury received in the course of treatment, it must satisfy the definition of injury in the amendment Act. It is claimed that the oedema is a physical disorder defect or morbid condition within the definition of disease. I am prepared for present purposes to treat it in isolation from the disease of which it was a manifestation and assume without deciding that on that footing it would be within that definition. But, as I have indicated, to be an injury it must have the contribution of the employment. The whole definition of injury must be read into Sec. 8(2)(b)(iii) even though when received in hospital an injury is deemed to arise out of or in the course of employment. In this respect, Slazengers (Australia) Pty. Ltd. v. Ivy Phyllis Eileen Burnett (1951) A.C. 13 at 22 is pertinent.

However, the respondent says that the employment did contribute to the oedema because the aggravated

cardiac disease of which it was a development was caused by work done in the employment. But that submission, in my opinion, is unacceptable. It is said that because work in the employment aggravated or accelerated the coronary disease and the myocardial degeneration so causing a relevant injury and because that aggravated and accelerated disease and condition in due time in the course of its development resulted in the oedema, therefore work in the employment in the relevant sense caused or contributed to the oedema. Whilst it is true that the work caused the injury which consisted of the aggravation or acceleration of the cardiac disease, in relevent and precise terms it did not, in my opinion, cause or contribute to the oedema, any more than it caused or contributed to the death. The work caused the injury and on the agreed facts the injury resulted in death. The relevant effect of the contribution of work to the disease so as to constitute it an injury, in my opinion, was, so to speak, spent in February, 1965, when the injury was received by the worker. All else was the result and consequence of the injury: cf. The Commonwealth v. Ockenden (supra) at p.224 in which a distinction was drawn between what occurred in the course of the employment and what occurred in the course of the disease.

In my opinion, therefore, the deceased worker suffered no injury after the commencement of the amendment Act: and, in any case, the employment in which he was injured did not in any relevant sense contribute to the change in his condition which was manifested in July, 1965 by the pulmonary oedema.

The employer's only relevant liability, in my opinion, is to pay to the dependants of the deceased worker according to the definition of dependants in the 1958 Act compensation according to Sec. 9 of that Act. This appeal, therefore, should be allowed and the question asked in the stated case answered in the negative.

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OGDEN INDUSTRIES PTY. LIMITED

v

LUCAS

JUDGMENT - KITTO. J.

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The Workers Compensation Act 1958 (Vict.) as in force before its amendment by Act No. 7292 which commenced on 1st July 1965, provided in s.5(1), so far as material, that if in any employment personal injury arising out of or in the course of the employment should be caused to a worker his employer should be liable to pay compensation in accordance with the Act. By s. 9(1) it was provided that where the worker's death should result from or be materially contributed to by the injury the compensation should be a sum in accordance with the provisions of certain appended clauses. The first of the appended clauses provided in sub-para. (i) of para. (a) that if the worker should leave a widow or any children under sixteen years of age at the time of the death or leave any other dependants wholly dependent upon his earnings the amount of the compensation should be £2,240 together with an additional £80 in respect of each such child. By s. 9(2) and other provisions it was provided that where the worker's total or partial incapacity should result from or be materially contributed to by the injury the compensation should be a weekly payment during the incapacity in accordance with appended clauses unless the Workers Compensation Board should award a lump sum in redemption of the employer's liability for future weekly payments.

The Act No. 7292 left s. 5(1) and s. 9(1) untouched, but it substituted for sub-para. (i) of

para. (a) of the first appended clause a new sub-paragraph providing, so far as need here be mentioned, that if the worker should leave any dependants wholly or mainly dependent upon his earnings the amount of the compensation should be £4,500 together with an additional £100 in respect of each child under the age of sixteen years.

At some time before the commencement of the Act No. 7292 personal injury arising out of his employment with the appellant was caused to a worker who was the husband of the respondent. The injury consisted in the aggravation and acceleration, due to his work, of coronary artery disease and myocardial degeneration, and as a result he suffered a coronary occlusion and myocardial infarction on 1st February 1965. His disease progressed, and a further coronary occlusion and myocardial infarction occurred shortly before 30th June 1965. Then, after the commencement of the Act No. 7292, the worker died of pulmonary oedema on 7th July 1965. The pulmonary oedema arose, as the parties have agreed, out of the work-aggravated and accelerated coronary artery disease, the work-aggravated and accelerated myocardial degeneration, the coronary occlusions and the myocardial infarctions; and death resulted from these things together with the pulmonary oedema. Each of these, it is agreed, arose out of the employment, though the pulmonary oedema arose out of it only in the sense that it was the terminal event in a long history of cardiac disease.

The worker left two children under sixteen as well as his widow, the respondent, all being wholly dependent upon his earnings.

The Workers Compensation Board awarded compensation to be paid by the appellant according to the provisions of the amending Act No. 7292, and stated a case of the Supreme Court asking, in effect, whether it was right in doing so or whether it should have applied the provisions of the principal Act as they stood before the amendment. The Supreme Court answered that the amending Act applied, and the appellant here seeks to have that decision reversed.

The only changes which the parties have identified as having occurred in the worker's

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physical condition after the commencement of the amending Act. No. 7292 are the pulmonary oedema and the death of the worker. It is said for the appellant that the pulmonary oedema was not an injury within the meaning of s. 5(1), and that therefore the only such injuries from which the death can be said to have resulted took place before the amending Act. I shall consider the case first on the assumption that that was so.

The Act No. 7292 made no express provisions as to whether the new sub-para. (i) of para. (a) in the first of the clauses appended to s. 9 was to apply only where an employment injury resulting in death was caused after the commencement of that Act or should apply to every case where death resulting from an employment injury should occur after the commencement of that Act. In my opinion the right conclusion is that the injury must have been caused after the commencement of the amending Act if the new sub-para. (i) is to apply.

The operation of s. 9, including its appended clauses, is merely to quantify what it describes as "the compensation", by providing for the three possible cases in which an injury within s. 5(1) may result in loss of earning capacity, namely the cases of death, of total incapacity and of partial incapacity. The section creates no liability in the employer to pay the compensation thus provided for. That is the work of s. 5(1), which operates, in any case of compensable injury, to subject the employer to a liability to pay whatever compensation the provisions of the Act may prescribe as appropriate to the circumstances of the case. They may prescribe different amounts at different times as the condition of the worker alters. They may prescribe different recipients at different times as events unfold, as for instance periodical payments to the worker while he lives and lump sums when he dies to such persons as then fill particular descriptions. If one were to ask at the time of the injury what liability for workers' compensation the injury entails for the employer the answer (unless death was certain and imminent) would need to be expressed in terms of contingencies. It would need to cover every possible eventuality for which the Act makes provision as it applies or may apply to the particular case.

It would be a kaleidoscopic answer, and in none of its applications would it provide a specific sum of money payable certainly to a definitely ascertained person, for that is not the sense in which the word "liability" is used in this connexion. The event that makes ultimately payable whatever compensation the Act provides in the varying situations that may later arise is the receipt of the injury by the worker. Upon that event "the provisions of this Act" - provisions which regulate the quantum of payments, the periods in respect of which and the times at which they are to be made and the persons to whom they are to be made - fasten upon the employer at that time to create a situation of liability and they proceed, as events thereafter occur, to issue in specific debts presently payable to ascertained persons. That this is the situation has long been established by such well-known cases as Lysons v. Knowles (1901) A.C. 79 and Ball v. Hunt (1912) A.C. 496.

The general principle of construction, as it has often been stated for the resolution of questions of the same general description as that which is now before us, is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events: Maxwell v. Murphy (1957) 96 C.L.R. 261 at p. 267, Chang Jeeng v. Nuffield (Aust.) Pty. Ltd. (1959) 101. C.L.R. 629 at p. 637-8, Fisher v. Hebburn Ltd. (1960) 105 C.L.R. 188 at p. 202. This principle is too narrowly interpreted, I think, if it is treated as referring only to rights or liabilities which are vested, in the sense that the individuals against whom or in whose favour they are to enure are finally ascertained and the amounts fixed. The sense of it is that which Fullagar J. expressed succinctly in Fisher v. Hebburn Ltd. (1960) 105 C.L.R. 188 at p. 194 by saying that an amending enactment, or for that matter any enactment, is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement. His Honour added that this rule has been frequently applied to

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amending statutes relating to workers' compensation, and that it has often been held that such amendments apply only in respect of "accidents" or "injuries" occurring after their coming into force. In the particular case his Honour thought, as did the whole Court, that the amending enactment there in question operated prospectively by attaching its legal consequences to future events other than accident or injury. That was the result, however, of a peculiar provision, having features which are not present in the Act we have to construe. In the absence of such features it has always been considered, so far as I am aware, that the principal provision, that if an employment injury be caused to a worker his employer shall be liable to pay compensation in accordance with the Act, operates at the moment of the injury to create a liability the ambit of which is to be ascertained by the application of other provisions to the appropriate facts. Here, it seems to me, the general principle as his Honour stated it reaches back to the occurrence of the injury; it reaches to intermediate facts or events too, but the injury attracts both its terms and its reason. The injury is an event to which legal consequences are attached, as I have pointed out, by s. 5(1), those consequences being ascertained by incorporating into the section, in order to fill out the expression "the provisions of this Act", the whole of the provisions which regulate the entitlement to compensation and the payment of it, and in particular s. 9(1) and cl. 1(a)(i) of the appended clauses as they stand at the time. These legal consequences, this situation of liability, is not changed by a subsequent amendment of cl. 1(a)(i), for s. 5(1) has done its work once for all: it applied the old cl. 1(a)(i) to the particular case so that if death should result from the injury or be materially contributed to by it payments therein provided for will have to be made. There is nothing to make s. 5(1) do its work a second time, and make the new cl. 1(a)(i) produce a new result in the particular case.

In the case of Moakes v. Blackwell Colliery Co. Ltd. (1925) 2 K.B. 64 which is always cited in this connexion, there were no doubt special considerations which have no counterpart here, but the kernel of the decision seems to have been that, as Pollock M.R. said at p. 67: "In all the three cases,

whether death or partial or total incapacity supervenes, it is from the injury that the right to compensation arises". A passage in the judgment of Scrutton L.J. shows that his Lordship saw no inaptness in speaking of the injury as s. 5 speaks of it, as giving rise to a "liability", even in respect of the payments to be made, if the worker dies of his injury, to the persons who then are found to be his dependants. He said "the workman met with the accident in October, 1920, and by reason of that accident the employers incurred a liability, if the workman died in consequence of the accident, to pay his dependants a sum which in certain events was limited to £150, in certain events funeral expenses not exceeding £10, with a right to deduct from the sum that they had to pay the dependants the weekly payments made under the Act".

The leading authority is Clement v. D. Davis & Sons Ltd. (1927) A.C. 126. I need not repeat the well-known passage from the judgment of Lord Dunedin at p. 131, completely apposite though it is. Suffice it to mention Lord Sumner's identification at p. 133 of the injurious accident in the course of the employment as the event out of which the liability under the Workmens Compensation Acts arose - the liability, I take his Lordship to mean, in the event of the workman's death to make payments to the dependants, whoever they might then prove to be, as well as the liability to make payments to the workman himself if he should not die. The change which would be made if the amending Act applied to a case where the injury occurred before the commencement of the Act his Lordship described, not as a change of liability in the narrow sense of an obligation owed to an ascertained person, but as "a change for the worse in the position of the employer" (1927) A.C. at p. 133; and I would understand him to mean the employer's general liability to make whatever payments anyone might become entitled to receive under the Act by reason of the consequences to the worker, whatever they might turn out to be, of the employment injury.

The judgment now under appeal states that in the Supreme Court counsel for the present appellant abandoned the contention which, for the reasons I

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have given, I would uphold. We were assured, however, that counsel had been misunderstood and the point was fully argued before this Court. The argument for the appellant included also a submission that the expression in s. 5(1), "in any employment", excludes as a cause of liability any personal injury not caused in the doing of work, and therefore excludes in the present case the pulmonary oedema that arose while the worker was in hospital. Counsel for the respondent gave the answer that the purpose of the expression is merely to ensure the application of the section to every kind of employment, thus extending its operation beyond the classes of employment to which workers' compensation legislation was limited in earlier times. In my opinion this is correct and the appellant's submission on this point fails.

I must turn, therefore, to the contention that the pulmonary oedema, which developed after the commencement of Act No. 7292 and was the immediate cause of the death, was an "injury" within the new definition supplied by that Act. The oedema occurred while the worker was in hospital for the purpose of receiving hospital attention and treatment in connexion with the earlier "injuries", for which he was entitled to compensation; and the argument is that by force of s. 8(2)(b) the "injury", if that is what it was, is to be deemed to have arisen out of or in the course of the employment and therefore to have given rise to a liability in the employer to pay compensation in accordance with the provisions of the Act as amended by Act No. 7292. It is specifically accepted by the appellant, in para. 8 of the statement of agreed facts, and I therefore assume without deciding, that the expression in s. 8(2)(b) "in attendance at any place", as applied to a hospital, is satisfied by the presence of the person concerned as an in-patient in the hospital.

The question in the case stated is whether it was open to the Workers Compensation Board on the material before it to award the present respondent the sum which is appropriate if the amendment by Act No. 7292 of cl. 1(a) (i) of the clauses appended to s. 9 applies in this case. Consequently what we have to decide is not whether

the pulmonary oedema was an "injury", but whether the Board, on the material before it, could properly find that it was. The material, unhappily, consists only of an agreed statement of facts. I say unhappily because the Board was presented with the artificial and highly unsatisfactory task of endeavouring to construe a written document instead of getting at the facts for itself, and that in a case which was eminently one for careful investigation with the direct assistance of medical witnesses.

The Board, observing that according to the written admissions the oedema was "a sudden physiological change for the worse in the lungs of the worker", and adding that it was unexpected and not designed by the worker, concluded that "therefore" it was an "injury by accident". For this it cited James Patrick & Co. Pty. Ltd. v. Sharpe (1955) A.C. 1, a case decided under earlier Victorian legislation in which "personal injury by accident" was the phrase used in s. 5(1) and not simply "personal injury". As the present s. 5(1) omits "by accident", it was not to the point to mention that the oedema was unexpected and not designed by the worker. But what is more important at the moment is that the Act under consideration in James Patrick & Co. Pty. Ltd. v. Sharpe defined injury to mean "any physical or mental injury or disease, and to include ... the aggravation acceleration or recurrence of any pre-existing injury or disease as aforesaid ..." We are concerned with a very different definition of injury. In s. 3(1) as amended by the Act No. 7292 it is provided that the word means "any physical 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 or acceleration".

The Board seems to have thought that the oedema fell within paras. (a) and (b) or one of them, for the ultimate conclusion that it was an "injury" within the definition in the 1965 Act was

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put upon the ground that admittedly it arose out of the coronary artery disease and myocardial infarctions which occurred in and arose out of the employment. The Supreme Court held that the conclusion should be supported under para. (b) (if not otherwise) because of specific admissions in the statement of agreed facts. This means, if it is correct, that the pulmonary oedema, though only a stage in the development of a cardiac disease of long standing, was itself a disease, that its sudden appearance on 7th July 1965 was either the contraction of a disease or the acceleration of a disease or both, and that the employment was a contributing factor to it.

The word "disease" is defined by s. 3(1) to include (inter alia) "any physical ... disorder ... whether of sudden or gradual development ...". A pulmonary oedema I take to be a swelling of the tissue of the lungs due to an accumulation of serous fluid, and accordingly, if considered by itself, a physical disorder and a "disease" by definition. The respondent's contention is that for the purposes of the Act it should be considered by itself, and that when the subsequent question has to be answered, namely whether the worker's death resulted from the oedema or was materially contributed to by it, the fact that it formed a stage in the development of another disease simply means that if the death resulted from, or was materially contributed to by either of the diseases it resulted from or was contributed to by both. If this be correct, the case is reduced to the question whether the agreed facts warrant a conclusion that the work done by the worker in his employment contributed, even though through the medium of other effects upon him and after a period of time, to a hastened occurrence of the pulmonary oedema. To this question there could be, I think, but one answer, namely that they do warrant that conclusion. It is agreed that the work done by the worker in his employment in and after December 1964 aggravated and accelerated a coronary artery disease (namely coronary atheroma) and consequential myocardial degeneration, and (thereby) caused a coronary occlusion and myocardial infarction which occurred on 18th February 1965. A second coronary occlusion and myocardial infarction occurred shortly before 7th June 1965 while the worker was in hospital, and as to these the agreed fact is that "the underlying pathological basis for

the said coronary occlusion and myocardial infarction was the degeneration of the coronary arteries and myocardium to which the work aggravation of such degeneration contributed". This somewhat murky piece of jargon seems to me to mean that the second episode was contributed to by the degeneration which itself had been contributed to by the employment. On 7th July 1965 the pulmonary oedema manifested itself. The parties agree, as I interpret their statement of facts, that it arose out of the employment in the sense that (i) the work of the employment had the effect of aggravating and accelerating, first, the coronary artery disease, then the ensuing myocardial degeneration, and then the resultant coronary occlusions and myocardial infarctions; and (ii) the pulmonary oedema was the terminal event in the cardiac disease thus accelerated and aggravated. A question of remoteness is here involved, but from (i) and (ii) taken together the Board was no doubt entitled to conclude that the work which the worker did up to 18th February 1965 accelerated the oedema by so hastening the course of the entire coronary artery disease that the stage of oedema was reached sooner than it would have been if the work had not been done.

If this conclusion be drawn, and the initial assumption be adhered to that it is in accordance with the Act to isolate the pulmonary oedema and consider it as a disease in its own right, so to speak, the case is made out that an acceleration of the pulmonary oedema, in the sense of a bringing forward in time of the onset that condition, occurred on 7th July 1965, and that it was an acceleration to which the employment, by its effect upon each of the earlier stages of the coronary artery disease, contributed.

These considerations seem to me to entitle the respondent to succeed, provided that the crucial step be taken of holding that the Act intends a physical disorder which comes into existence merely as a stage in the development of a larger disorder to be considered separately for the purpose of applying the definition of "disease" and the provisions of ss. 5(1) and 9(1). For my part, though I confess to having wavered on the point, I think that to take that step would be to introduce into

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the scheme of the Act a conception so artificial and so removed from the common sense of the matter that compelling words should be required before accepting it. I find no such compelling words. In the present case the mutual admissions are not fairly susceptible, I think, of any other meaning than that what was caused to the worker in his employment was an aggravation and acceleration of the single disorder of coronary artery disease and myocardial degeneration. That was a progressive disorder, and of course the aggravation and acceleration of it was an aggravation or acceleration of every successive manifestation of it; but there was no aggravation or acceleration of oedema save as part of the progressive condition and the operation of the Act, according to what I think is the sounder construction, is exhausted when its provisions have been applied in respect of the disease consisting of the progressive disorder as a whole.

In my opinion the Board construed the Act with a literalness that misses its true meaning. I find myself, therefore, unable to agree in the decision of the Supreme Court and would allow the appeal.

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REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE TAYLOR

OGDEN INDUSTRIES PTY. LIMITED

v.

LUCAS

JUDGMENT - TAYLOR. J.

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The question in this case is whether the dependants of Reginald George Lucas, who died on 7th July 1965, are entitled to compensation assessed in accordance with the Workers Compensation Act 1958 or by that Act as amended by the Workers Compensation (Amendment) Act 1965 which came into force on 1st July 1965. Admittedly the deceased had sustained a number of compensable injuries before that date which contributed to his death. The first of these was sustained in December 1964, the next in February 1965 and a final injury shortly before 30th June 1965. Additionally, the respondent contends that he sustained a further compensable injury on the day of his death. However this contention may, for the time being, be put aside.

By the amending Act the amount of compensation payable to the dependants of a worker whose death has resulted from, or has been materially contributed to by, personal injury arising out of or in the course of his employment was increased from the sum of £2,240 (together with an additional sum of £80 in respect of each child under the age of sixteen years at the date of his death) to the sum of £4,500 (together with an additional sum of £100 in respect of each child under the age of sixteen years who was wholly or mainly dependent upon the earnings of the worker at the time of his death, or, would but for the incapacity have been so dependant, and is a claimant in the proceedings for an award of compensation in respect of the death.)

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It appears that the deceased worker left three dependants, his widow who is the present respondent and two children under the age of sixteen years who were wholly dependent upon him. The question is, of course, whether they are entitled to receive as compensation the sum of £4,700 ($9,400) or £2,400 ($4,800) and the question arises because the legislature did not by its amending Act declare whether the increased amount should be payable to the dependants of any worker whose death has resulted on or after the 1st July 1965 from an injury sustained in the course of his employment either before or after the passing of the amending Act, or, whether it should be payable only in respect of the death of any worker whose death has resulted from a compensable injury received after the passing of that Act. Perhaps it was thought that the matter was too clear for words and that it would never be thought that the dependants of one of two workers dying on the same day as the result of compensable injuries would be entitled to receive the higher amount of compensation whilst the dependants of the other would be entitled to receive only the smaller amount. Additionally, as will appear, if the amending Act were to be construed so as to give it such an operation, the further result would follow that the class of "dependants" in the one case might well be different from the qualifying class in the other. Yet the case has involved a hearing before the Workers Compensation Board, another hearing, upon appeal, lasting four days before the full Court of the Supreme Court and has occupied the attention of this Court for more than three days. I merely observe that the heavy expense which has been incurred and which, of course, must be borne by one of the parties would have been unnecessary if the legislature had simply declared its intention in the matter. This, I point out, is not an unusual type of case; there have been many of the same character in recent years and this Court has had occasion to remark upon the absence from amending statutes of provisions defining the ambit of their operation.

-- Broadly, the argument advanced by the appellant is that it is to be presumed that a statute is not to have a retrospective operation and that, since the liability to pay compensation arises upon the receipt of a compensable injury, the amendment

should not be considered to apply to cases where the worker, though dying after the 1st July 1965, has received his injury before that date. However, in the absence of authority I would reject this contention; it may, perhaps, be and it has been said that an injured worker's right to compensation arises when he receives a compensable injury, but, it seems to me, this cannot be said of his dependant's right to recover compensation in the event of his death.

By the Workers Compensation Act 1958 the expression "dependants" was defined to mean:-

"(a) the widow of the worker;

(b) the children, including children born out of wedlock, of the worker who were under sixteen years of age at the time of the death of the worker; and

(c) such other persons as were wholly or in part dependent upon the earnings of the worker at the time of his death or would but for the incapacity due to the injury have been so dependent."

This definition was deleted by the amending Act and the following definition substituted:-

"'Dependants' means such persons as were wholly mainly or in part dependent upon the earnings of the worker at the time of the death or who would but for the incapacity due to the injury have been so dependent."

It seems that the effect of this amendment was to make actual dependency at the date of death the qualification for inclusion in the class of "dependants" and there would, therefore, be excluded any person, whether the widow or children, who was not actually dependent at that time. It is, however, clear enough that in the case of a worker who, later, dies as the result of a compensable injury it is impossible to say at the date of the injury who his "dependants" as defined either by the 1958 Act, or by the amending Act, will be. Indeed, at the date of the injury they may not even be in existence. One can readily

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enough conceive the case of an unmarried worker receiving a compensable injury some time before the 1st July 1965 and subsequently, marrying after that date and having a child before dying as the result of his injury. In my view it is impossible to say that the liability to pay compensation in the event of a worker's death - or the corresponding right of the "dependants" as so defined - arises upon receipt of the worker's injury. It may, of course, be said at that point of time that in the event of the worker dying of his injury the employer will become liable to pay compensation to those persons who qualify as dependants at the time of his death but this is far from saying that any such present right or liability then arises. Such was the view of the Full Court of the Supreme Court of New South Wales in Dwyer v. Broken Hill South Limited (1928 2 W.C.R. 207) and it seems to be implicit in the concluding observations made in Gammage v. The Metropolitan Meat Industry Commissioner (48 S.R. (N.S.W.) 99 at p. 101) where a reference was made to Brazewell v. Emmott and Wallshaw Ltd. (1929 140 L.T. 603).

However in a later case (Australian Iron & Steel Ltd. v. Coal Mines Insurance Pty. Ltd. (52 S.R. (N.S.W.) 47) two members of the Full Court departed from this view mainly upon the authority of Moakes v. Blackwell Colliery Company Limited (1925 2 K.B. 64) and Clement v. D. Davis and Sons Limited (1927 A.C. 126). Then in 1964 (Van Kooten v. Haslington (64 N.S.W. S.R. 387)) the Court, as it was then constituted, followed that decision though it seems apparent from the observation of Walsh J., who delivered the leading judgment, that "If the matter had not already been dealt with in the authorities, it might well be argued that it is difficult to assert that a claim which is made by a dependant in respect of the death of a worker is a claim to enforce a right which arose or accrued as soon as the injury occurred", that he took this course simply because he followed what he conceived to be the established law. This also seems to have been the attitude of the other two members of the Court.

In Australian Iron & Steel Ltd. v. Coal Mines Insurance Pty. Ltd. (supra) Street C.J. referred to a passage from the judgment of the Judicial Committee in Victoria Insurance Company Limited v.

Junction North Broken Hill Mine (1925 A.C. 354 at pp. 356-357) in which it was said that:-

> "In the case of an accident liability arises only in the employer who was the employer at the date of the accident. It is a condition of liability that the person said to be liable shall have been employer at that date. The accident must arise 'in the course of the employment' ... The date of contraction of the disease and not the date of its ascertainment ... is the date for fixing liability."

But in that case the only question was whether the employer's liability to make payment of compensation to a worker suffering from a "scheduled disease" was a legal liability which arose as soon as the disease was contracted, or, only when the worker became disabled thereby. No question arose concerning an employer's liability to pay compensation to the dependants of a deceased worker and their Lordships were not concerned with, and did not direct their attention to, any such question. However, Street C.J. proceeded to say (at p. 50):-

> "The law was laid down in similar fashion by the House of Lords in Clement v. D. Davis & Sons Ltd. (1927 A.C. 126), in which case Moakes v. Blackwell Colliery Co. Ltd. (1925 2 K.B. 64) was expressly approved. In the course of his judgment Viscount Dunedin, said:- '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 the one hand and the employer on the other. The exact pecuniary amount had to depend on the particular circumstances and 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' (1925 2 K.B. at p.131)."

Herron J. also accepted the view that the point was resolved by the decisions in Moakes' Case and Clement's Case and observed:-

> "These cases are all to the same effect, namely that there is an accrued right in the workman

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immediately on the happening of the injury to have his compensation determined in accordance with the laws then existing and that the right of the workman who suffers from an accident accrues immediately on the happening of the injury.

By a parity of reasoning the rights of the dependants accrue immediately upon the happening of the injury and the date of death is not relevant to the determination of their rights or the measurement thereof."

One may, perhaps, ask to whom do the "rights of the dependants accrue immediately" when at that stage it is impossible to say who the "dependants" are or, rather, who they will ultimately turn out to be. The third member of the Court expressly refrained from dealing with the point and determined the case on the construction of the policy of insurance before the Court.

These observations require us to examine both Moakes' Case and Clement's Case. The latter case was concerned with the question whether s. 24(2) of the Workmen's Compensation Act, 1923 (Eng.) applied in determining the amount of compensation payable to the dependant widow of a deceased workman who, in 1918, had been injured by accident arising out of and in the course of his employment and whose death as the result of his injuries occurred in 1925. Under the legislation as it stood until 1923 the quantum of benefit to the dependants of such a deceased workman was prescribed by cl. 1(a)(i) of the First Schedule to the Workmen's Compensation Act, 1906. So far as is relevant the clause provided: "where death results from the injury - (i) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum." The italics are mine and are employed by way of emphasis. It was argued in the case that since

a total sum in excess of £300 had been paid by way of weekly payments to the worker during his life-time, no sum was payable to his dependants on his death. But by s. 24(2) of the amending Act of 1923 it was provided that:-

> "No deduction shall be made under paragraph (1)(a)(i) of the First Schedule to the principal Act, as amended by section two of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said section two, nor so as to reduce the amount payable under the principal Act below two hundred pounds".

Section 2 of the amending Act provided that:-

> "Where a workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent, then -
>
> (a) if both the widow or other member of the workman's family and such child or children as aforesaid were all wholly dependent on the workman's earnings, there shall, in respect of each such child, be added to and dealt with as part of the compensation payable under paragraph (1)(a) of the First Schedule to the principal Act, a sum equal to fifteen per cent of the amount arrived at by multiplying the average weekly earnings of the workman, or where such earnings are less than one pound, then by multiplying one pound, or where such earnings exceed two pounds then by multiplying two pounds, by the number of weeks in the period between the death of the workman and the date when the child will attain the age of fifteen, fractions of a week being disregarded."

However, s. 30 of the amending Act provided that:-

> "The provisions of sections two to ten of this Act and of the amendments of any scheme made in

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pursuance thereof shall not apply to any case where the accident happened before the commencement of this Act."

It was, of course, clear that the first part of s. 24(2), which forbad any deduction in respect of weekly payments made to a workman which would operate to reduce the amount payable to his children under s. 2, could have no application where the accident to the workman had occurred before the amending Act; the difficulty arose from the concluding words of the sub-section - "nor so as to reduce the amount payable under the principal Act below two hundred pounds". But pursuant to para. (1)(a)(i) of the First Schedule to the principal Act, as it stood before amendment, the amount of compensation payable to dependants might have varied between £150, as a minimum, and £300 as a maximum, and by s. 3 of the amending Act the minimum became £200 but, by force of s. 30, only in respect of death from injuries sustained after the passing of the amending Act. In the result it was held that s. 24(2) was nothing more than a provision ancillary to the amendments introduced by ss. 2 and 3 and that, since those provisions applied only in the case of death as the result of injuries sustained after the passing of the Act, the ancillary provision had no wider application. In other words, s. 24(2) was a provision to be observed in calculating compensation payable to dependants where the amount of compensation fell to be determined under ss. 2 and 3 and since these sections were expressed not to apply where the accident happened before the amending Act there was no room for the application of any part of s. 24(2) in determining compensation payable to the appellant.

It is to be observed that neither in Moakes' Case nor Clement's Case was any reference made to the definition of "dependants" although this term was, so far as relevant to the present enquiry, defined to mean "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependant". But no doubt it was thought that the presence of s. 30 in the amending Act, upon its proper construction, made any reference to it unnecessary. Further it is to

be observed - and this factor played a critical part in the decision - that under the Act prior to its amendment weekly payments of compensation made by the employer operated in diminution of any ultimate liability on the part of the employer to the dependants of the workman in the event of his death as the result of the injury which gave rise to his right to compensation. Indeed, in Clement's Case it appeared that the weekly payments of compensation up to the time of the death of the workman exceeded the amount of compensation which, in the absence of such weekly payments, would have been payable to his dependants when ascertained. This consideration had a decisive effect on the construction of s. 24(2) for to have construed it otherwise than their Lordships did would have been to give the amending Act a truly retrospective operation since such a construction would have operated to deprive the employer of what was, in effect, a right of set off which he had acquired under the principal Act. Finally, I add that I do not find in the speeches delivered in the case any general agreement with Viscount Dunedin's general proposition 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 the one hand and the employer on the other". Indeed, if there had been general agreement with this proposition it would have been quite unnecessary to consider the question of retrospectivity on the narrower ground, that is to say, that the employer had an accrued right to set off weekly payments made to the worker against any future liability to his dependants.

Moakes' Case (supra), it seems to me, was decided precisely on the same basis. But the present case is, in my view, materially different. In the first place, no attempt has been made by the legislature - as was made by s. 30 of the Workmen's Compensation Act, 1923 (Eng.) - to define the ambit of operation of the amending Act and, secondly, the amount of weekly payments made to a worker in his lifetime was not deductible from the amount which, according either to the 1958 Act or the amending Act, ultimately became payable to those persons who on his death qualified as "dependants". There is, therefore,

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no basis upon which it can be asserted that to construe the provisions of the amending Act in question in this case as applying to the case of a worker who, though suffering an injury before that Act came into operation, dies after that event, would be to give the amending Act a retrospective operation. Such a construction would not affect rights and liabilities accrued or incurred before that event; it would do no more than treat the amendment as speaking prospectively in the sense that it would regulate rights and liabilities accruing or arising in the future (Abbott v. The Minister for Lands (1895 A.C. 425) and Director of Public Works v. Ho Po Sang and Others (1961 A.C. 901)).

But it is contended that because the 1958 Act, by s. 5, specifies, in effect, in advance the consequences which would follow if, at some time in the future, a worker should die as the result of a compensable injury, the construction of the amending Act contended for by the respondent would be to give it a retrospective operation. In examining this contention one may ask what the result would have been had cl. 1(a) of the clauses appended to s. 9 of the amending Act - which specified the amount of compensation which would become payable to the dependants upon the death of a worker - simply been repealed. Apart from the provisions of s. 7 of the Acts Interpretation Act 1958 no right to, or liability to pay, compensation upon the death of a worker could arise. Nor, having regard to that section, could any such right or liability exist in the future unless it could be said that some "right privilege obligation or liability" had been "acquired accrued or incurred" under the repealed enactment. However, cl. 1(a)(i) was not only repealed but the provision providing for increased benefits was substituted. In my view, this provision was applicable whenever a worker, whether injured before or after the commencement of the amending Act, died after that event as the result of a compensable injury. In other words the stipulation in s. 5 of the Act - which was not amended - that the employer "shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of this Act" must be understood to mean, after the amendment, in accordance with the Act as it then stood.

It seems to me that both the right of the dependants and the liability of the employer arise upon the death of the worker and it, by no means, follows that an Act which operates to prescribe different rights and liabilities before that event occurs involves any element of retrospectivity. As Fullagar J. said in Fisher v. Hebburn Limited (105 C.L.R. 188 at p. 194) "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. 64 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". In the result, therefore, I am of the opinion that the amending Act operated to quantify the amount of compensation payable to the dependants of the deceased and that they are, therefore, entitled to the larger amount. I add that I am fortified in this conclusion by the observations of their Lordships in The United Collieries Limited v. Simpson (1909 A.C. 383).

In these circumstances it is unnecessary for me to express any opinion on the contention that, on the admitted facts, the deceased suffered a further compensable injury on 7th July 1965 which contributed to his death on that day. However, in view of the opinions expressed by other members of this Court it is desirable that I should do so. The statement of agreed facts sets out that the personal injuries sustained by the deceased consisted of:-

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(a) Coronary occlusion;

(b) Myocardial infarction;

(c) Aggravation and acceleration by the effect of work of coronary artery disease; and

(d) Aggravation and acceleration by the effect of work of myocardial degeneration.

As stated these "injuries" were sustained by the worker respectively in December 1964, February 1965, March 1965 and June 1965. Thereupon, the statement relates that on 7th July 1965, whilst in hospital undergoing treatment for the consequences of his earlier injuries he died of pulmonary oedema. "The pulmonary oedema", it was said,"was a sudden physiological change for the worse in the lungs of the worker which occurred on the 7th day of 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 out of the employment". On these agreed facts the Board found that on 7th July 1965 the worker had suffered a further injury from which he died on the same day and that by virtue of s. 8 of the Act it was deemed to have arisen in the course of his employment. On the authority of Sharp v. Patrick (1955 A.C. 1) it was contended by the respondent that it was open to the Board so to find. But, in my view, the presence of the word "disease" in the first limb of the definition of "injury" as it stood at the time when Sharp v Patrick was decided was critical to the decision in that case. Accordingly, it does not support the contention that what, according to the agreed facts, could have been no more than the terminal event,

sudden or otherwise, in a long history of heart disease, was an "injury" within the meaning of that term as defined by the 1958 Act as amended in 1965. In that definition the word "disease" does not appear in the first limb; diseases are expressly dealt with in the second limb and so far as the recurrence, aggravation or acceleration of a disease is concerned it must, notwithstanding s. 8, be shown that the employment was a contributing factor. I would reject the respondent's contention on this point.

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OGDEN INDUSTRIES PTY. LIMITED

v

LUCAS

JUDGMENT - WINDEYER. J.

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Before July 1965 the deceased worker, who was suffering from heart disease, had several coronary occlusions. The appellant does not dispute that these were compensable injuries. On 1st July the Workers Compensation (Amendment) Act 1965 (Vic.), No. 7292, came into operation. It made various amendments to the principal Act, the Workers Compensation Act 1958 (Vic.). On 7th July the worker died. It is agreed that his death resulted from, or was (within the meaning of s. 9(1) of the principal Act) materially contributed to by, the injury or injuries caused to him before 1st July 1965.

What results from those facts? That is the first question in the case. In concrete terms it is whether the dependants of the worker, entitled to receive compensation because his death resulted from his injuries, should be paid $9,400 or $4,800. The former sum is the amount payable in accordance with the rates prescribed by the Act as amended and in force at the date of death; the latter is the amount payable in accordance with the Act as it stood at the date of the above-mentioned injuries.

There is a second question in the case. It was argued for the respondent that, even if the new rates of compensation apply only in cases where the injury which causes or contributes to the death occurs after 1st July 1965, the dependants are entitled to $9,400. It was said that

the pulmonary oedema, which was the immediate antecedent of death on 7th July, should be deemed to have been itself a compensable injury. That proposition, which bulked large in the arguments both in the Supreme Court and in this Court, involves a debatable issue of mixed fact and law. In logical sequence it is secondary to the first question. I therefore put it aside for the present.

The amending Act of 1965 made several alterations in the law relating to the consequences of a worker's death from an employment injury. This was done by deleting certain provisions of the principal Act and simultaneously substituting others.

"Injury" was defined in terms which gave the word a different denotation from that it had previously been held to have. A new definition was substituted for the former definition of "dependants". The effect of this is that only persons who at the date of a worker's death were wholly or mainly dependent upon his earnings, or who would have been so dependent but for his incapacity due to his injury, are now entitled to compensation on his death. Previously the widow of a deceased worker and his children under sixteen had been counted as his dependants, whether or not they had been in fact dependent on his earnings. And the amounts of compensation payable to dependants were substantially increased by the amending Act. This was done by substituting new clauses for the old clauses appended to s. 9(1).

The respondent in this appeal, who is the widow of the worker, claimed compensation for herself and two children under the age of sixteen. They were all actual dependants of the deceased, so that it is immaterial to their rights to compensation whether the old definition or the substituted definition of dependants be applied. The question is therefore simply whether the amount of their entitlement is to be ascertained according to the old or the new rates.

It is unfortunate that when Parliament made these changes it did not expressly state to whom

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and for whom they were to apply. The question which has arisen might well have been foreseen. The difficulties it causes could easily have been avoided. For want of a few words in the amending Act - a provision for example like s. 15 of the Act of 1953 (No. 5676) - making Parliament's intention clear, the rights of a deceased worker's dependants have become the subject of long drawn-out and costly litigation.

As from 1st July 1965 the Act as amended was in operation in respect of all matters to which it was applicable. The question for us is, Does it apply in all cases when death occurred after that date, whenever the injury from which death resulted occurred? Or, does it only apply in cases when the injury as well the death occurred after that date? It is, I think, misleading to describe this as a question of retrospectivity. The Act as amended looks forward, not backwards. It deals with the consequences of deaths in the future; the only question is, What deaths? Moreover, as the Chief Justice recently pointed out, in Commissioner for Railways v. Bain (1965), 112 C.L.R. 246 at p. 257, the language of a statute and the subject-matter with which it deals may make it clear that the Legislature intended it to have a particular result whether or not that involves giving it a retrospective or retroactive operation.

Section 5(1) of the principal Act is as follows:-

> "5(1). If in any employment personal injury arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of this Act."

This wording is of long standing. The way in which it operates after the amendment is provided for by s. 5(3) of the Acts Interpretation Act 1958 (Vic.) as amended by Act No. 6632 of 1960:-

> "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) shallunless 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 ....."

The appellant's contention is that when, before 1st July 1965, the worker suffered a compensable injury it, the appellant, at once became, by virtue of s. 5(1), under a liability to pay compensation to the worker's dependants if he should die leaving dependants as then defined: that the Act as it then stood fixed the amounts which would become payable: that the amending Act ought not to be read as altering those amounts. In support of this proposition the appellant called in aid the well-known rule of construction that a statute is not to be read as disturbing substantive rights, vested as the result of past events, unless it clearly appears that it is intended to do so. There is a presumption "against reading a statute in such a way as to change accrued rights the title to which consists in transactions passed and closed or in facts or events that have already occurred": per Dixon J. in Kraljevich v. Lake View and Star Limited (1945), 70 C.L.R. 647 at p. 652: see too Maxwell v. Murphy (1957), 96 C.L.R. 261 at p. 267. This canon of construction has a place now in the statute law of Victoria; for since 1950 the provisions of the Interpretation Act 1958 (Vic.) have applied to amending Acts as well as to repealing Acts. In Doro v. VictorianRailways Commissioners, (1960) V.R. 84 at p. 90 Adam J. suggested that this means that questions such as arise in this case should ordinarily be decided by reference to the terms of the statutory provisions governing statutory interpretation rather than by recourse to common law doctrine. With this I agree. It is thus I think better now to have regard to the interpretation statute than to passages in judgments in which the presumption against a statute being read so as to affect vested rights has been formulated, but remembering that the statute states in effect the common law principle, using some economy of words to do so.

I therefore set out - so far as they are relevant - the statutory provisions which are now to be found in s. 7(2) of the Acts Interpretation Act 1958 (Vic.):-

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"(2). Where any Act passed on or after the first day of August One thousand eight hundred and ninety, 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 -

(a) .....

(b) affect the previous operation of any enactment so repealed or amended of 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 ... as aforesaid."

Among other cases decided by the application of similar provisions to these, rather than by resort to judicial enunciations of the common law canon, are Director of Public Works v. Ho Po Sang, (1961) A.C. 901; Free Lanka Insurance Co. Ltd. v. Ranasinghe, (1964) A.C. 541.

Going then to the effect of the enactment upon the operation of the amending Act in this case: I do not doubt that it would defeat any suggestion that the new rates of compensation should be applied in a claim made after 1st July in respect of a death which had occurred before then. A case of that kind would be governed by the law as it was when the death occurred, although the claim was not made, and the proceedings for an award were not instituted, until after the amendment had come into operation. But that this would be so in that case demonstrates how different is the present case.

The argument for the appellant, using the terms of the Interpretation Act, was as follows:

Before the amendment s. 5(1) of the Workers Compensation Act operated when the worker suffered an injury: it created then a "liability" for the employer: the amending Act is not to "affect the previous operation" of s. 5(1) or to affect the "liability" which the appellant had incurred: to increase the amount which was payable according to the Act as it was before 1965 is to impose a new liability, that is to "affect" the "previous operation" of the Act and the liability it created.

The words "any right privilege obligation or liability acquired accrued or incurred" which the Interpretation Act uses, and the same words when used by judges, are all general and abstract terms. Each of them could be the heading of a chapter in a work of analytical jurisprudence. Section 5(1) speaks of the employer being "liable to pay compensation". The word "liable" here at once attracts the idea of a "liability". But it is not necessary to be a disciple of Hohfeld, or wedded to the terminology of his analysis of legal rights and duties, to see that both words are, using his phrase, "chameleon-hued". And it is necessary to be cautious in going from the word "liable" as used in s. 5(1) to the word "liability" as used in other contexts. "Liability" can be, and often is, used as a synonym for "duty" or "obligation"; but Sir George Paton in his book Jurisprudence (3rd (1964) ed. by Professor Derham p. 242) uses it in an opposed sense. "Obligation", he says, "should be sharply distinguished from liability. Obligation relates to what a person ought to do because there is a duty laid upon him: liability to what he must do because he has failed to do what he ought". The term "liabilities" when used to describe unpaid debts reflects this meaning. For Salmond and Hohfeld "liability" has still another meaning. It describes a person's liability to be, by the power of someone else, made subject to a duty. In that sense it is the opposite of "immunity". It seems to me that without descending to too much refinement there are at least three main senses in which lawyers speak of a liability or liabilities. The first, a legal obligation or duty: the second the consequence of a breach of such an obligation or duty: the third a situation in which a duty or obligation can arise

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as the result of the occurrence of some act or event. It is in the third sense that s. 5(1) speaks of an employer as liable to pay compensation in accordance with the Act. But I do not think it is the sense in which it is said that an amending Act does not disturb existing liabilities arising out of past transactions. That to my mind describes a liability having become complete by past events rather than a situation in which some future event must occur to make the effect of past events create a completed liability. The position was put in the first edition of Halsbury, Vol. 20 p. 153, as follows: "The liability to pay compensation under the Workmen's Compensation Act attaches to the relation of employer and workman, and is quite irrespective of negligence. ... it is an obligation placed upon every employer of labour to make pecuniary compensation to a limited extent, whenever death or disablement happens to a workman in the course of his employment". The obligation "to pay compensation in accordance with the Act" arises when incapacity or death ensues from the injury - and, in the case of death, only if the worker leaves dependants. It is said that s. 5(1), speaking as it does from the happening of the injury, by its reference to a liability to pay in accordance with the Act means that the pecuniary liability, if it should thereafter arise, is to be quantified in accordance with those provisions, that they measure the limit of a contingent liability; and thus create an immunity against its increase not disturbed by the amending Act. The argument is powerful, but I have come to the conclusion that it puts too much weight upon the words "in accordance with the provisions of this Act". The amending Act gives these words a new content of meaning as from the date it came into force. In reading the Act after 1965 in relation to the liability in respect of deaths thereafter, we ought I think to read s. 5(1) when it speaks of "compensation in accordance with this Act" as speaking of this Act as amended: cf Rattan Singh v. The Commissioner of Income Tax, (1957) 1 W.L.R. 625. Lord Tenterden C.J. in Surtees v. Ellison (1829), 9 B. & C. 750 at p. 752, said: "It has been long established that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed". The only matter which was

past and closed when the 1965 Act came into operation was, it seems to me, that the worker had suffered an injury of a kind which, if death ensued, would entitle his dependants to compensation. An alteration of the definition of "injury" would not alter this (in the absence of an express provision that it should do so). But when the Act of 1965 came into operation it provided a new measure of the actual pecuniary liability of the employer which would arise when a worker died leaving dependants. Whether the present respondent can have the benefit of the new measure depends upon ascertaining, by permissible means, the intention of the Parliament of Victoria. It is to be decided, I think, by bearing in mind that the amendment was enacted to take its place in an existing and continuing system of workers compensation law, and to be construed in the light of s. 5(3) of the Acts Interpretation Act.

I have looked at the question primarily from the point of view of the employer's obligations, because it was said in the course of the argument that this, rather than the rights of the worker or his dependants, was the matter to be considered. The Victorian Act, following the English model and unlike the New South Wales Act, is cast in terms of the liability of the employer to pay compensation rather than of the right of the worker to receive it. But, as I have said, when s. 5(1) uses the word "liable" it does so to describe a prospective duty or obligation. Duty or obligation is the jural correlative of right or claim. In my opinion a liability, in the sense of an obligation, can only be said strictly speaking to have been "incurred" when it can be correlated with a right or claim in some identifiable person who can enforce it. And the persons who can claim the benefit of the obligation which the Act imposes in the case of the death of the worker were, as the law was before 1965 and as it is now, not ascertainable until the death. This is a situation in which it seems to me not correct to speak of a right having accrued and a liability having been incurred before death.

For the reasons I have given I myself construe the Act as amended as providing the measure

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of the legal consequences of deaths occurring after it commenced to operate. But it is said that there are authorities which compel me, or should persuade me, to a different view. My brothers Taylor and Owen in their judgments, which I have had the benefit of reading, have dealt with these cases in a way which relieves me of any necessity to set out their facts. I agree with their Honours' observations as to their effect. I shall state briefly for myself my reasons for saying so. It is convenient to start with a passage in the judgment of the Privy Council, delivered by Lord Reid in Sunshine Porcelain Potteries Pty. Ltd. v. Nash, (1961) A.C. 927 at p. 942:-

> "There are many cases, Australian and British, a leading example being Clement v. D. Davis & Sons Ltd., (1927) A.C. 126, 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."

I do not read those remarks as an endorsement binding upon me of the proposition that an Act amending the law of workers' compensation must always, in the absence of a special provision, be taken as applying only in relation to injuries which occur after it comes into operation. Their Lordships were not concerned with the limits and effect of a proposition which they were dismissing as irrelevant. In the Act before them the fact of disablement as the result of a progressive industrial disease was to "be treated as the happening of the injury". The question was when did the disablement happen or was to be deemed to have happened. There is however in their Lordships' judgment one statement (at p. 939) which brings into relief the fundamental question in this case. Their Lordships refer to "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". This brings us back again to the question: What is the intention of the legislature as revealed in the amending Act?

In Clement v. D. Davis & Sons Ltd. (1927) A.C. 126, the case to which Lord Reid referred, and in Moakes v. Blackwell Colliery Co., (1925) 2 K.B. 64, the case it affirmed, the critical consideration was the effect of a particular section, s. 30, in the Act there in question. That Act had increased the compensation the dependants of a workman would become entitled to on his death. Section 30 was an express provision that the new benefits should not apply in the case of deaths resulting from accidents which had happened before the Act was passed. It was held, mainly because of this provision, that certain rights of set-off or deductions, by which the employer's contingent liability in the case of death had been limited, continued to operate in relation to deaths resulting from accidents before the Act came into operation. The decision thus turned upon the terms of the Act rather than upon any general canon of construction. Lord Dunedin, however, approached the question with some general observations (at p. 131) as follows:-

> "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 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 s. 30 makes this quite clear to a great extent by expressly declaring that the additional benefits conferred by ss. 2 to 10 are not to enure to any class arising out of accidents in the past."

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His Lordship then considered the words of the Act in question and concluded: "I am therefore of opinion that the proper interpretation of the section is in accordance with, and not against, the antecedent probability of what would have been expected".

Of course, no one would dispute that, unless the contrary appears, you do not construe an amending Act "so as to upset vested rights and liabilities which are complete in themselves". But, for reasons I have already given, I cannot regard that description as applicable to the position existing in the present case on 1st July 1965. It is significant that Lord Sumner, speaking after Lord Dunedin in the same case, spoke of the employer as having before the death of the workman a "contingent liability which would accrue in the event of the workman's death". Contrast this with Lord Dunedin's statement that upon the happening of an accident "certain rights and certain liabilities accrue at once". And then recall what Lord Dunedin had said many years before in his dissenting judgment in United Collieries Ltd. v. Simpson, (1909) A.C. 383. And then add what Lord Loreburn said in the same case, speaking of the nature of the right of the dependant of a deceased workman:-

> "Now where the Act says that the employer is liable to make compensation in the event of death in case there are dependants, ... that certainly looks like a debt arising on the death from employer to dependants."

and later:-

> "If there is this right, when does it arise or become vested? The statute evidently treats it as arising because of the workman's death. It seems to follow that it arises on the workman's death, unless some other event is fixed."

Next take what in the same case Lord Macnaghten said (at p. 393):-

> "The measure of liability is to be found in the First Schedule. But the liability falls

> upon the employer on the happening of the accident. It is the accident and nothing else which creates the liability..... The Act itself treats the liability as a subsisting liability from the very moment of the accident and as a present right."

Then observe that Lord Birkenhead, in King v. Port of London Authority, (1920) A.C.1, spoke of "the incapacity which is a condition precedent to liability under the Act".

This last statement I venture to adopt: and I forbear from further quotations. Many might be assembled from many courts, English and Australian, which have had to consider workers' compensation statutes. They would show that it is not only in the House of Lords that the word "liability" has proved chameleon-hued, and has meant different things for different men.

It is for this reason that I do not think much is to be gained by quoting sentences and passages from Australian judgments in which an employer's liability and an incapacitated worker's right are described as alike arising at once on the happening of injury or accident. I would merely notice that some of these occur in cases in which the injury to the worker had at once disabled him; he was incapacitated then and there; so that there was indisputably and simultaneously an accrued liability and a vested right. Kraljevich's Case (1945), 70 C.L.R. 647 is a good example. The worker there was injured and incapacitated in 1944. His right to compensation then arose. It was by reason of the incapacity then vested and complete: his employer's corresponding liability thus fell to be defined and quantified according to the law then in force. Similarly in Stevens v. The Railway Commissioners for N.S.W. (1930), 31 S.R. (N.S.W.) 138, a workman met with an accident which incapacitated him from work. It was said by the Supreme Court that "there was an accrued right to the workman immediately on the happening of the injury to have his compensation determined in accordance with the then existing law". There the right unquestionably accrued on the happening of the injury. Why? Because the incapacity occurred then. The judgment of

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Jordan C.J. in Gammage v. Metropolitan Meat Industry Commissioner (1947), 48 S.R. (N.S.W.) 99 was referred to, mainly for the dicta in it. But no question like that in the present case arose there - and no such question could have arisen. The worker was immediately incapacitated by an employment injury. There was no amending Act. The question was simply whether upon the construction of the Act as it stood his rights to weekly payments during incapacity were fixed at the date of his incapacity, which was the date of his injury, or were enlarged by his having next day married a wife. The learned Chief Justice, holding that his marriage did not entitle him to additional benefits, his wife not being a dependant when the right to compensation accrued, pointed out that the position is of course different in case of a worker's death for then the dependants are ascertained at the date of death. In Fisher v. Hebburn Ltd. (1960), 105 C.L.R. 188 at p. 203, my brothers Kitto and Menzies did say that in cases other than those of disease of gradual onset the time at which liability arises is when the injury occurs. And in their judgment I said I substantially concurred. But that case was concerned with the question of when liability arises, and on what employer it falls, if incapacity occurs as a result of a disease contracted by a gradual process. The question which arises in this case did not there arise; and I do not regard an incidental remark in that case as compelling a conclusion in this case. In Van Kooten v. Haslington (1964), 82 W.N. (N.S.W.) Pt. 2, 50, the Supreme Court of New South Wales expressed a view which is the opposite from the conclusion that I have reached. And in the present case the Supreme Court of Victoria followed the New South Wales decision. It is, however, plain from the judgment of Walsh J. in the Supreme Court of New South Wales that he would have taken a different view if he had not felt constrained by authority binding on him. I am not troubled to the same extent as his Honour was; and feel free to come to a different conclusion from that which the Supreme Courts reached.

Before leaving the case I return to Clement v. D. Davis & Sons Ltd., supra, dicta in which have led to what I think to be mistaken doctrine. There are two aspects of what was said there on which I wish to remark. The first is that Lord Sumner there

assumed, although without deciding, that increased amounts payable as funeral expenses by virtue of the amending Act applied to the death of a workman after that Act came into operation, although the accident had occurred before then. And in Briggs v. Thomas Dryden & Sons, (1925) 2 K.B. 667, Pollock M.R. suggested the same thing, again without having to decide the point. This is significant having regard to the manner in which the new amounts for funerals were substituted in the Schedule in the Act there in question, comparable with the way in which in the Act before us the new rates for dependants were substituted in the clauses attached to s. 9. I can see no relevant distinction between an amendment increasing the amount payable to a workman's executor or relatives to enable them to bury his corpse and an amendment increasing the amount payable to persons who were dependant on him. The increase in the one case is more, much more, than in the other. Beyond that where is the distinction? In each case a "contingent liability" from the date of the accident becomes an enforceable obligation from the date of death.

The second comment I would make on the case in the House of Lords concerns Lord Dunedin's remark about the "probability of what would have been expected". Now whatever were the probabilities in England when his Lordship spoke, is it improbable that today an Australian legislature increasing death benefits under worker's compensation laws would intend the dependants of all workers dying after the change in the law to enjoy its benefits? The system of workers' compensation is geared to compulsory insurances against the employers' liability; but in a way that has not deterred Australian legislatures from time to time increasing its benefits for workers and their dependants.

Returning from what was said in other cases to the Act which we have to construe, I remain of the opinion that in terms and in intent it gave the dependants of the deceased worker in this case a right to compensation in accordance with it, that is at the rates prevailing on 7th July 1965.

In the view I take it is therefore not necessary that I enter upon the other question argued - the

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proposition that the deceased man suffered a further injury within the meaning of the Act on the day of his death. Nevertheless, as this was the ground on which the present respondent succeeded below, I think I should say that in my view it was mistaken. In the circumstances I shall state my reasons briefly. I shall assume that the deceased worker when lying in hospital during the last stages of a fatal heart disease was "in attendance" there within the meaning of s. 8(2)(b)(iii) of the Act, although I doubt whether the assumption is correct. I shall assume too that he was there at a time when he was no longer in employment - that is to say that there was no contractual relationship of master and servant between the appellant and him, although as a man suffering from a compensable injury he was still a worker and the appellant his employer for the purposes of the Act. And I shall assume further - and without expressing any opinion on the matter - that this does not preclude him or his dependants having the benefit of the Act if he suffers an injury in circumstances such as are described in s. 8(2).

The question then becomes, Was the pulmonary oedema an "injury" within the meaning of the Act; and if so did the death result from, or was it materially contributed to by this "injury"? All that we have to go on is what appears in the "statement of agreed facts", where it is stated that: "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 .....". This is an unhappily indefinite way of stating cause and consequence. Doubtless the philosopher, the physician, and the lawyer look at and speak of cause and consequence in very different ways. But, allowing for that, I find great difficulty in arriving at any conclusion satisfying to my mind from language such as this; and it was what the Board had before it. I can only say that the statement of facts read as a whole, and that sentence in particular, lead me to the conclusion that the worker suffered from a pathological condition of the heart, which got progressively worse, that its worsening was in the

ordinary course of the disease, for him, that he did not recover but died from the disease, that the pathological condition which was a product of the progress of the disease and the immediate cause of death was a pulmonary oedema.

The proposition for the respondent is that the occurrence of the oedema was itself an injury and one which must be deemed to have been caused to the worker in the course of his employment. This is said to be the result of the application of the definition of "injury" in the Act as it now stands, coupled with reading the phrase in that definition, "any travelling referred to in sub-section (2) of section eight of this Act", as including lying in bed in hospital. I do not read the reference to "travelling" in s.8 as having that effect. More importantly however I am unable to accept the proposition that the oedema was an "injury".

The oedema is described in the statement of agreed facts as "a sudden physiological change for the worse in the lungs of the worker" - and as "the terminal event in a long history of cardiac disease". I do not think either statement is helpful. As to the latter, the "terminal event" of the worker's cardiac disease was his death. It is I consider a false idea of cause and consequence - false that is for present purposes - to isolate a particular pathological condition or episode occurring in the course of the progress of a disease; and then, because it is the condition existing at the point of death, or is an episode which immediately precedes death, to say that from it death results. I have at other times stated my views on this topic. As I have seen no reason to change them I shall not enlarge upon the matter here, merely refer to what I wrote in The Commonwealth v. Butler (1958), 102 C.L.R. 465 at pp. 479-480. Turning to the reference to "a sudden physiological change for the worse": This seems to have become an almost hallowed phrase in workers' compensation law. But neither its meaning nor its proper application has been made clear by the manner of its use here. When the words "injury by accident" were in the Act it served a purpose for the interpretation of that composite expression. But the word "accident" does not appear now. As the Act now stands two

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things at least can be said. One is that the words "physiological change for the worse" do not appear in the Act. The other is that they are not a synonym for injury. A physiological change for the worse means, I suppose, the occurrence of some pathological condition, or the appearance of some symptom or manifestation of a pathological condition. It is not, I take it, a description aptly applicable to anatomical injuries, such as broken bones and cut fingers, and I imagine it would not be aptly applied in functional disorders of the mind - at all events according to the present use of words and the present knowledge of metabolism as affecting mental processes. Whatever application it has must therefore be in relation to the inclusion of diseases in the definition of injury. I have on other occasions discussed some of the difficulties inherent in these words "sudden physiological change" and I shall not go over the same ground again here: see Darling Island Stevedoring and Lighterage Co. Ltd. v. Hussey (1959), 102 C.L.R. 482 at p. 520; The Commonwealth v. Hornsby (1960), 103 C.L.R. 588 at p. 608.

The proposition that the oedema was an injury, depends not on any descriptive phrase derived from judgments in other cases, but on the definition of injury in the amending Act, which had come into operation on 1st July 1965, some days before the oedema occurred. It seems to me that it is impossible to bring this occurrence within that definition. It was not in itself a disease contracted in the course of employment. Was it the aggravation or acceleration of a pre-existing disease? It seems to me that it cannot be said that it was. "Aggravation" means, I think, that an existing disease has been made worse, not that it has simply become worse. "Acceleration" I have previously said and venture to repeat "probably presupposes a progressive disease, one that, running its ordinary course, increases in gravity until a climax, such as death or total invalidism, is reached - its progress to this end result not being ordinarily susceptible of being permanently arrested, but susceptible of being hastened by external stimuli": Federal Broom Co. Pty. Ltd. v. Semlitch (1964),110 C.L.R. 626 at pp. 639-640. To this view I adhere. On the facts as stated, it may I think be accepted that

the deceased worker's employment before 1st July 1965 hastened the progress of his heart disease. But I do not think that the facts as stated can support a finding that the oedema which occurred on 7th July was the consequence of an acceleration then occurring and to which the employment was then a contributing factor. The Act looks not to the consequence of acceleration but to the fact that by some external stimulus the disease has been accelerated in its progress. It is the fact of the worker's employment having accelerated the progress of the disease which attracts the definition of injury. In the present case thedisease was running its course when the worker entered hospital. There is nothing, I think, to shew that after 1st July any incident of his employment - assuming the employment to be then still subsisting - further accelerated his disease so as to bring his death nearer.

We heard some argument about the meaning in the definition of "injury" of the words "without limiting the generality of the foregoing". I do not myself understand how this phrase, which directs, perhaps with needless caution, that later words shall not restrict the application of earlier words, can be used to make the earlier words enlarge the meaning of the later words. The second limb of the definition described the circumstances in which diseases are to be considered injuries. In my view it does not mean (except in cases of aggravation and acceleration as described) that stages and phases and episodes in a progressive disease, whether of infective or autogenous origin, are themselves separate injuries caused to a worker in the course of his employment.

I would dismiss the appeal.

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REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE OWEN

OGDEN INDUSTRIES PTY. LIMITED

v

LUCAS

JUDGMENT - OWEN J.

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This is an appeal from the decision of the Supreme Court of Victoria on a case stated by the Workers' Compensation Board in which the question submitted was "whether it was open to the Board on the material before it to award the applicant $9,400 ". This question was answered by the Supreme Court in favour of the applicant.

She is the widow of one Reginald George Lucas who died in hospital on 7th July 1965 and the application for compensation was made by her on her own behalf and on behalf of her two children who were under the age of sixteen years at the date of her husband's death. Lucas had been employed by the appellant and in December 1964 had suffered a coronary occlusion as the result of the sudden detachment of an atheromatous plaque in a coronary artery. The parties agreed that this was an injury which arose out of or in the course of his employment. On 18th February 1965 he suffered a further occlusion arising out of or in the course of his employment which resulted in total incapacity for work and thus became entitled to be paid and was in fact paid weekly payments of compensation from 18th February 1965 until the date of his death. In March 1965 and again in June 1965 he was admitted to hospital for treatment of his heart condition and while in hospital and shortly before 30th June 1965 he suffered a further coronary occlusion. On 7th July 1965 and while still in hospital undergoing treatment he died from pulmonary

oedema which, if I have correctly understood the statement of agreed facts resulted from the coronary occlusions and the degeneration of the muscles of the heart caused thereby. In these circumstances the appellant conceded that the worker's widow and children were entitled to be paid compensation but claimed that the amount payable was that fixed by s. 9(1) and Clause 1(a)(i) of what I will call the Principal Act before its amendment in 1965, that is to say the sum of £2,400, made up of £2,240 together with an additional sum of £80 in respect of each child under sixteen years of age at the time of the worker's death.

For the applicant, however, it was contended that as a result of the Workers' Compensation (Amendment) Act 1965, (the amending Act), which came into force on 1st July 1965, a few days before the worker's death, the amount for which the award should be made was £4,700, made up of £4,500 and two additional sums of £100 each in respect of the children.

The amending Act made a number of amendments to the Principal Act and it is necessary to refer to some of them. It made some change in the definition of "dependants" in the Principal Act but it is not disputed that whether it is the definition as it stood before the amendment or the definition as amended that is to be applied the applicant and her children were "dependants". For present purposes the significant point about the definition as it stood both before and after the amendment is that until the death of an injured worker occurs it is impossible to determine whether he has any "dependants" because the word was defined by the Principal Act to mean (a) the widow of the worker; (b) the children of the worker who were under the age of sixteen years at the time of his death; and (c) such other persons who were wholly or partly dependent upon the worker's earnings at the time of his death or would but for the incapacity due to the injury have been so dependent and, after its amendment, as meaning "such persons as were wholly mainly or in part dependent upon the earnings of the worker at the time of the death or would but for the incapacity due to the injury have been so dependent".

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The amending Act also amended the definition of "injury" in the Principal Act and substituted for Clause 1(a)(i) of the clauses appended to s.9 of that Act a clause which provided (inter alia) for an increase in the lump sums payable to the "dependants" of a worker whose death results from or is materially contributed to by an employment injury. I will refer to this clause as the "substituted clause".

The case for the applicant was put in several ways. It was said that, on the agreed statement of facts, it was open to the Board to find, as it appears to have done, that the pulmonary oedema was itself an "injury" because it was "a sudden physiological change for the worse in the worker's lungs", and since it occurred while the worker was in attendance at hospital for the purpose of receiving attention for the defective condition of his heart it is deemed by s. 8(2) of the Principal Act to have arisen out of or in the course of his employment. In these circumstances, it was said, the worker had suffered an employment injury after the amending Act had come into operation and when he died his dependants were entitled to be paid the amount of compensation set out in the substituted Clause 1(a)(i). If, however, the pulmonary oedema which caused death was not an "injury" so that the case was one in which the employment injury had occurred before and the death after the introduction of the substituted clause nevertheless its terms were to be applied because, on its true construction, it was intended to cover all cases in which the worker had died, leaving dependants, after the amending Act came into force whether the injury which caused that death had occurred before or after the amendment. It was only when the worker died that it was possible to ascertain whether he had left any dependants and, if he had, to identify them. It was submitted that it was at that point of time that the employer's obligation to pay them was incurred and the law then in force was to be applied in determining the extent and nature of that obligation.

For the appellant it was submitted that the relevant law to be applied was that in force at the time when the injury occurred. It was then, so it was argued, that, under s. 5 of the Principal

Act, the employer incurred a liability to pay compensation to dependants should the worker's injury result in death notwithstanding the fact that at the date of injury - assuming that it did not result in the instant death of the worker - it could not be said that there ever would be any dependants or, in any case, who they would be. The submission continued that if the date when the injury occurred is the relevant time to be considered, the application of the substituted clause to a case such as the present would be to give it a retrospective operation which was not justified by its terms. Counsel for the appellant agreed, however, and in my opinion rightly agreed, that if the liability of the employer to pay compensation to the dependants arose upon the death of the worker, the law to be applied was that operating at the date of death.

The conclusion to which I have come is that the substituted clause was intended to cover all cases in which the worker's death occurred after it began to operate despite the fact that the death resulted from an injury occurring before that substituted clause began to operate. Notwithstanding a number of authorities to which we were referred, I am of opinion that it is when the death of the worker occurs that liability is incurred by the employer to compensate those, if there be any, who are then found to be his dependants and the right to compensation vests and that it is the law in force at the time of the death that is to be applied in measuring the extent of that liability and of the corresponding rights. This was the view expressed by that outstanding Judge Ferguson J., speaking for the Full Supreme Court of New South Wales, in Dwyer v. Broken Hill South 2 W.C.R. 207. His Honour said, at p. 209:-

> "..... the first time when any question arose as to the widow's claim was upon her husband's death and the amount that she was to receive was to be determined then, and was to be determined, it seems to me, in accordance with the law then in force....."

For the appellant, however, it was submitted that to so decide would be to run counter to a number

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of cases both here and in England in which, it is said, the proposition is laid down that it is at the moment of injury that the employer incurs a liability to compensate those who, if and when the worker later dies, are then found to be his dependants and that it is at that moment of time that the right of those dependants to receive compensation accrues. These authorities begin with Moakes v. Blackwell Colliery Co. (1925) 2 K.B. 64 and Clement v. D. Davis & Sons Ltd. (1927) A.C. 126 and it is necessary to examine these decisions in some detail. In Moakes' Case a workman had been injured in October 1920 whilst working in the employer's colliery and was thereby incapacitated. Weekly payments of compensation calculated in accordance with the Workmen's Compensation Act of 1906 (the Principal Act) were made to him until the end of 1923. On 1st January 1924 an amending Act, the Workmen's Compensation Act of 1923, came into force. It provided for an increase in the rate of weekly payments and in fact payments at the new rate were made until 1924 when the injured man died as a result of his injuries, leaving dependants. The weekly payments made up to the date of death totalled £204. 5. 0d. and, by paragraph 1(a)(i) of the First Schedule to the Principal Act it was provided that where death resulted from the injury and the workman left dependants wholly dependent upon his earnings, the maximum amount of compensation payable in respect of the dependants should not exceed £300. The paragraph also provided that where weekly payments of compensation had been made to the workman during his lifetime the amount of those payments was to be deducted from the lump sums which would otherwise have been payable to his dependants upon his death. In the case which was under consideration this meant that under the Principal Act the Amount payable by the employer to the dependants would have been £95. 15. 0d. that being the difference between the maximum of £300 set by paragraph 1(a)(i) and £204. 5. 0d, the amount of the weekly payments made during the workman's life. The Act of 1923 had, however, by s. 2, increased the amounts payable under the Principal Act in respect of dependent children and had set a higher limit, £600 in place of £300, on the total figure which dependants might recover. It had also provided, by s. 24(2), that

"no deduction shall be made under paragraph 1(a)(i) of the First Schedule to the principal Act, as amended by s. 2 of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said s. 2, nor so as to reduce the amount payable under the principal Act below £200".

The amending Act went on to declare, by s. 30, that a number of the sections of that Act, including s. 2, should not apply to any case in which the accident had happened before the Act began to operate. The question that arose was whether the dependants were entitled to be paid not less than the £200 to which s. 24(2) referred or whether, as the employer contended, the amount of its liability was to be ascertained in accordance with paragraph 1(a)(i) of the First Schedule to the Principal Act as it stood before it was amended by the Act of 1923. The decision of the Court of Appeal, given on the same day as that on which the argument took place, was in favour of the employer and, from an examination of the judgments, the reasoning which led to this conclusion seems to me to have been based upon two considerations. In the first place, s. 2 of the Act of 1923 had amended paragraph 1(a)(i) of the First Schedule to the Principal Act but, by s. 30 of the amending Act, it was declared that s. 2 was not to apply to cases in which the accident had happened before the amending Act came into force. It followed that s. 24(2) of the amending Act, which dealt with the deductions that might be made under paragraph 1(a)(i) as amended by s. 2, could have no application to the case since the accident which caused the workman's injury had occurred before 1st January 1924. This appears from the judgment of the Master of the Rolls, at p. 69, where his Lordship said:-

"After careful consideration of the argument presented here, it appears to me that subs. 2 of s. 24 is, by virtue of s. 30, not to have its operation upon the case of an accident which happened before the commencement of this Act; and, if that be so, then the deductions which are to be made must be estimated according to the system which obtained before the Act of 1923 came into operation. Upon that ground I am of opinion that the learned judge came to a wrong conclusion.

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Scrutton L.J. appears to have taken the same view and Sargent L.J., at p. 72, said that

> "Inasmuch as the first branch of s. 24(2) only applies to future accidents, so a similar limitation must be given to the second branch of subs. 2 also."

In the second place, the English Act, unlike its Victorian counterpart, provided that where death resulted from an injury, the employer was entitled to set off against the payments that would otherwise have been payable to the worker's dependants the amount of the weekly payments of compensation made to the worker between the date of injury and the date of death. If, for example, those weekly payments had equalled or exceeded the amount that would have been payable to dependants on the worker's death the employer would have been under no further liability. To apply the amending Act to such a case would have the effect of reimposing a liability which had been wholly or partly discharged before that Act came into operation. In the course of the judgment of the Master of the Rolls, however, his Lordship, referring to the right to be paid compensation whether on death or partial or total incapacity, used the phrase, at p. 67,

> "But in all those three cases, it is from the injury that the right to compensation arises."

and Scrutton L.J. said, at p. 70:

> "It seems to me that when the accident happened the employers incurred a liability by reason of the provisions of the Act if certain subsequent events happened ....."

In later cases the two passages which I have just quoted have been regarded as laying down the proposition that in a case in which a workman dies as a result of an employment injury, the rights of his dependants to compensation - if at the time of his death there are such persons - accrue and the liability of the employer to pay compensation to them is incurred when the injury occurs and that these rights and liabilities are governed by the law in force at that date. In one sense it is correct to say, as did the Master of the Rolls,

that the right to compensation arises from the injury since there can never be any dependants and therefore never anyone with a right to receive compensation on the worker's death unless he first suffers an employment injury from which his death results. But with all respect, I find it difficult to see how it can properly be said that at the time of the injury the employer comes under a liability to pay compensation to such dependants as may thereafter be found to exist at the date of the worker's death or that at the time of injury any right to compensation accrues to those who may not even then be in existence. It may be, as some of the authorities here and in England seem to say, that the moment an employment injury occurs the employer incurs a liability to pay compensation to the worker and the latter is vested with a corresponding right to receive it should the injury result in incapacity. With all respect I doubt whether this is a correct statement of the position except perhaps where incapacity is immediately caused by the injury. But even if this be the law, it can at least be said that the person in whom the right is said to have vested and to whom the liability is said to have been incurred is in existence and can be identified at the moment of injury. When one is considering, however, the rights of dependants this is not so and it seems to me, with all respect to those who think otherwise, that it is wrong to speak of a liability having been incurred to and a right having vested in a dependant before the worker's death.

Clement v. D. Davis & Sons Ltd. (supra) was a case in which the facts were somewhat similar to those in Moakes' Case. The workman had suffered an employment injury in 1918 and had died in 1925 as a result of it. During his lifetime and up to 1st January 1924 when the amending Act of 1923 came into force, his employer had made weekly payments of compensation totalling £363. 7. 6d. so that, at the date when the Act began to operate, the amounts so paid exceeded the maximum sum of £300 specified in paragraph 1(a)(i) of the First Schedule to the Principal Act as it was before its amendment. If the workman had died the day before the coming into force of the amending Act and had left dependants, the employer would have been under no liability to pay them compensation since the weekly payments

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which had already been made and for which he was entitled to claim credit had exceeded £300. It was argued for the employer that the case was governed by the Schedule as it stood before the amendments made by the Act of 1923 and that it was therefore under no liability to make any payment to the dependants and, in support of this contention, reliance was placed upon Moakes' Case. The appellant, the workman's widow, claimed that paragraph 1(a)(i) of the Schedule as amended by the Act of 1923 was to be applied and that the employer was not entitled to be credited with the amount of the weekly payments that had been made because this would mean that the amount payable to her would be reduced below £200 contrary to the amendment of the paragraph made by s. 24(2) of the amending Act. Their Lordships were of opinion that Moakes' Case was rightly decided and upheld the employer's contention. Here again it seems to me that the determining factors were those which I have already mentioned in dealing with Moakes' Case. Viscount Dunedin, at page 132, after referring to s. 24(2) of the Act of 1923, went on:-

> "My Lords, I am of opinion that the result come to by the Court of Appeal is right. The direction as to a deduction not being allowed to reduce the amount payable to less than £200 is only a reduction which is to be made from the sum calculated on para. 1(a)(i) of the First Schedule as amended by s. 2, and the Schedule as amended by s. 2 is a Schedule which can only apply to new accidents, because the amendments effected by s. 2 are specifically excluded from applying to old accidents."

Lord Sumner said, at pp. 133-4:-

> "Before that Act" (that is the Act of 1923) "an employer, who had on his books a continuing present liability to make weekly compensation payments to an injured man, would also, week by week, be entitled to write down pro tanto the contingent liability which would accrue in the event of that workman's death. In the present case the employer had thus written it off altogether. Week by week his payments had vested in him a corresponding right - a diminution of his contingent liability until it

reached zero. Unless the Act of 1923 somewhere clearly states that the earlier legislation, under which that result had been automatically brought about before the Act of 1923 came into force, is retrospectively altered by its provisions, I am of opinion that the statutory presumption against a retrospective operation must prevail."

Lord Wrenbury considered that the effect of s. 30 of the amending Act excluded the operation of s. 24(2) in the case of accidents occurring before the Act of 1923 came into force and, as I read his judgment, Lord Blanesburgh was of the same opinion. In the course of his judgment, however, Viscount Dunedin had said, at p. 131:-

"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 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 s. 30 makes this quite clear to a great extent by expressly declaring that the additional benefits conferred by ss. 2 to 10 are not to enure to any class arising out of accidents in the past."

The first part of this last quotation is the only passage that I have been able to find in the case in support of the view that the liability of the

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employer is incurred and the rights of dependants accrue when the employment injury is suffered. And it is, to my mind, significant that in neither of these cases was any reference made to the difficulty of reconciling this idea with the fact that it is not until the death of the worker that it can be known whether there are any dependants and, if so, who they are.

What was said in the judgments of Viscount Dunedin in Clement's Case and of the Master of the Rolls and Scrutton L.J. in Moakes' Case as to the liability to dependants arising at the date of the injury may perhaps be compared with passages to be found in some of the judgments in an earlier case of United Collieries Ltd. v. Simpson (1909) A.C. 383. There Lord Loreburn, speaking of the right of a dependent widow to compensation, said at p. 389:-

> "If there is this right, when does it arise or become vested? The statute evidently treats it as arising because of the workman's death. It seems to follow that it arises on the workman's death, unless some other event is fixed."

Lord Shaw said, at p. 395:-

> "My Lords, upon the death in July 1907 of Simpson, a workman in the appellant's employment, a liability emerged under the Workman's Compensation Act 1906, upon his employer to compensate his mother as his sole dependant."

And at pp. 398-9:-

> "With regard to the liability itself, it appears to me that under s. 1 of the statute that liability emerges if (1) the death or injury have occurred by accident arising out of or in the course of the employment; (2) that the person injured should be a workman; and (3) that the workman should leave dependants, that is to say that dependants should be in existence at the time of death."

Lord Macnaghten said, however, at p. 393:-

> "It is enacted in s. 1 that, if in any employment personal injury by accident such as therein described is caused to a workman, his employer is liable to pay compensation in accordance with the First Schedule of the Act. The measure of liability is to be found in the First Schedule. But the liability falls upon the employer on the happening of the accident. It is the accident and nothing else which creates the liability ..... The Act itself treats the liability as a subsisting liability from the very moment of the accident and as a present right."

But from what immediately followed in his Lordship's judgment, it rather appears that he there was speaking of the right of the injured workman and not of his dependants as having arisen on the happening of the accident. Later, at p. 394, he used the phrase

> "in the case of death, when the liability has once accrued and the right of the dependant has come into existence it falls upon the employer to satisfy the liability ...."

We were referred also to Australian Iron & Steel Ltd. v. Coal Mines Insurance Pty. Ltd. 52 S.R. (N.S.W.) 47, a case which was concerned with the construction of an insurance policy issued under the New South Wales Workers' Compensation Act. In that case two members of the Court (Street C.J. and Herron J. as he then was) were of opinion that Moakes' Case and Clement's Case established the principle that the rights of dependants vest when the injury occurs. In Van Kooten v. Haslington 64 S.R. (N.S.W.) 387 the same view was taken although Walsh J. expressed the opinion that, having regard to the definition of "dependants", it would, but for the cases, have been difficult to contend that a claim which is made by a dependant in respect of the death of a worker is a claim to enforce a right which arose or accrued as soon as the injury occurred. Finally we were referred to Fisher v. Hebburn Ltd. 105 C.L.R. 188. In that case, a mine worker had become totally incapacitated by Buerger's disease in 1949. The disease was in no way connected with his employment and was not compensable. In

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Reasons for Judgment of His Honour Mr. Justice Owen (Contd.) 20th September 1967.

1955 a Medical Board appointed under the Worker's Compensation Act certified that he was suffering from pneumoconiosis contracted in the course of his work as a miner which disabled him for all work and that he was also suffering from Buerger's disease, not associated with his work as a miner, which also incapacitated him for work. The worker had contracted pneumoconiosis in the course of his employment as a miner and, being a disease of such a nature as to be contracted by a gradual process, it was a compensable injury under the Workers' Compensation Act, the compensation being payable by the employer who last employed him. In 1947 it had been decided in Dawkins v. Metropolitan Coal Co. Ltd. 75 C.L.R. 169 that a worker who was already totally incapacitated by a non-compensable injury and afterwards was found to have developed a diseased condition arising out of or in the course of his employment which would itself have totally incapacitated him had it not been for the fact that he was already incapacitated by a non-compensable disease was not entitled to compensation because his incapacity could not be said to have resulted from the second injury. Following this decision the Act was amended in 1951 by adding a new subs. (2A) to s. 7 of the Act. Section 7 is the section in the New South Wales Act which corresponds with s. 5(1) of the Victorian legislation and the new subs. (2A) provided that:-

> "Compensation shall be payable in respect of an injury which, but for existing incapacity, would have resulted in total or partial incapacity of the worker. Such compensation shall be payable as if such total or partial incapacity had in fact resulted from the injury."

and that "existing incapacity" meant

> "total incapacity by disease or otherwise -
>
> (a) not entitling the worker to compensation under this Act; and
>
> (b) existing at the time when the total or partial incapacity would otherwise have resulted from the injury."

The question then in Fisher's Case was whether the pneumoconiosis, which must have been contracted by the worker before 1949 when he last worked as a miner and before he was incapacitated by Buerger's disease, was compensable by virtue of the amended s. 7. It was held that it was. In the course of the joint judgment of Kitto and Menzies JJ., their Honours said, at pp. 202-3:-

> "What has to be identified for this purpose is the point of time at which a right to receive or a liability to pay compensation in accordance with the Act accrues in the case of a disease of gradual onset. In other cases the point of time is shown by s. 7(1) to be the date of receipt of the injury: Stevens v. Railway Commissioners for N.S.W. (1930) 31 S.R. (N.S.W.) 138; Gammage v. Metropolitan Meat Industry Commissioner (1947) 48 S.R. (N.S.W.) 99; Australian Iron and Steel Ltd. v. Coal Mines Insurance Pty. Ltd. (1951) 52 S.R. (N.S.W.) 47, the reason being that immediately upon the happening of that event the worker's employer comes under a statutory liability to pay compensation in accordance with the Act, to the worker if incapacity for work results and to his dependants if death results. It is nothing to the point that the liability thus arising does not entail any payment unless and until incapacity or death supervenes: the liability exists none the less."

and on this counsel for the appellant relied as showing that their Honours had accepted the interpretation that had been placed on the decisions in Moakes' Case and Clement's Case. This is no doubt correct but the matters which have been debated before us were not argued in Fisher's Case and were not, I think, present to their Honours' minds.

With all respect, I cannot subscribe to the view that, for the purposes of applying the prima facie rule that a statute is to be presumed not to operate so as to affect liabilities incurred or rights accrued prior to the commencement of the statute, an employer's liability to a worker's dependants is incurred and the rights of the

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20th September 1967.

dependants accrue at the date of the injury from which death later results.

If, however, I am wrong in this, a further point arises and it becomes necessary to consider whether or not the substituted Clause 1(a)(i) appended to s. 9 of the Victorian amending legislation does not, on its true construction, apply to a case in which the worker's injury happens before and his death occurs after the substitution was made. A passage from the judgment of Fullagar J. in Fisher's Case seems to me to be in point and I agree with it. His Honour said, at pp. 194-5:-

> "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. 64 and Kraljevich v. Lake View and Star Ltd. (1945) 70 C.L.R. 647 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.
>
> This is, I think, the case here. I think the prospect of subs. (2A) begins with incapacity and not with injury. It applies, in my opinion, on its true construction, to all cases in which incapacity occurs after its commencement, whether the 'injury', from which the incapacity resulted, occurred before or after its commencement. It is true that it begins with a reference to compensation 'payable in respect of an injury'. But compensation is not payable until incapacity results from an injury ..... It seems to me that subs.(2A) must be read as limited to incapacities occurring after 27th June 1951, but not as limited to injuries occurring after that date."

Section 5(1) of the Principal Act must, of course, be read with s. 9(1) which is in these terms:-

> "Where the worker's death results from ..... the injury the compensation shall be a sum in accordance with the provisions of the clauses appended to this section."

and with the substituted clause. The subject-matter with which s. 9(1) and that clause deal is the amount to be paid to dependants upon the death of the worker. That is their concern and it seems to me that when the substituted clause was introduced in 1965, "its prospect" began with death and not with injury, to adapt the words of Fullagar J., and that it should be construed as applying to all cases in which death should thereafter occur as the result of injury whenever it was that the injury was suffered.

In these circumstances it is unnecessary for me to consider whether on the material before the Board it was open to it to find that the pulmonary oedema which resulted in the death of Lucas was itself an "injury" but I would not wish to be taken as accepting the view which appears to have been taken by the Board and in the Supreme Court that "any physiological change for the worse" in a worker's condition is a "physical injury", particularly when it occurs in the course of a progressive disease.

I would dismiss the appeal.

No. 11.

ORDER OF THE HIGH COURT OF AUSTRALIA

DISMISSING APPEAL

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR GARFIELD BARWICK, MR. JUSTICE KITTO, MR. JUSTICE TAYLOR, MR. JUSTICE WINDEYER, and MR. JUSTICE OWEN

Wednesday the 20th day of September 1967

In the High Court of Australia

No. 11
Order of the High Court of Australia dismissing Appeal.
20th September 1967.

THIS APPEAL from the order of the Full Court of the Supreme Court of the State of Victoria made the 28th day of February, 1967 upon a Case Stated by the Workers' Compensation Board on the 4th day of October, 1966 coming on for hearing before this Court at Melbourne on the 9th, 10th, 11th and 12th days of May, 1967 UPON READING the transcript record of the proceedings herein AND UPON HEARING Mr. Connor of Queen's Counsel and Mr. Costigan of Counsel for the Appellant and Mr. Hill and Mr. Fox of Counsel for the Respondent THIS COURT DID ORDER on the said 12th day of May, 1967 that this appeal should stand for judgment and the same standing for judgment this day accordingly at Sydney THIS COURT DOTH ORDER that this Appeal be and the same is hereby dismissed AND THIS COURT DOTH FURTHER ORDER that the costs of the Respondent of this appeal be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Appellant to the Respondent AND THIS COURT DOTH BY CONSENT FURTHER ORDER that the sum of One hundred dollars ($100.00) paid into Court as security for costs be paid out to the Solicitors for the Appellant Messrs. Maurice Cohen & Co.

By the Court,

E.P. FOX

DEPUTY REGISTRAR

(Seal)

Seal

No. 12.

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT SANDRINGHAM

The 26th day of January, 1968

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

Lord Privy Seal — Sir Elwyn Jones
Lord Beswick — Mrs. Hart
Mr. Short

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 23rd day of January 1968 in the words following, viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Ogden Industries Pty. Limited in the matter of an Appeal from the High Court of Australia between the Petitioner and Heather Doreen Lucas Respondent setting forth that the Petitioner desires to obtain special leave to appeal from a Judgment of the High Court of Australia delivered on the 20th September 1967: that such Judgment dismissed an Appeal by the Petitioner from a Decision of the Full Court of the Supreme Court of Victoria which had answered certain questions submitted to it in a case stated by the Workers Compensation Board of Victoria: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the said Judgment of the High Court of Australia dated the 20th September 1967 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken

the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its Appeal against the Judgment of the High Court of Australia dated the 20th September 1967 on condition of (1) depositing in the Registry of the Privy Council the sum of £400 as security for costs and (2) lodging in the said Registry an undertaking to pay the costs of the Respondent on a solicitor and own client basis in any event:

"AND their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W.G. AGNEW.

IN THE PRIVY COUNCIL No. 12 of 1968

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :-

OGDEN INDUSTRIES PTY LIMITED Appellant

- and -

HEATHER DOREEN LUCAS Respondent

RECORD OF PROCEEDINGS

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Appellant

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Solicitors for the
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