



Does the transitional limit on lump sum compensation contained in cl 55(2) of Schedule 1 of the Injury Prevention, Rehabilitation and Compensation Act 2001 apply to the appellants as people suffering from a Schedule 2 occupational disease, which has cover under s 30 of the Act?

[2] The answer will determine whether the appellants are entitled to lump sum compensation as opposed to an independence allowance under the transitional provisions of the Injury Prevention, Rehabilitation, and Compensation Act 2001 (the Act).

### **Background facts**

[3] The parties are agreed on the essential background facts. They are:

- All of the appellants have cover under the Act for asbestosis or mesothelioma due to exposure to asbestos while in employment.
- The conditions are occupational diseases listed in Schedule 2 of the Act.
- The appellants were last exposed to the relevant work conditions before 1 April 2002.
- The injury dates for the appellants under the Act are the date each first sought treatment for the condition, which in each case was after 1 April 2002.
- The appellants were all assessed by the respondent as having 80 percent or more permanent whole person impairment from their injury and were paid the independence allowance entitlement for the assessed impairment. The respondent determined they were not eligible for lump sum compensation because of the transitional provisions of the Act.
- The appellant, Estate of Priddle, was unsuccessful in a review of the respondent's decision and appealed to the District Court. This appeal was disallowed by Judge Ongley in decision 205/05.

- The appellants, M Angell and the estate of Soeters were successful on review. The respondent then appealed those review decisions. The appeals were upheld by Judge Ongley in the District Court under decision numbers 203/05 and 204/05.
- In determining that the appellants were not entitled to lump sum compensation the District Court Judge applied the earlier decision of the High Court in *ACC v Estate of Rob Lehmann* HC WN CIV2004-485-2132 3 June 2005 Goddard J.
- In *Lehmann* Goddard J held that cl 55(2) of Schedule 1 of the Act applied to the appellants as persons suffering from a Schedule 2 occupational disease with the result they were not entitled to lump sum compensation.
- An appeal was not pursued in the *Lehmann* case.
- The appeals to the High Court in the present case were then taken and determined on a pro forma basis. They were declined for the same reasons given by the Court in the *Lehmann* case.
- Leave to appeal to this Court by way of case stated on a question of law was granted. The question of law was settled on 18 January 2006.

### **Statutory framework**

[4] Section 20(1) and (2)(e) extends cover under the Act to personal injury caused by a work-related gradual process, disease, or infection.

[5] Section 30 defines personal injury caused by a work-related gradual process, disease, or infection. Section 30 reads:

**30 Personal injury caused by work-related gradual process, disease, or infection**

(1) Personal injury caused by a work-related gradual process, disease, or infection means personal injury—

- (a) suffered by a person; and
- (b) caused by a gradual process, disease, or infection; and
- (c) caused in the circumstances described in subsection (2).

(2) The circumstances are—

- (a) the person—
  - (i) performs an employment task that has a particular property or characteristic; or
  - (ii) is employed in an environment that has a particular property or characteristic; and
- (b) the particular property or characteristic—
  - (i) causes, or contributes to the cause of, the personal injury; and
  - (ii) is not found to any material extent in the non-employment activities or environment of the person; and
  - (iii) may or may not be present throughout the whole of the person's employment; and
- (c) the risk of suffering the personal injury—
  - (i) is significantly greater for persons who perform the employment task than for persons who do not perform it; or
  - (ii) is significantly greater for persons who are employed in that type of environment than for persons who are not.

(3) **Personal injury caused by a work-related gradual process, disease, or infection** includes personal injury that is of a type described in Schedule 2 that is suffered by a person who is or has been in employment involving exposure to agents, dusts, compounds, substances, radiation, or things (as the case may be) described in that schedule in relation to that type of personal injury.

(4) Personal injury of a type described in subsection (3) does not require an assessment of causation under subsection (1)(b) or (c).

[(4A) This Act covers personal injury caused by a work-related gradual process, disease, or infection only if—

- (a) the exposure to the gradual process, disease, or infection actually occurred in New Zealand; or

(b) the person concerned was ordinarily resident in New Zealand when the exposure actually occurred.]

(5) **Personal injury caused by a work-related gradual process, disease, or infection** does not include—

(a) personal injury related to non-physical stress; or

(b) any degree of deafness for which compensation has been paid under the Workers' Compensation Act 1956.

(6) Subsection (7) applies if, before 1 April 1974, the person—

(a) performed an employment task that had a particular property or characteristic; or

(b) was employed in an environment that had a particular property or characteristic.

(7) The circumstances referred to in subsection (6) do not prevent the person's personal injury from being personal injury caused by a work-related gradual process, disease, or infection, but he or she does not have cover for it if section 24 or section 361 applies to him or her.

[6] Schedule 2, which is referred to in s 30(3), lists a number of occupational diseases including lung cancer or mesothelioma diagnosed as caused by asbestos.

[7] Section 60 is also relevant. It provides the Corporation may decline a claim for injury of a kind described in s 30(3) only in limited circumstances:

**60 Decision on claim for Schedule 2 injury**

The Corporation may decline a claim that a personal injury is a work-related personal injury of a kind described in section 30(3) only if the Corporation establishes that—

(a) the person is not suffering from a personal injury of a kind described in Schedule 2; or

(b) the person's personal injury has a cause other than his or her employment.

[8] Section 37 sets out the date on which the person is to be regarded as suffering the personal injury caused by work-related gradual process, disease, or infection as follows:

**37 Date on which person is to be regarded as suffering personal injury caused by work-related gradual process, disease, or infection**

(1) The date on which a person suffers personal injury caused by a work-related gradual process, disease, or infection is the earlier of the following dates:

(a) the date on which the person first receives treatment from a medical practitioner for that personal injury as that personal injury:

(b) the date on which the personal injury first results in the person's incapacity.

(2) Subsection (1) applies subject to subsection (3).

(3) A person suffers his or her personal injury on the date specified in subsection (4) if he or she suffers the personal injury because, before 1 April 1974, he or she performed a task, or was employed in an environment, in the circumstances described in section 30(2).

(4) A person to whom subsection (3) applies must be regarded as having suffered his or her personal injury on 1 July 1992, unless he or she actually suffers it on a date later than 1 July 1992 determined under subsection (1).

(5) This section is subject to clause 55(2) of Schedule 1 (which relates to the entitlement to lump sum compensation for personal injury caused by a work-related gradual process, disease, or infection in circumstances described in that provision).

[9] Clause 55(2) of Schedule 1 to the Act provides:

(2) A person who suffers personal injury caused by a work-related gradual process, disease, or infection in the circumstances described in section 30(2) is not entitled to lump sum compensation for permanent impairment if one of the following dates preceded 1 April 2002:

(a) the date on which the person last performed the task or was employed in the environment in those circumstances:

(b) the date on which the person first received treatment for the personal injury as that personal injury.

(c) the date on which the personal injury first resulted in the person's incapacity.

### **The differing interpretations**

[10] The appellants' exposure to asbestos at work last occurred before 1 April 2002. If cl 55(2) applies to the appellants they are not entitled to lump sum compensation by reason of cl 55(2)(a).

[11] The appellants' case is that cl 55(2) does not apply to them as they have not suffered personal injury in the circumstances described in s 30(2). They say that as they did not have to establish the requirements of the subsection it does not apply to their case.

[12] The respondent says that a Schedule 2 disease can be said to occur in circumstances described in s 30(2) of the Act so that cl 55(2) applies.

### **The High Court decisions**

[13] In the *Lehmann* case Goddard J accepted the respondent's submission that the circumstances were the same in the case of both s 30(2) and s 30(3) and the only distinguishing factors were the necessity for affirmative proof in the case of personal injury caused by work-related gradual process, disease, or infection not of a type described in Schedule 2 and the legislative acceptance of proof in cases that were of such a type. The Judge considered that s 30(3) was not a separate definition but rather was an included definition of personal injury. The Judge considered that Schedule 2 diseases can be said to occur in circumstances described in s 30(2) of the Act. She concluded that by referring to s 30(2), cl 55(2) applied to all of the subsections in s 30. Goddard J adopted the same reasoning in the judgment under appeal.

### **Appellants' submissions**

[14] Mr Miller submitted there is a distinction between the occupational diseases provided for by s 30(2) and s 30(3). He submitted that s 30(3) sets out an alternative and different category of occupational disease injuries to those that may qualify under s 30(2).

[15] Mr Miller then referred to the use of the phrase "caused in the circumstances described in subs (2)" in s 30(1)(c) and submitted that it was of no relevance to s 30(3)/Schedule 2 applicants who do not have to rely on or even refer to any of the circumstances in s 30(1) or (2) for cover.

[16] Mr Miller also submitted that “includes” in s 30(3) had been used by the legislature as an extension to the definition in s 30(1).

[17] He submitted that Parliament intended claimants in the appellants’ situation, who fit within s 30(3), would be treated in a different manner from those assessed under s 30(2). He submitted that if that was not Parliament’s intention then cl 55(2) would have expressly referred to s 30(3) or the phrase “personal injury caused by a work-related gradual process, disease, or infection suffered by the person” rather than restricting the reference to s 30(2).

[18] Mr Miller also referred to the International Labour Organisation Convention 42 (the Convention) from which Schedule 2 of the Act is derived. The Convention was ratified by New Zealand in 1938 and was given effect in domestic law when inserted into legislation as Schedule 2 of the Accident Insurance Act 1998 and, with some additions, as Schedule 2 to the Act. Mr Miller submitted that if the appellants were not to receive a lump sum payment for a post 1 April 2002 injury (as provided for in s 37(1)) when an accident victim would receive it then there would be a breach of the Convention.

[19] Mr Miller finally submitted that the interpretation he argued for would allow fair compensation to be paid to dying claimants in the appellants’ position and would comply with the purposes of the legislation as referred to in s 3 of the Act, the Convention, and would reflect a generous and unrigidly approach to the interpretation of Accident Compensation legislation.

### **The respondent’s submissions**

[20] Mr Wilson submitted that Schedule 2 diseases come within the circumstances described in s 30(2) for the following reasons:

- Section 30(1) is a definitional provision.

- Section 30(3) is a further definitional provision which expressly includes Schedule 2 diseases within the s 30(1) definition, provided exposure during employment is satisfied.
- The nature of Schedule 2 occupational diseases is such that s 30(1)(c) and thus the s 30(2) criteria can be presumed to be satisfied without the need for an assessment of causation but such occupational diseases are just as much injuries suffered in the circumstances described in s 30(2) as a personal injury, not due to a Schedule 2 disease, but which could be affirmatively proved to satisfy the s 30(2) criteria.
- Section 30(4) does not exempt Schedule 2 diseases from s 30(2) for all purposes but only for the limited purpose of removing the necessity for the assessment of causation. Section 60 confirmed that the s 30(3) presumption was rebuttable.

[21] Mr Wilson thus submitted the appellants' injuries were suffered in circumstances described in s 30(2) with the result cl 55(2) applied to them.

[22] In response to Mr Miller's submissions in reliance on the Convention, Mr Wilson submitted that the principal objective of the Convention is to ensure that workers suffering occupational diseases are treated in accordance with the general principles and legislation relating to compensation for industrial accidents. He submitted that cl 55(2)(a) makes it clear that the date of exposure is crucial and the entitlement to lump sum compensation is governed by the last date on which the claimant was exposed to the material work task or environment unless it occurred at an even earlier date. Once it was accepted the exposure date was, or may be crucial, he submitted the Act provided equal treatment for those suffering industrial accidents and occupational disease. Mr Wilson submitted that on the other hand, the construction argued for by the appellants would result in unequal treatment as between those suffering Schedule 2 diseases and those suffering other diseases as the entitlement of the former would be governed by the deemed date of injury and that of the latter by the earlier of the deemed date of injury or the date of last exposure.

## Decision

[23] The issue is, as Mr Wilson submitted, whether Schedule 2 diseases come within the circumstances described in s 30(2). In determining that question, the wording of s 30 (and cl 55(2)) must be interpreted as a whole having regard, not only to the language used in the section and clause, but also to their context, to the scheme and purpose of the Act, with reference, if necessary, to the history and policy of the legislation, and to the consequences of the interpretation under consideration: *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549, 553; *R v Pora* [2001] 2 NZLR 37.

[24] We are not able to accept the respondent's first argument that s 30(1) is the definitional provision and that the effect of s 30(3) is merely to include Schedule 2 diseases within the s 30(1) definition. Section 19 of the Act provides that the phrase, "personal injury caused by a work-related gradual process disease or infection" is defined in s 30. It is the section as a whole that defines the phrase, not s 30(1).

[25] In defining the phrase in s 30 the legislature has used "means", "includes" and "does not include" at various parts within the section. In the published statute, where the phrase is used in conjunction with these definitional aids, (ss 30(1), 30(3) and 30(5)) the phrase is emboldened. As Mr Wilson observed, in the text *Burrows Statute Law in New Zealand* (3ed), Professor Burrows notes at 283 that in Acts since 2000, sections in which words are defined feature the defined words in bold.

[26] Also as noted by Professor Burrows, at 285-287 of the text, the most common use of "includes" is as an extensive definition. While a combination of the words means and includes in the phrase "means and includes" might introduce an exhaustive definition, where "means" and "includes" are used separately, "includes" generally extends the definition.

[27] That is the way that the drafters of the Act have used "means" and "includes" in s 30. The words are used in two separate and distinct parts of s 30 and in two different contexts. The definition of personal injury caused by a work-related gradual process disease or infection in s 30(3) is not a subset of a principal definition

in s 30(1) of the phrase. It does not bring those qualifying under s 30(3) for cover for such personal injury within a broader concept of “personal injury caused by a work-related gradual process, disease, or infection suffered by the person” set out in s 30(1). Section 30(3) is quite independent of s 30(1).

[28] The position can be illustrated this way. Section 26 of the Act defines personal injury to include physical injuries suffered by a person (s 26(1)(b)). Section 26(2) excludes from personal injury, personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is a personal injury of a kind described in s 20(2)(e) to (h). Section 20(2)(e) extends cover to “personal injury caused by a work-related gradual process, disease, or infection suffered by the person”.

[29] So, a person suffering personal injury in New Zealand on or after 1 April 2002 caused by a work-related gradual process, disease, or infection is entitled to cover under the Act. Section 19 of the Act then directs a claimant to s 30 for a definition of what constitutes “personal injury caused by a work-related gradual process, disease, or infection suffered by the person”. A claimant suffering from an occupational disease listed in Schedule 2 has his or her cover confirmed by s 30(3), subject only to s 60. There is no need for them to consider the application or otherwise of s 30(1) and subs (2).

[30] The matter can be tested another way, by reference to the wording of s 30 itself. Section 30(1) requires three elements to be satisfied for the injury to be personal injury caused by a work-related gradual process, disease, or infection under that subsection. The personal injury must be:

- (a) suffered by a person;
- (b) caused by a gradual process, disease, or infection; and
- (c) caused in circumstances described in subs (2).

[31] Section 30(3) provides cover for a person suffering from an occupational disease provided that it is:

suffered by a person who is or has been in employment involving exposure to agents, dusts, compounds, substances, radiation, or things ...

[32] The requirement that the injury be suffered, which is found in s 30(1)(a) is also set out in the wording of s 30(3). Section 30(4) makes it clear that the other requirements to bring a claimant within the definition in s 30(1), namely (b) and (c) are excluded in the case of cover under s 30(3). There is no relationship between s 30(3) and s 30(1) other than that both subsections provide alternative ways in which a claimant may satisfy the test for “personal injury caused by a work-related gradual process, disease, or infection suffered by the person”. But s 30(3) is a stand alone definition, not dependent in any way upon s 30(1).

[33] For the same reasons, we do not accept the submission that s 30(4) only exempts Schedule 2 claimants for the limited purpose of removing the need for the assessment of causation.

[34] It is significant that s 30(4) excludes not only causation under s 30(1)(c) but also under subs (1)(b). As a consequence there is no requirement for a person suffering from a Schedule 2 occupational disease to establish or prove that the disease, the personal injury, was caused by a gradual process disease or infection, provided it is an occupational disease listed in Schedule 2.

[35] When s 30 is considered in context, we conclude that the intent of the legislature was to provide a separate means of cover under s 30(3) for those people suffering from the occupational diseases listed in Schedule 2 without them having to bring themselves within the definition in s 30(1) and, consequently, the circumstances referred to in s 30(2) at all.

[36] To the extent there is any reference to the relevant provisions in the legislative history it supports the above interpretation. When the Select Committee reported the Bill back to Parliament they recommended an amendment to the draft bill to clarify:

... that a person who has the diseases listed in Schedule 2 does not need to meet causation requirements set out in clause 30 to establish cover.

[37] The Select Committee sought to provide a different basis for cover for those claimants under, now, s 30(3).

[38] The Committee also specifically recommended further amendments to clarify that lung cancer and mesothelioma caused by exposure to asbestos were covered.

[39] As a consequence of the report s 30(3) was redrafted and s 30(4) was incorporated. Notably, s 30(3) was amended to include specific reference to “exposure to agents, dusts, compounds, substances, radiation or things ...” in place of “exposure to the **risk of contracting** an occupational disease” (emphasis added).

[40] While, as Mr Wilson submitted, a number of the elements of s 30(2) are not strictly causative elements, the wording used by the legislature in s 30(1)(c) refers to personal injury “caused in the circumstances described in subsection (2)”. Section 30(2) then commences with the words “The circumstances are”. It follows the causative circumstances are all the circumstances set out in s 30(2). Section 30(4) exempts Schedule 2 claimants from the necessity of an assessment of causation under s 30(1)(b) and (c) which is an exemption from assessment of all the circumstances set out in s 30(2).

[41] Such an interpretation is also consistent with the saving provision for the Corporation, s 60. Section 60 provides that the Corporation may decline a claim based on a Schedule 2 injury, but only if the Corporation establishes either that the person is not suffering from the injury or the injury had a cause other than their employment. It would not be sufficient, for example, for the Corporation to prove that the particular property or characteristic of the work caused or contributed to the cause of the personal injury (as in s 30(2)(b)(i)), the Corporation must go further and prove that the disease was caused other than by employment. Again the test is different.

[42] We do not consider that the obligations under the Convention are a particularly determinative factor in this case. As Mr Wilson submitted, if the date of

exposure was or may be crucial then arguably the Act on his interpretation provides equal treatment for those suffering industrial accidents and occupational disease. However, that rather begs the question of whether those suffering the occupational disease under Schedule 2 are subject to the exception in cl 55 (2) and thus subject to the date of exposure test. To the extent that the Convention is of assistance, we consider it is of more assistance to the appellants. The occupational diseases in Schedule 2 include all of the diseases listed in the schedule to the Convention. If the interpretation argued for by the respondent is to apply then there will be a distinction between workers suffering injury by accident after 1 April 2002 and workers suffering personal injury by accident by reason of an occupational disease even if they, like the present appellants, first received treatment or were first incapacitated by that disease after 1 April 2002. To that extent the appellants' submission is more consistent with the objective of the Convention.

[43] The appellant's interpretation does, however, have the effect that there is a distinction between those workers suffering from occupational diseases listed in Schedule 2 and other workers that qualify for cover for personal injury caused by a work-related gradual process, disease, or infection under s 30(1). But that is not a reason to exclude the entitlement to lump sum compensation of others such as those in the position of the appellants in the present case. As Mr Miller submitted, there are examples of such distinctions throughout the Accident Compensation legislation.

[44] There may also be, as Mr Miller submitted, a distinction to be drawn between the Schedule 2 diseases, which in many cases will be fatal, and other personal injuries under s 30(1) caused in the circumstances set out in s 30(2). It could be said that to provide an entitlement for lump sum compensation for those who are subject to the often fatal serious diseases in Schedule 2, is consistent with the purpose and principles of the Accident Compensation legislation. In this regard s 3 of the Act is relevant. It reads:

### **3 Purpose**

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury

in the community, and the impact of injury on the community (including economic, social, and personal costs), through—

- (a) establishing as a primary function of the Corporation the promotion of measures to reduce the incidence and severity of personal injury:
- (b) providing for a framework for the collection, co-ordination, and analysis of injury-related information:
- (c) ensuring that, where injuries occur, the Corporation’s primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant’s health, independence, and participation:**
- (d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment:**
- (e) ensuring positive claimant interactions with the Corporation through the development and operation of a Code of ACC Claimants' Rights:
- (f) ensuring that persons who suffered personal injuries before the commencement of this Act continue to receive entitlements where appropriate.

(emphasis added)

[45] In the circumstances of a person suffering from a terminal disease it could be said that “rehabilitation with a goal of achieving an appropriate quality of life” and “[restoring] to the maximum practicable ... a claimant’s ... independence, and participation” supports the entitlement to lump sum payments for permanent impairment. Such interpretation is also in keeping with the approach this Court has said should be taken to the interpretation of the Accident Compensation legislation. In *Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436 in the context of considering the definition of personal injury by accident in the 1982 Act Richardson J said as to the policy underlying the 1982 Act at 438 - 439:

... a generous unrigidly interpretation of personal injury by accident is in keeping with the policy underlying the Accident Compensation Act of providing comprehensive cover for all those suffering personal injury by accident in New Zealand wherever, whenever and however occurring, and to do so in place of common law remedies.

[46] The wording of cl 55(2) itself suggests that it only applies to s 30(1) claimants as they are subject to s 30(2). Read literally cl 55(2) only restricts lump sum compensation for personal injury caused by a work-related gradual process, disease, or infection in the circumstances described in s 30(2). For the reasons outlined above the circumstances in s 30(2) only have application to those claimants seeking cover under s 30(1). Those claimants who are suffering from Schedule 2 occupational diseases have cover under s 30(3) and are not subject to the circumstances in s 30(2). If it was the legislature's intention to exclude all claimants suffering personal injury caused by a work-related gradual process, disease, or infection there would have been no need for the legislature to have included the words "in circumstances described in s 30(2)" in cl 55(2). The effect of cl 55(2) is to limit the entitlement to lump sum compensation in the circumstances set out in the clause. To the extent it is a limitation on such lump sum compensation for people who otherwise have cover, it should not be read in an expansive way particularly when there is no need to.

## **Result**

[47] For the above reasons we allow the appeal and answer the question posed:

Does the transitional limit on lump sum compensation contained in cl 55(2) of Schedule 1 of the Injury Prevention, Rehabilitation and Compensation Act 2001 apply to the appellants as people suffering from a Schedule 2 occupational disease, which has cover under s 30 of the Act?

No.

## **Costs**

[48] The appellants are entitled to costs which will be fixed in the sum of \$6,000 together with disbursements as fixed by the Registrar. We certify for second counsel if necessary.

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