PARTIES: D & W LIVESTOCK TRANSPORT

V

JOHN ERNEST SMITH

TITLE OF COURT: COURT OF APPEAL (NT)

JURISDICTION: APPEAL FROM SUPREME COURT (NT)

FILE NO: NO. AP 14 OF 1993

DELIVERED: 18 MARCH 1994

HEARING DATE: 28 FEBRUARY 1994

JUDGMENT OF: KEARNEY, PRIESTLEY AND GRAY JJ

CATCHWORDS:

Statutes - interpretation - whether amending provision prospective or retrospective in effect - application of rules of construction - significance of question whether it affects procedural or substantive rights or is declaratory in nature - whether plain words required if retrospectivity affects money entitlements of party to existing litigation

Work Health Amendment Act (No. 3) 1991 (NT), s2
Work Health Act (NT), s189(3)
Stevens v Head (1993) 176 CLR 433, referred to
Cunningham-Beattie v Groote Eylandt Mining Co Pty Ltd (1989) 60 NTR 1, distinguished

Statutes - interpretation - whether amending provision prospective or retrospective in effect - significance of date of commencement of amending Act - significance of non-use of drafting techniques commonly used to effect retrospectivity

Work Health Amendment Act (No. 3) 1991 (NT), s2
Work Health Act (NT), s189(3)
Stevens v Head (1993) 176 CLR 433, referred to
Cunningham-Beattie v Groote Eylandt Mining Co Pty Ltd (1989) 60 NTR 1, distinguished

Workers' compensation - interpretation - words and phrases - meaning of "injury" in s189 - whether embraces consequences of remedial procedures

Work Health Act (NT), ss189(1), (2) & (3)
Migge v Wormald Bros Industries Ltd [1972] 2 NSWLR 29, (Mason JA) applied
Migge v Wormald Bros Industries Ltd [1972] 47 ALJR 236, applied
Mahoney v J. Kruschich (Demolitions) Pty Ltd (1985) 156 CLR 572, applied

REPRESENTATION:

Counsel
Appellant: B.T. Lander QC
Respondent: J.E. Reeves

Solicitors
Appellant: Elston & Gilchrist
Respondent: Cridlands

Judgment Category Classification: CAT A
Court Computer Code:
Judgment ID Number: kea94007.J
Number of Pages: 15

kea94007.1

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP 14 of 1993

BETWEEN:

D & W LIVESTOCK TRANSPORT
Appellant

AND:

JOHN ERNEST SMITH
Respondent

CORAM: KEARNEY, PRIESTLEY AND GRAY JJ

REASONS FOR JUDGMENT

(Delivered 18 March 1994)

KEARNEY J:

The relevant facts and the issues which arise in this appeal are set out and discussed in the opinion of Priestley J. Approaching the issues in the way in which they have been formulated and argued before the court I respectfully concur in his Honour's conclusion that the appeal should be dismissed. The rights under s189(2) are not properly categorized as purely matters of procedure, and the presumption favouring a prospective operation of the amending Act is not displaced.

On reflection, I think it would have been arguable that s189(3) has retrospective effect on the basis that it is a provision declaratory, explanatory or expository of s189(2). The usual construction of declaratory provisions is set out in *Attorney-General v Theobald* (1890) 24 QBD 557 at pp560-1, though

as in all cases it is necessary to ascertain from the language used what the legislature intended. This line of argument was not raised before this court; the case was fought on a different basis. Even if s189(3) has retrospective effect, it is arguable that the term "injury" in s189(1), (2) and (3) embraces, in terms of *Migge v Wormald Bros Industries Ltd* [1972] 2 NSWLR 29, the "secondary consequences [of the initial injury] adverse to the injured person:' that is, in this case, it embraces the HCV which has resulted in the respondent's present and uncompensated total incapacity. If "injury" is construed in this commonsense way, the appellant would appear to be outside the scope of s189(3) on the facts, as in no real sense has he been compensated "in respect of [his] injury", and the appeal would fail. As I say, these questions were not ventilated before this court; in the circumstances, it is unnecessary to have them explored by the parties.

The appeal should be dismissed, with costs.

PRIESTLEY J:

This employer's appeal under the Work Health Act comes to this court after two previous hearings. The first was before a magistrate. Before him there were a number of issues, including a medical question about which complex evidence was given. He found in favour of the worker. The next hearing was before Angel J who heard an appeal from the magistrate which, because it was limited to points of law, raised fewer questions. He dismissed the appeal. The appeal from Angel J to this court raises fewer questions still because there is now no dispute,

for the purposes of this appeal, about any factual matter, and the principal argument is one of statutory construction only. This makes it possible to state very briefly the facts which, it is common ground, are relevant for this court's decision.

On 23 February 1985 Mr J. E. Smith (the worker) was injured while working for D & W Livestock Transport (the employer). As a result of the injury he was admitted to Katherine Hospital. A splenectomy was done on 26 February 1985. During the operation the worker was given a blood transfusion of seven units of blood.

The worker went back to work in May 1985. He was paid workers compensation for the period he was off work, apparently by agreement and without court proceedings, under the Workers Compensation Act.

The worker stopped working for the employer in June 1986 and began to work for other employers.

In 1986 the Work Health Act (the WHA) was passed, repealing the Workers Compensation Act for most purposes.

The worker's employment began to be interrupted by illness, until in December 1990 he was diagnosed as suffering from HCV (Hepatitis C) and cirrhosis of the liver. He had contracted HCV from the blood transfusion in the operation of 26 February 1985. After 10 April 1991 he did not work.

The WHA gave him a choice of claiming compensation for the consequences of his HCV infection under the repealed Workers Compensation Act or under the WHA. The section giving him this choice was s 189, which until 1 January 1992 was as follows:

> " (1) Where a cause of action in respect of an injury to or death of a person arising out of or in

> the course of his employment arose before the commencement of this section, a claim or action (including a claim or action at common law) in respect of that injury or death may be made, commenced or continued after the commencement of this section as if this Act had never commenced and for that purpose the repealed Act" [ie the Workers Compensation Act] "shall be deemed to continue in force.
>
> (2) Notwithstanding subsection (1), a person may claim compensation under this Act in respect of an injury or death referred to in that subsection and on his so doing this Act shall apply as if the injury or death occurred after the commencement of this section, and subsection (1) shall have no effect."

The worker decided to exercise the option given to him by subs (2), and on 12 December 1991 he commenced proceedings under the WHA against the employer claiming weekly payments of compensation and other compensation under that Act.

It is material here to mention some details concerning the WHA which are relevant to the main argument in the appeal in this court.

The WHA was assented to on 16 December 1986. Section 2 provided that ss 1, 2, 6 to 18 and 194 should come into operation on the day it was assented to and the remaining provisions should come into operation on the date or dates fixed by the Administrator by notice in the Gazette. This date was 1 January 1987. Thus both s 188, which repealed the Workers Compensation Act, and s 189 already set out, came into operation on 1 January 1987.

This court was informed by counsel for the worker, without objection by counsel for the employer, that the weekly compensation payable under the Workers Compensation Act has not increased since it was repealed as from 1 January 1987, but that the corresponding payment under the WHA has been regularly

increased since that date. It seems a reasonable inference that this is one of the reasons why the worker chose to bring his proceedings under the WHA.

It has been recognised for many years in workers compensation law that when a surgical procedure, such as the splenectomy in the present case, has been carried out to remedy or alleviate an injury compensable under the workers compensation legislation, the total condition resulting from the injury and the surgery is to be attributed to the original injury, so long as the operation was reasonably undertaken by the worker: see per Mason JA in *Migge v Wormald Bros Industries Ltd* (1972) 2 NSWLR 29 at 44-46, expressly approved on appeal in the High Court, (1973) 47 ALJR 236; *Mahony v J. Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 529.

As matters stood, then, at the time the worker filed his claim against the employer on 12 December 1991, he was entitled to compensation for the consequences of the HCV infection under the WHA.

This much was conceded (on the facts as this court must take them) by the employer in this appeal. But the employer also contended that the worker was not entitled to compensation under the WHA.

The reason for this was that before the worker's claim was decided, the Work Health Amendment Act (No 3) 1991, Act No 61 of 1991, had come into operation. This Act amended the WHA in a number of ways. The presently relevant amendment was effected by s 31 of Act No 61 of 1991. This section amended s 189 by inserting in subs (2), after the words "Notwithstanding

subsection (1)", the words "but subject to subsection (3)" and then adding subs (3) as follows:

> " (3) Nothing in subsection (2) shall be construed as permitting a claim for compensation to be made under this Act in respect of an injury to or the death of a person arising out of or in the course of the person's employment before the commencement of this Act where, in respect of that injury or death, compensation has been paid -
>
> (a) under the repealed Act;
>
> (b) under any other law in force in the Territory relating to the payment of compensation in respect of the injury or death of the person arising out of or in the course of the person's employment; or
>
> (c) at common law."

Before the magistrate the employer submitted, (and the proposition has not at any time been contested by the worker) that "compensation had been paid ... under the repealed Act" within the meaning of those words in the new subs (3) of s 189. It was then argued that subs (3), once inserted in the WHA, had effect from the commencement of the Act, that is, acted retrospectively, with the result, that the worker could not claim compensation under the WHA. The worker argued that subs (3) operated prospectively only.

The magistrate did not accept the employer's construction. He found the various other contested matters in the worker's favour and held that compensation was payable to the worker as claimed.

When the appeal came to Angel J, he took a different view of the effect of the amended s 189, and upheld the employer's construction; however he further held that the worker's 1991 claim for compensation was one for a new injury which had not been compensated for, therefore was outside the scope of

s 189(3), and could proceed under the WHA. He then made other findings in favour of the worker (not in dispute in the appeal in this court) and dismissed the appeal from the magistrate.

The employer then appealed to this court, accepting Angel J's construction of s 189, but asserting that he had been wrong in his finding on the "new injury" point.

In the course of argument counsel for the employer made it clear that the employer was not seeking to re-argue any of the matters argued before the magistrate and Angel J other than the "new injury" point and (by way of seeking to uphold Angel J) the construction point.

Counsel for the employer and the worker agreed that the "new injury" point had not been mentioned by either party before Angel J. Whether this meant that it was not open to Angel J to decide the case on that point, as the employer contended, could be a matter of some difficulty for this court to decide. However, I do not think that question needs to be examined. This is because, for reasons I will explain a little later, I have formed the opinion that the amendment to s 189 applied to cases arising on and after 1 January 1992, so that the worker was entitled to bring his compensation proceedings, and have them decided, under the WHA as it stood on 12 December 1991.

To explain this I need to give some further details about Act No 61 of 1991. It was assented to on 6 November 1991. Section 2 said:

> "This Act shall come into operation on a date to be fixed by the Administrator by notice in the *Gazette*."

The date fixed by the Administrator for the Act to come into operation was 1 January 1992.

The result of the construction of the amended s 189 contended for by the employer is that s 2 of Act No 61 of 1991 should be read as meaning:

> "This Act shall be deemed to have come into operation on 1 January 1987."

It would further mean that a case properly begun under s 189(2) on, say, 1 January 1991, heard, and reserved for judgment, could be the subject of valid orders until 31 December 1991, but, if judgment were delivered on 1 January 1992 would have to be dismissed.

A construction which produces such consequences excites scepticism. This is particularly so in the present instance, when the language of the amending Act does not seem to support it.

The meaning of s 189 as amended needs to be considered in association with s 2 of Act No 61 of 1991, a section bearing upon the amendment, the construction of which also comes into question in this case.

There seem to me to be two points to be made about s 2 of Act No 61 of 1991. The first is that the employer's construction does an unusually extreme degree of violence to the apparently plain meaning of the section. The other point is that s 2 of the principal Act indicates (if indication be needed) that the legislature knows perfectly well the different ways in which commencement sections can be framed. It is no more difficult to say in a commencement section that the Act or some section of the Act shall be deemed to have come into operation on some past date than it is to say that it shall come into operation on the day when it is assented to or on some future date to be fixed by

some stated method. There are numerous clearly expressed retrospective provisions on the statute books of Australian jurisdictions. One recently considered in the High Court is set out in *Stevens v Head* (1993) 176 CLR 433, at 443, 545. Another, more pertinent for present purposes, appears in the Criminal Code Amendment Act 1991, No 1 of 1991, of the Legislative Assembly of the Northern Territory.

Further, s 189 itself, as first enacted, shows the legislature dealing with another aspect of retrospectivity in a clear way.

The fact that the legislature used none of the well known methods of making it clear that retrospectivity was intended in regard to the amendment to s 189 seems to me to be a significant indication not only that the amendment was, as a matter of language in context, prospective, but also that the legislature intended it to be.

The argument the employer relied on to overcome the apparently clear meaning of the amending Act was that s 189 was a procedural section; and that what was said to be the regular presumption of construction that procedural amendments are given retrospective effect should be acted on here. In support of that argument, the decision of Asche CJ in *Cunningham-Beattie v Groote Eylandt Mining Co Pty Ltd* (1989) 60 NTR 1, was relied on.

Support was also sought for this construction argument in the purposive consideration that the amendment to s 189 was intended to prevent a worker being compensated twice for the same injury, which was thought to be a possibility under the

section in its unamended form. It was not contended that there would be any double compensation in the present case.

I do not think the employer's submission that s 189(3) is procedural gains any support from Asche CJ's decision in *Cunningham-Beattie*.

In that case a woman's de facto husband was killed in August 1984 in an accident in the course of his employment. The Workers Compensation Act entitled the de facto wife to claim compensation upon proof of various matters one of which was that she had been wholly or mainly maintained by the worker for not less than three years immediately prior to his death. The de facto wife had been working herself at the time of his death which may have made it difficult for her to prove she was "wholly or mainly" maintained by him. Presumably because of this problem she did not make a claim under the Workers Compensation Act. When the WHA came into force she commenced proceedings under s 189(2).

This was because the provision made by the WHA for claims for compensation by de facto wives of deceased workers for compensation relaxed the prior requirements of the Workers Compensation Act in a number of ways, one of them being that the de facto spouse need show only that she had been wholly or in part dependent on the earnings of the worker at the date of his death.

The de facto spouse's case was that s 189(2) entitled her to claim compensation under the more liberal provisions of the WHA, even if she had not had any cause of action in respect of

the death of her de facto husband under the Workers Compensation Act.

Asche CJ gave detailed consideration to the language and the interaction of subss (1) and (2) of s 189 and came to the conclusion that the injury or death for which a person might claim compensation under subs (2) was properly an injury or death referred to in subs (1) which had given rise to a cause of action under the Workers Compensation Act. He made his conclusion very clear, saying he had no doubt as to the meaning of subs (2) nor any doubt

> "that its purpose is to allow a person who has a cause of action in respect of an injury or death arising out of or in the course of employment, *which cause of action arose before the commencement of the section*, to adopt the procedures and methods of calculation of compensation permitted under the Work Health Act. It does no more that than; and specifically it does not permit a person who had no cause of action in respect of an injury or death arising out of or in the course of employment which arose before the commencement of the section to establish a claim now under the Work Health Act." (at 10).

The result in the particular case was that the de facto wife could only succeed in her claim under the WHA if she could show her cause of action arose before the commencement of the WHA.

In reaching his conclusion Asche CJ had first discussed the familiar rules of construction of statutes when retrospectivity is in question. He thought the considerations relating to those questions assisted in confirming the interpretation he afterwards put forward, but he said that even without that assistance he would reach the interpretation he reached simply by consideration of the language in its context.

His reasons make it clear that his conclusion did not depend upon the retrospectivity presumptions and rules of construction but that they confirmed his understanding of the two subsections as a matter of their straightforward ordinary meaning.

In discussing the question whether s 189 as it then stood was procedural or substantive Asche CJ had said:

> "In my view s 189 is essentially procedural, ie if a person chooses to exercise an existing right, alternative procedures are permitted. But, if s 189(2) is employed, the procedure for enforcement of the right will involve a different method of calculation for compensation which might be to the advantage of the applicant. To that extent it might enhance the existing right which he must possess before claiming compensation. But it does not create a new right. The subsection remains a matter of procedure ..." (at 7)

These observations were made in regard to the unamended s 189 which was creating a new alternative procedure in regard to causes of action already existing when the section began to operate. The material point decided by *Cunningham-Beattie* was that the WHA did not create new causes of action out of events occurring before it began to operate. If those events did not give rise to a cause of action before the WHA commenced, then they could not found a cause of action under the WHA after it began to operate, even if the same events, occurring after the commencement of the WHA, would make a valid cause of action under it.

Clearly, *Cunningham-Beattie* can not govern the construction of the new s 189(3) or s 2 of the amending Act. Section 189(3) takes away in some circumstances the option given by s 189(2), and here it is important to recognise that what Asche CJ called an enhanced but not a new right in fact entitled

the worker to get compensation under the WHA different from that under the Workers Compensation Act. On the basis of what the court was told by counsel about the different benefits obtainable under the WHA from those under the Workers Compensation Act, I infer that in money terms the result under the WHA would be better for the worker than under the Workers Compensation Act. It seems to me that it is that kind of situation, no matter what it is called, that the presumption against retrospectivity is intended to protect. The worker had been entitled, although he did not know it for much of the time, for nearly five years to claim compensation under the WHA more advantageously than under the Workers Compensation Act. These were not merely procedural advantages. For them to be taken away by an amending Act, very plain words would be needed.

I do not think it is a regular presumption of construction that amendments of the kind here in question which may reduce the money entitlements of a party to litigation already on foot, are given retrospective effect. Such a construction requires very plain words. As it happens, in this case the words seem to me, quite plainly, to indicate the opposite.

As to the purposive argument, the possibility of double payment thought to exist under the original s 189 seems to me to have been rather speculative. No instances of its having happened between 1 January 1987 and 6 November 1991 were drawn to our attention. It does not seem unlikely that the legislative idea was that if the possibility had existed so long without causing observed difficulty, it would be sufficient to eliminate the possibility prospectively.

In my opinion therefore the construction put upon s 189 by the magistrate was sound and the construction contended for by the employer in this appeal, which would have to be accepted before the appeal could succeed, is not, in my opinion, acceptable. The magistrate was therefore entitled to decide the case under the WHA on the basis he did and it is not necessary to consider the alternative basis adopted by Angel J.

Since writing the above I have had the benefit of reading Kearney J's draft reasons. As to his observations concerning *Attorney-General v Theobald* (1890) 24 QBD 557 and the possibility that s 189(3) should be construed as declaratory, I would comment that what was said in *Theobald* about the meaning of formulas such as "shall be construed" in statutes was not followed by the Privy Council in *Young v Adams* [1898] AC 469. Sections of a New South Wales Act were in question. Lord Watson said:

> "It may be true that the enactments are declaratory in form; but it does not necessarily follow that they are therefore retrospective in their operation, and were meant to apply to acts which had been completed or to interests which had vested before they became law. Neither the context of the statute, nor the terms of the clause itself, appear to their Lordships to favour that result." (at 474-5)

Thus, the construction of the sections was arrived at by consideration of their language in the overall context. The declaratory form was treated as a guide only, which must give way to clear words.

In the present case, I doubt whether the words in question were intended to be declaratory. For the reasons I have already given, I think the statutory language requires the meaning I have given it.

I would dismiss the appeal with costs.

GRAY A/J

I agree that the appeal should be dismissed for the reasons expressed by Priestley J.