

SUPREME COURT OF QUEENSLAND

CITATION: *Stergioulas & Ors v Hemsley & Anor; WorkCover Qld v Stergioulas & Ors* [2000] QSC 389

PARTIES: **LORITA IRENA STERGIOULAS**
(first plaintiff)
and
JOSHUA CON STERGIOULAS [by his Litigation
Guardian and mother **LORITA IRENA STERGIOULAS**]
(second plaintiff)
and
MARISSA STERGIOULAS [by her Litigation Guardian
and mother **LORITA IRENA STERGIOULAS**]
(third plaintiff)
v
JEFFREY IAN HEMSLEY
(first defendant)
and
SUNCORP GENERAL INSURANCE LIMITED
[ACN 075 695 966]
(second defendant)

WORKCOVER QUEENSLAND
(applicant)

v
LORITA IRENA STERGIOULAS
(first respondent)
and
JOSHUA CON STERGIOULAS [by his Litigation
Guardian and mother **LORITA IRENA STERGIOULAS**]
(second respondent)
and
MARISSA STERGIOULAS [by her Litigation Guardian
and mother **LORITA IRENA STERGIOULAS**]
(third respondent)
and
JEFFREY IAN HEMSLEY
(fourth respondent)
and
SUNCORP GENERAL INSURANCE LIMITED
[ACN 075 695 966]
(fifth respondent)

FILE NO/S: No. 8060 of 1999
No. 8372 of 2000

DIVISION: Trial Division

DELIVERED ON: 12 October 2000

DELIVERED AT: Brisbane

HEARING DATE: 29 September 2000

JUDGE: Chesterman J

ORDER: 1. **That WorkCover Queensland is entitled to a first charge pursuant to s 278(2) of the *WorkCover Queensland Act 1996* in the amount of \$215,442.82 on the damages payable pursuant to the settlement of action S8060 of 1999.**

2. **That the proposed settlement of the action for the sum of \$300,000.00 be sanctioned.**

3. **That the second defendant in the action pay the plaintiff's costs of and incidental to the action including the cost of this application to be assessed on the standard basis.**

CATCHWORDS: WORKERS' COMPENSATION – ALTERNATIVE RIGHTS AGAINST EMPLOYER AND THIRD PARTIES – EFFECT OF CLAIM OR PROCEEDING FOR OR RECEIPT OF COMPENSATION ON RIGHT TO DAMAGES – SATISFACTION OR REDUCTION OF AMOUNT OF JUDGMENT BY WORKERS' COMPENSATION PAYMENTS – spouse and defendants paid compensation by WorkCover Queensland for death of father under s 218 *WorkCover Queensland Act 1996* – later recovered compensation from third party – WorkCover right to charge under s 278 – whether charge applied to total compensation received or individual awards

COUNSEL: G Mullins for the first, second and third plaintiffs and first, second and third respondents
M Timmens for the first and second defendants and fourth and fifth respondents
B Hoare for the applicant

SOLICITORS: Collas Moro Ross for the first, second and third plaintiffs and first, second and third respondents
Barker Gosling for the first and second defendants and fourth and fifth respondents
WorkCover Queensland for the applicant

WorkCover Queensland Act 1996, ss 34, 217, 218, 278
Workers' Compensation Act 1990 (Qld), s 190
Acts Interpretation Act 1954 (Qld), s 32C

McDowell v Baker (1979) 144 CLR 413, considered

- [1] **CHESTERMAN J:** These applications were heard together. The first plaintiff in action 8060/99 is the mother of the second and third plaintiffs. They are respectively the widow and children of the late Thomas Stergioulas who died in a motor vehicle collision on 14 July 1998. The action claiming damages for loss suffered as a consequence of the death of their husband and father was commenced against the first defendant and his insurer, the second defendant on 6 September 1999. Subject to the court sanctioning the children's actions the suits were compromised on 23 June 2000 by the defendants' agreement to pay \$300,000.00. Mrs Stergioulas asks the court to sanction the settlement of the action and for consequential orders as to costs.
- [2] The other application is brought by WorkCover Queensland ("WorkCover") which seeks a declaration that it is entitled to a first charge in an amount of \$215,442.82 on the damages recovered in the action. The plaintiffs accept that WorkCover is entitled to a charge but submit that it does not operate over the whole award.
- [3] At the time of his death Mr Stergioulas was separated from his family but an immanent reconciliation and resumption of cohabitation were confidently expected. The circumstances of the collision were such as to make a reduction in damages for contributory negligence by Mr Stergioulas distinctly likely. These factors make the proposed settlement of the plaintiffs' action for the sum mentioned reasonable. I am persuaded by the advice of their counsel that the settlement is in their best interests. Accordingly I will sanction the compromise on the terms proposed.
- [4] WorkCover's application is not so easily disposed of. It paid to or on behalf of the plaintiffs the sum of \$215,442.82. Of this amount \$6,798.00 were paid to undertakers who had arranged the funeral. The payment does not appear to have been made directly to any of the plaintiffs but it was made on their behalf. The funeral payments were made to discharge the obligation imposed on WorkCover by s 217. The balance of the compensation was paid pursuant to s 218 of the Act, which provides:

- "(2) The amount of compensation payable for the worker's dependants is –
 - (a) if the worker has left dependent members of the worker's family, for the members - \$184,820.00; and
 - (b) if the worker has left a totally dependant spouse and dependent members of the worker's family who are under 16 or are students, for each member other than the spouse - \$6,940.00; and
 - (c) if the worker has left dependent members of the worker's family . . . who are under 16 or students, for each member or a child – a weekly amount . . . while the member or child is under 16 or a student."

Some \$9,944.82 were paid to the second and third plaintiffs, or the first plaintiff for the benefit of the second and third plaintiffs, pursuant to s 218(2)(c). By two

cheques each drawn on 20 January 1999 by WorkCover the first plaintiff was paid respectively the sums of \$184,820.00 and \$13,880.00. The second sum was paid for the benefit of the second and third plaintiffs. The amount is twice the sum provided for by s 218(2)(b).

- [5] WorkCover's right to recover payments of compensation from an award of damages is regulated by s 278 of the Act. It provides:

“278(1) This section applies to –

(a) an injury sustained by a worker in circumstances creating –

- (i) an entitlement to compensation; and
- (ii) a legal liability in the worker's employer, or other person, to pay damages for the injury, independently of this Act;

(b) . . .

- (2) An amount paid as compensation to a person for an injury, to which there is an entitlement to payment of damages at a time or for a period before the person becomes entitled to payment of damages by an employer or other person, is a first charge on any amount of damages recovered by the person to the extent of the amount paid as compensation to the person.”

Section 34 of the Act defines injury so as to include a death which occurs in circumstances such as those in which Mr Stergioulas died. Section 278 therefore applies, there being an injury (death) sustained by a worker in circumstances creating an entitlement to compensation and a legal liability in some person to pay damages for the death.

Although “worker” is very elaborately defined in the Act the definition does not extend to dependants.

- [6] The point in issue concerns only the damages to be recovered by the infant plaintiffs. Mrs Stergioulas accepts that whatever damages she recovers will be subject to WorkCover's charge. The argument advanced on behalf of the other plaintiffs is that they were each paid only the sum of \$6,940.00 (pursuant to s 218(2)(b)) and that WorkCover's charge is limited to those sums. The plaintiffs' claims for damages for the death of their breadwinner is in substance (and, in this case, in form) a claim by each of the individual dependants for damages for the loss of his or her dependency. Each of the plaintiffs is entitled to his or her own award of damages. The proposed division of the settlement sum between plaintiffs will yield considerably more than \$7,000.00 each to the infants. The damages apportioned to Mrs Stergioulas will be insufficient to satisfy the balance of the compensation. The result will be that WorkCover will not recoup all the money it has paid.
- [7] The same phenomenon occurred in the past under legislation which preceded the Act. Over time it was amended to make the statutory charge more effective. There was detected a policy “that the worker and/or his dependants shall not receive more

than the greater of the maximum compensation to which they may be entitled and the damages to which they may be entitled.” Per Aickin J (with whom Stephen and Mason JJ agreed) in *McDowell v Baker* (1979) 144 CLR 413 at 429.

- [8] The plaintiffs’ argument depends upon a very literal reading of s 278(2). The subsection provides (omitting irrelevant parts):

“An amount paid as compensation to a person for an injury, to which there is an entitlement to payment of damages . . . is a first charge on any amount of damages recovered by the person to the extent of the amount paid as compensation to the person.”

It is said that the use of the definite article “the” before the noun “person” where it appears for the second and third times indicates that the charge applies only to the damages recovered by the particular recipient. That is, it is said that the charge operates only on the damages recovered by a particular person and is limited to the amount of compensation paid to that person. The point is perhaps illustrated by substituting the plaintiff’s names for the general noun used in the subsection, which would then read:

“An amount paid as compensation to Joshua . . . is a first charge on any amount of damages recovered by Joshua to the extent of the amount paid as compensation to Joshua.”

It is then said that the compensation paid to Joshua was only \$6,940.00.

- [9] The basic assumption on which the plaintiffs’ submission is based, that the draftsman of the Act intended to comply exactly with the rules of grammar is, experience suggests, unwarranted. The result contended for by the plaintiff is contrary to the policy evidenced in previous legislation. The explanatory memorandum issued with respect to the Act indicates that s 278 was not intended to change the previous law which found expression in s 190 of the *Workers’ Compensation Act* 1990 which is drafted in such a way as not to give rise to the present difficulty. If the plaintiffs are right the children will have received a substantial windfall at the expense of their mother. They will receive an award of damages of about \$100,000.00 each. Just under \$7,000.00 (which they have already received) will be repaid to WorkCover. Mrs Stergioulas’ damages which will also be about \$100,000.00 will be subject to a charge of \$201,562.82, being the total amount of compensation paid less the amount to be recovered from the childrens’ damages.
- [10] The plaintiffs’ submissions have the effect of producing unfairness between the plaintiffs and of diminishing the effectiveness of the statutory charge the function of which is to prevent the over compensation of plaintiffs to the general detriment of those who pay premiums to WorkCover. I apprehend that the court should not afford to s 278(2) a construction which will have this result unless its language permits no other course.
- [11] The plaintiffs’ argument depends on two propositions:

- (i) That in a dependency action the charge conferred by s 278 operates only in respect of the award of damages to a particular plaintiff and not to the global award.
- (ii) The second and third plaintiffs were paid only the sum of \$6,940.00 each as compensation.

[12] The second proposition is invalid. Its invalidity poses a considerable problem for the plaintiffs' preferred construction.

It is not right that the only compensation paid to the second and third plaintiffs was the sum of \$6,940.00 each. They each received \$4,972.41 by way of weekly payments in addition to the lump sum. More significantly part of the larger sum of \$184,820.00 was also paid to them. Section 218(2)(a) makes it clear that that sum is paid "*for the members*" of the deceased worker's family. The sum was not paid to or for Mrs Stergioulas only. It was for all of the plaintiffs in undifferentiated amounts. It is not possible to say that any specific amount was paid to any member of the family. If s 278(2) is construed as the plaintiffs contend it is not possible to know what is the amount of the charge payable in respect of the damages recovered by each plaintiff. The draftsman must be presumed to have known of the terms of s 218 when he drafted s 278(2). It is likely that the subsection was not meant to be limited to an unascertainable amount of compensation. It is more likely that in cases like the present the charge was meant to operate in respect of the amount of damages recoverable by the dependents globally.

There are two ways of construing the subsection to achieve this end. The first is to disregard the phrases "to a person", "by the person" and "to the person" where they appear. The phrases are unnecessary as a matter of syntax and grammar. Compensation must be paid to a person or persons and damages must be recovered by a person or persons. Their deletion leaves the subsection quite intelligible and achieves what appears to have been the legislative intention. So, notionally amended, the subsection would read:

"An amount paid as compensation for (a death), to which there is an entitlement to payment of damages . . . is a first charge on any amount of damages recovered to the extent of the amount paid as compensation."

The amount of compensation was \$215,442.82. The amount of damages recovered is \$300,000.00. The subsection so understood would operate to allow WorkCover to recoup the amount it paid to or on behalf of the dependants of a deceased worker who would receive by way of compensation and damages (reduced by the charge) the amount agreed or determined by the court as fair recompense for their loss.

[13] The second approach is to remember that s 32C of the *Acts Interpretation Act* 1954 provides that nouns used in legislation in the singular form include the plural form and vice versa.

Applying this understanding to s 278(2) it would read:

"An amount paid as compensation to a person or persons for an injury . . . is a first charge on any amount of damages recovered by

the person or persons to the extent of the amount paid as compensation to the person or persons.”

This construction would allow for the aggregation of the damages payable to all of the plaintiffs in the action as well as the compensation paid to or on their behalf. The charge for the total amount of compensation would apply to the aggregated damages.

- [14] For these reasons I declare that WorkCover Queensland is entitled to a first charge pursuant to s 278(2) of the *WorkCover Queensland Act* in the amount of \$215,442.82 on the damages payable pursuant to the settlement of action S8060 of 1999.
- [15] As I indicated I sanction the proposed settlement of the action for the sum of \$300,000.00. I order the second defendant in the action to pay the plaintiffs’ costs of and incidental to the action including the cost of this application to be assessed on the standard basis.

There will be no order for the costs of the application brought by WorkCover.