[HIGH COURT OF AUSTRALIA.]

UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . . . } APPELLANT;
DEFENDANT,

AND

BURNETT . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1936-1937.

SYDNEY, 1936, *Aug.* 12, 13.

1937, *April* 30.

Starke, Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Claim under Workers' Compensation Act made by worker prior to his death—Compensation received by worker—Further claim by worker under the Act—Date of hearing fixed—Notification to employer—Action by worker's widow under Compensation to Relatives Act 1897-1928 (*N.S.W.*)—*Alternative remedies—Option—Knowledge of worker—Workers' Compensation Act* 1926-1929 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1929), *sec.* 63.*

In an action under the *Compensation to Relatives Act* 1897-1928 (N.S.W.) brought by a widow against her deceased husband's employer, the defendant pleaded in the third plea that in respect of the injury which caused his death the husband had served notice on, and had claimed and received compensation under the *Workers' Compensation Act* 1926-1929 (N.S.W.) from, the defendant, that he afterwards claimed further compensation under the Act and commenced proceedings before the Workers' Compensation Commission and filed therein an application for determination as to the defendant's liability, and that notice of the application and of the day fixed for the hearing thereof was served upon the defendant. In the fourth plea it was alleged that the husband claimed and received compensation under the Act, and thereafter claimed further compensation thereunder, and exercised his option and elected to proceed under the Act, and filed and served an application for further compensation and a notice of hearing. By the fifth plea it was alleged that the husband, being entitled to the benefits of the *Workers' Compensation Act* or to maintain an action at law,

*The provisions of this section are set out at p. 422, *ante*.

elected to and did proceed under the Act, and with full knowledge of all material facts claimed further compensation and filed and served a notice of application and served notice of the day of hearing. The plaintiff demurred to the pleas. The Supreme Court of New South Wales gave judgment for the plaintiff on each of the demurrers. On appeal to the High Court, *Starke* J. was of opinion that the facts pleaded in the third plea, of which the other pleas were but variants, were sufficient in their legal effect to constitute an exercise of the option provided in sec. 63 (2) of the *Workers' Compensation Act* to proceed under that Act and thus exclude any right to proceed independently of the Act; *Dixon* J. was of opinion that the fourth and fifth pleas alleged the fulfilment of all the conditions necessary, according to the *ratio decidendi* of the majority of the court in *Latter* v. *Muswellbrook Corporation*, *ante* p. 422, to bring the case within sec. 63 (2), and therefore the demurrers to those pleas ought to have been overruled : *Evatt* and *McTiernan* JJ. were of opinion that the third plea was bad inasmuch as it failed to allege that the worker was ever aware that there was an option to proceed independently of the Act and further that the fourth and fifth pleas should be regarded only as argumentative pleas not properly raising any issue of law additional to that raised by the third plea. The court being equally divided, the decision of the Supreme Court : *Burnett* v. *Union Steamship Co. of New Zealand Ltd.*, (1936) 36 S.R. (N.S.W.) 119 ; 53 W.N. (N.S.W.) 38, was affirmed.

Harbon v. *Geddes*, (1935) 53 C.L.R. 33, and *Latter* v. *Muswellbrook Corporation*, *ante*, p. 422, referred to.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales, under the *Compensation to Relatives Act* 1897-1928 (N.S.W.), by Isabella Burnett, on behalf of herself and her three children, for damages in the sum of £5,000, in respect of the death of her husband and their father, which was alleged to have been caused by negligence for which his employer, the defendant, Union Steamship Co. of New Zealand, was responsible. The defendant, by its third plea, pleaded that the deceased husband was a worker employed by the defendant and that in respect of the injury which caused his death, he served a notice on the defendant and claimed and received compensation from the defendant under the *Workers' Compensation Act*; that the husband afterwards claimed further compensation under the Act, and commenced proceedings in the Workers' Compensation Commission and filed therein an application for a determination of questions as to the defendant's liability, which application was served on the defendant, a day fixed for proceeding with the application, and notice thereof duly given to the defendant. By the fourth

H. C. OF A. 1936.

UNION STEAMSHIP CO. OF NEW ZEALAND LTD. v. BURNETT.

plea it was alleged that the deceased husband claimed and received compensation under the Act, and thereafter claimed further compensation thereunder, and exercised his option and elected to proceed under the Act, and filed and served an application for further compensation and a notice of hearing. By the fifth plea it was alleged that the deceased husband being entitled either to the benefits of the *Workers' Compensation Act* or to maintain an action at law, duly elected to proceed under the Act, and did proceed thereunder, and with full knowledge of all material facts claimed further compensation, and filed and served a notice of application, and served notice of the day of hearing. The plaintiff demurred to each of the pleas, which were based upon sec. 63 of the *Workers' Compensation Act* 1926-1929 (N.S.W.). The Full Court of the Supreme Court gave judgment for the plaintiff on each and all of the demurrers on the ground that the litigious proceedings alleged to have been taken under the *Workers' Compensation Act* stopped far short of an award or other form of satisfaction; and that they created no bar to the plaintiff's action: *Burnett* v. *Union Steamship Co. of New Zealand Ltd.* (1).

From that decision the defendant, by leave, appealed to the High Court.

Flannery K.C. (with him *De Baun* and *Rainbow*), for the appellant. Sec. 63 of the *Workers' Compensation Act* prohibits concurrent, or double, proceedings (*Bennett* v. *L. and W. Whitehead Ltd.* (2)). If proceedings either under the Act or at common law are commenced, there arrives before judgment a period at which it can be alleged of the plaintiff that he has elected, that is, has exercised his option and is barred from the other remedy. The pleas are proper pleas. They are, in effect, pleas in abatement (*Bullen and Leake's Precedents of Pleadings*, 3rd ed. (1868), p. 475; *Le Bret* v. *Papillon* (3)). Although sec. 63 preserves a worker's common law rights in the case of negligence, it forbids double proceedings. "Satisfaction" of a claim under the Act or of an action at law is not the test. Proceedings commenced under the Act must be concluded before the worker

(1) (1936) 36 S.R. (N.S.W.) 119; 53 W.N. (N.S.W.) 38.
(2) (1926) 2 K.B. 380.
(3) (1804) 4 East 502, at p. 508; 102 E.R. 923, at pp. 925, 926.

may, in a proper case, seek to enforce a remedy at common law. Where there has been an unequivocal determination on behalf of the worker in respect of one or other of the two remedies, the question of election under sec. 63 cannot arise. With only one remedy remaining after such determinations there cannot be an election, or choice, by the worker. The right of the respondent to pursue an action at law is debarred by the proceedings under the Act commenced by her deceased husband (*Union Steamship Co. of New Zealand* v. *Robin* (1); *British Electric Railway Co. Ltd.* v. *Gentile* (2)).

[DIXON J. referred to *Barker* v. *Stoneham & Wilson* (3).]

The option provided in sec. 63 of a choice between two remedies was exercised, and thereafter the other remedy was not available (*Priestly* v. *Fernie* (4); *Rice* v. *Reed* (5)). The exercise of the option was completed by the commencement of curial proceedings under the Act, and the communication of that fact to the appellant (*Scarf* v. *Jardine* (6); *Curtis* v. *Williamson* (7)). The facts alleged show an unequivocal act by the worker which in law constitutes an election by him of a remedy (*Bennett* v. *L. and W. Whitehead Ltd.* (8)). In determining whether or not there has been an election consideration must be given, not to the mental attitude of the person concerned, but to his overt acts in relation to the other party. Whether a statutory remedy is in substitution for, or cumulative upon, remedies under the common law was discussed in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (9). The legislature has preserved in sec. 63, in all circumstances except those where the plaintiff recovers at common law, the statutory remedy. A plaintiff is committed to the choice made, but if the common law remedy be chosen, failure to succeed therein does not, but success does, bar the right under the Act. The decision in *Bennett's Case* (10) was aimed at remedies and not at satisfaction. The first portion of sub-sec. 2 of sec. 63 amounts to a deprivation of right which has been left untouched by sub-sec. 1, and the last portion of the sub-section is a restoration of that right in a certain event. All proper,

(1) (1920) A.C. 654, at p. 661.
(2) (1914) A.C. 1034.
(3) (1922) 22 S.R. (N.S.W.) 512; 39 W.N. (N.S.W.) 183.
(4) (1863) 3 H. & C. 977; 159 E.R. 820.
(5) (1900) 1 Q.B. 54, at pp. 65, 66.
(6) (1882) 7 App. Cas. 345, at pp. 352, 353, 360, 361.
(7) (1874) L.R. 10 Q.B. 57.
(8) (1926) 2 K.B., at pp. 388, 389.
(9) (1859) 6 C.B.N.S. 336, at p. 356; 141 E.R. 486, at p. 495.
(10) (1926) 2 K.B. 380.

H. C. OF A. 1936-1937.

UNION STEAMSHIP CO. OF NEW ZEALAND LTD. v. BURNETT.

necessary and material facts were pleaded in the pleas. It is not necessary that all the alleged facts, nor the evidence with respect to the particular matter, should be set forth. The third plea raised a new question reserved by all the members of the court in *Harbon* v. *Geddes* (1). That plea is not demurrable, and the fourth and fifth pleas clearly are not demurrable.

Evatt K.C. (with him *Burns*), for the respondent. This matter should not be determined on a point of pleading. Although the general words in the pleas may have been included for the purpose of raising further facts, there is no indication as to what are those further facts. Even though the deceased worker received compensation and made a further claim under the *Workers' Compensation Act*, and it is assumed that those facts constitute an election, it was not an election made by the respondent, nor is it binding upon her. She was not a party to the application made under the Act. All the deceased did with knowledge as to his position was to file that application. The filing of that application is the only fact additional to the facts present in *Harbon* v. *Geddes* (1). The legislature intended by sec. 63 to remove the injustice revealed by the decision in *Cribb* v. *Kynoch Ltd.* [*No.* 2] (2), to prevent concurrent proceedings, to disentitle a worker to benefits under the Act if and when he has received a judgment in damages, at common law, to ensure that an award of compensation shall be less than an award of damages, and to ensure that a worker shall not receive more than he is able to obtain at common law. Such a construction of sec. 63 is logical and reasonable, and works no injustice against worker or employer. A worker, or his widow, in whose favour an award under the Act has been made is nevertheless, in a case of negligence for which the employer is responsible, entitled to proceed at common law for damages, subject only to the amount received as compensation being deducted from the damages recovered. Under sec. 63 a worker, or his widow, must exercise an option as to which remedy he or she elects to pursue. The mere choosing or pursuing of a particular remedy is not an exercise of that option unless at the time of the choosing or pursuing the worker or his widow is cognizant of all the material facts and of his or her rights

(1) (1935) 53 C.L.R. 33.

(2) (1908) 2 K.B. 551.

in law (*Murray* v. *Schwachman Ltd.* (1)). Knowledge was not specifically averred in the third and fourth pleas. In so far as knowledge was averred in the fifth plea there was not a sufficient averment of the knowledge of the legal rights of the deceased at the time when he lodged his application with the commission, which is the material time. Even if that application had met with success the worker was still entitled to proceed at common law; if it terminated in failure the same position arose, and at no time had the position been created when the alternative right of obtaining further compensation payments under the award is taken away, on the obtaining of a judgment at common law.

Cur. adv. vult.

1937, April 30.

The following written judgments were delivered :—

STARKE J. This appeal raises again the proper construction of sec. 63 of the *Workers' Compensation Act* 1926-1929 of New South Wales. It provides :—"(1) Nothing in this Act shall affect any civil liability of the employer where the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible. (2) In such case the worker may, at his option, proceed under this Act or independently of this Act, but he shall not be entitled to compensation under this Act, if he has obtained judgment against his employer independently of this Act." One view is that the protection given by the section to the employer is against double payments, and that it is not the mere claim, but the recovery of compensation under the Act, that puts an end to the civil liability for damages, which is otherwise not affected by the Act; whilst the other is that the employer is protected against two sets of proceedings: the option is to do one of two things, to proceed either under the Act or independently of the Act, and the exercise of that option in one way must exclude its exercise the other way. The Irish Court of Appeal took the former view, whilst the Court of Appeal in England and the Court of Session in Scotland took the latter view (See *Bennett* v. *L. and W. Whitehead Ltd.* (2)). But the Acts under

(1) (1936) 2 All E.R. 478.

(2) (1926) 2 K.B. 380.

H. C. OF A. 1936-1937.

UNION STEAMSHIP CO. OF NEW ZEALAND LTD. v. BURNETT.

Starke J.

which the decisions of those courts were given are not identically the same as the *Workers' Compensation Act* of New South Wales, and the decisions do not necessarily govern its construction (Cf. *King* v. *King* (1)). In *Codling* v. *John Mowlem & Co. Ltd.* (2), decided under the English Act of 1906, *Atkin* J., as he then was, regarded the provision in the English Act that the employer should not be liable to pay compensation both independently of and also under that Act as a protection given to the employer additional to the right he had of holding the workman to the exercise of his option. " It may emphasize and confirm," he said, " the provision confining the workman to one only of the alternative remedies, but it also gives a right, independent of the exercise by any one of an option, i.e., a right not to pay twice over " (3). But this view suggests that the words in the English Act upon which the cases are based are : " but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act." In the Irish Court of Appeal, *Holmes* L.J., in his dissenting judgment in *Beckley* v. *Scott & Co.* (4), said :—" I am unable to give any but one meaning to these words. As I understand the English language, when an option is given to a person to take either of two courses, he is not to take both ; and as I understand legal principle, an option or election of this kind once exercised must be adhered to." And the decisions of the Court of Appeal in England and of the Court of Session in Scotland accord with this construction of the words mentioned. It would be advisable, I think, to accept the English and Scotch decisions as an authoritative construction of the words in the *Workers' Compensation Act* of New South Wales until a higher authority holds otherwise, or unless there is some compelling reason to the contrary to be found in the words used in the New South Wales Act (See *Trimble* v. *Hill* (5)). *Harbon* v. *Geddes*, (6), in this court may be discarded, for the justices differed in their reasons and the proper construction of the Act remains unsolved in that case.

It is claimed, however, that the words in sec. 63 (2), " but he shall not be entitled to compensation under this Act, if he has

(1) (1920) V.L.R. 443, at p. 450.
(2) (1914) 2 K.B. 61.
(3) (1914) 2 K.B., at p. 66.
(4) (1902) 2 I.R. 504, at p. 534.
(5) (1879) 5 App. Cas. 342, at p. 344.
(6) (1935) 53 C.L.R. 33.

obtained judgment against his employer independently of this Act," require a construction of the section in the sense adopted by the Irish Court of Appeal. The words may give an additional protection to the employer, as is suggested by *Codling's Case* (1), though their purpose is rather, I think, to protect the workman against loss of his right to compensation under the Act unless he obtains judgment against the employer in proceedings independently of the Act. The provision displaces, I think, the decision of the Court of Appeal in *Cribb* v. *Kynoch Ltd.* [*No.* 2] (2) that a workman cannot proceed independently of the Act and fail and then proceed under the Act. In *Harbon* v. *Geddes* (3) I suggested that it achieved the same result as sec. 29 (2) of the English Act of 1925, but in another way. It certainly mitigates the danger, and, one may think, the hardship, arising from the nature of the option given to the workman. But it does not change the option. It makes, however, no provision for the case in which the workman has proceeded under the Act, and subsequently takes proceeding isndependently of the Act, but leaves that case to the operation of the opening sentence of sub-sec. 2 : " In such case the worker may, at his option, proceed under this Act or independently of this Act." I do not think that the use here of the demonstrative adjective ' such ' instead of ' that,' as in the English Act, makes any difference in the construction of the sentence. The provision of sec. 63 (2)," but he shall not be entitled to compensation under this Act if he has obtained judgment against his employer independently of this Act," affords no basis, in my opinion, for departing from what the Court of Appeal in England and the Court of Session in Scotland and *Holmes* L.J. in his dissenting judgment in *Beckley's Case* (4) regard as the plain and ordinary meaning of the opening words of the sub-section.

It is another question what constitutes the exercise by the workman of the option given to him. But for the decisions both in England and in Scotland, I should have thought the opinion of *Scrutton* L.J. in *Bennett* v. *L. and W. Whitehead Ltd.* (5) almost unanswerable : —" The employer is not to be subjected to double proceedings. I do not think you can escape the statutory prohibition against doing

(1) (1914) 2 K.B. 61.
(2) (1908) 2 K.B. 551.
(3) (1935) 53 C.L.R. 33.
(4) (1902) 2 I.R., at pp. 531-536.
(5) (1926) 2 K.B., at pp. 404, 405.

H. C. OF A. 1936-1937.

UNION STEAMSHIP CO. OF NEW ZEALAND LTD. v. BURNETT.

Starke J.

a thing by saying that, though you have done it, you have not elected to do it. If by statute you have an option to do A or B, but not both, and you have done A, it does not seem to me relevant to say 'I have done A, but I have not elected to do it.' Unless it can be said that you do not take proceedings when you issue a writ and serve it on the defendant, I think you have elected to do what you have in fact done, and cannot take the other alternative." But, according to the decisions, it is a question of fact whether an option has or has not been exercised. A passage in the judgment of *Bankes* L.J. in *Bennett's Case* (1) is worth noting:—"I do not consider that it necessarily follows that there can be no conclusive election unless and until a determination of the proceedings brought by the workman is arrived at. I can conceive a number of circumstances which, added to the commencing of one particular form of proceeding, might lead to the conclusion that a final election had been made before any decision in those proceedings had been arrived at." And *Atkin* L.J., towards the close of his judgment, said:—"I think that election is a question of fact in each case, and is not a question of law. . . . I think it is clear in this case that the learned judge treated the question as one of law and not of fact, and that if there were any evidence of election, the case should be sent back to him for his finding; but on consideration of the facts I find no evidence that the applicant did elect to adopt the common law remedy to the exclusion of his rights under the *Workmen's Compensation Act*. The evidence seems to me all the other way" (2). There are, however, numerous cases, some of which I cited in *Harbon* v. *Geddes* (3), which show that the payment and receipt of money to which a workman was not entitled except under the Act and which are in no way qualified, warrant the conclusion of fact that the workman has exercised the option given him by the Act. Such payments and receipts are unequivocal acts indicating the workman's determination to pursue a particular course, and constitute an exercise of his option.

It only remains to apply the provisions of the Act as thus interpreted to the case now under appeal. The plaintiff—the respondent

(1) (1926) 2 K.B., at p. 394. (2) (1926) 2 K.B., at p. 410.
(3) (1935) 53 C.L.R., at pp. 44, 45.

in this court—on behalf of herself and her three children brought an action against the defendant—the appellant here—to recover damages from the defendant under the *Compensation to Relatives Act* (Lord Campbell's Act) for negligence resulting in the death of her husband. But if the husband's right to maintain an action and recover damages in respect of the injury which caused his death had been taken away, then the conditions which enabled the plaintiff to sue could not be satisfied (See *Harbon* v. *Geddes* (1)).

The appellant pleaded several pleas, but to the third, fourth and fifth of these pleas the respondent demurred. The third plea alleged in substance that the respondent's husband had claimed and received compensation from the appellant in accordance with the provisions of the *Workers' Compensation Act*, and that he recovered from his injury and received the final payment of the compensation under the Act, and signed a receipt for payments made to him under the said Act, and thereafter claimed further compensation, commenced proceedings, and filed an application for determination by the Workers' Compensation Commission of the liability of the appellant to pay further compensation, which was served upon the appellant and a day fixed for proceeding therewith. Assuming that " proceed " in sec. 63 (2) of the Act requires some legal proceedings, or the making of a claim that results in legal proceedings (Cf. *Harbon* v. *Geddes* (2) and *Bennett's Case* (3)), here the plea alleges that the deceased accepted compensation under the Act and signed receipts therefor and thereafter took proceedings to determine the liability of the appellant under the Act. All these matters of fact are, for the purposes of the demurrer, admitted to be true. They are not of doubtful significance, but clear and unequivocal: there is a claim to, and an acceptance of, benefits, and a proceeding under the Act. Consistently with the authorities, they are sufficient in their legal effect to constitute an exercise of the option to proceed under the Act, and thus exclude any right to proceed independently of the Act. The fourth plea is a variation of the third, but is even more explicit in its terms: the defendant claimed and received compensation under the Act, and thereafter

(1) (1935) 53 C.L.R., at p. 44. (2) (1935) 53 C.L.R. 33.
(3) (1926) 2 K.B., at p. 398.

H. C. OF A. 1936-1937. UNION STEAMSHIP CO. OF NEW ZEALAND LTD. v. BURNETT. Starke J.

claimed further compensation and exercised his option and elected to proceed under the Act and filed an application for such further compensation. The fifth plea (framed with regard to the judgment of *Atkin* L.J. in *Bennett's Case* (1) and some observations in *Harbon* v. *Geddes* (2)) is but another variant, and alleges that the deceased elected to and did proceed under the Act, and claimed and received compensation thereunder, and thereafter with full knowledge of all the material facts claimed further compensation thereunder.

In my opinion, this appeal should be allowed and the demurrer overruled.

DIXON J. This appeal was argued before the case of *Latter* v. *Muswellbrook Corporation* (3) was heard. But I think that in deciding it I ought to give effect to the opinion expressed by the majority of the court in that case rather than to my own individual view of the meaning of sec. 63 (2) of the *Workers' Compensation Act* 1926-1929 (N.S.W.). I have expressed my own opinion of the interpretation of that sub-section at some length in *Harbon* v. *Geddes* (4) and in *Latter's Case* (3). A comparison of the judgments in those cases will show that it is completely at variance with the interpretation adopted by *Latham* C.J., *Evatt* and *McTiernan* JJ.

The application of my view to the facts pleaded in the present appeal would have led to the same conclusion as that reached by the Supreme Court. For when the language of the pleas is examined none of them appears to allege enough to bring the case within the sub-section. The third plea necessarily admits that the worker died from his injuries. When, therefore, it states that he recovered from his injuries it must be understood to refer to a temporary recovery of capacity to work. At any rate it cannot be construed as alleging facts showing that the employer's liability to pay compensation was satisfied. It alleges that payment of compensation ceased and that thereafter the worker took proceedings under the Act and had a day fixed for hearing. According to my opinion this plea would afford no answer. It does not show that there was any satisfaction of the employer's liability. It does not show that any

(1) (1926) 2 K.B., at pp. 405-410.
(2) (1935) 53 C.L.R. 33.
(3) *Ante*, p. 422.
(4) (1935) 53 C.L.R. 33.

award was made. The commencement of the proceedings under the New South Wales Act could not be enough, for the reasons I have given in my former judgments. The fourth and fifth pleas use general language which might cause some embarrassment. But, on the whole, I think they should be construed as not intending to allege that the worker took any further overt steps. These pleas so construed differ from the third in imputing to the worker an intention to adhere to the remedies provided by the Act. But according to the view I have already expressed in the previous cases, intention is not the test. The pleas, therefore, would fail to answer the declaration if the view of the section which I hold had been adopted.

But that view has been rejected by the majority of the court and I propose to decide the appeal, not according to my own view, but according to the *ratio decidendi* of the judgments of *Latham* C.J. and *Evatt* J. and *McTiernan* J. in *Latter's Case* (1). As I understand it, that ratio makes a choice between the two remedies by a worker who is aware of his rights an indispensable condition of the application of sec. 63 (2). The fifth plea alleges facts which fulfil this condition and I am inclined to think that the fourth plea by the use of the expression " exercised his option and elected to proceed under the said Act " impliedly does so. In both these pleas it is alleged that the plaintiff took legal proceedings in pursuance of the election, and, if, as *Rich* J. and I think, legal proceedings are a necessary condition, and if this condition is cumulative upon that of what may be called election with knowledge, fulfilment of the cumulative condition is also alleged. It appears to me that these pleas allege that fulfilment of all the conditions necessary, according to the interpretation adopted by the majority of the court, to bring the case within sec. 63 (2).

It follows that the demurrer to the fourth and fifth pleas ought to have been overruled. I think the appeal should be allowed.

EVATT AND MCTIERNAN JJ. This appeal relates to demurrers raised by the plaintiff to each of three pleas of the defendant. In the action, brought under the *Compensation to Relatives Act*, the

(1) *Ante*, p. 422.

H. C. OF A. 1936-1937.

UNION STEAMSHIP CO. OF NEW ZEALAND LTD. v. BURNETT.

Evatt J. McTiernan J.

plaintiff was the wife of an employee of the defendant, whose death was alleged to have been caused by the negligence of the defendant company. The purpose for which special leave was asked by the defendant and granted by this court was to determine whether the facts set out in the third plea of the defendant constituted a good answer to the plaintiff's claim. That plea alleged (i) that the worker gave notice of injury to the defendant under the *Workers' Compensation Act*, and claimed and received certain compensation payments from the defendant; (ii) that the worker recovered from his injury; (iii) that the worker received a "final payment" of compensation under the Act, signing a receipt therefor; (iv) that the worker next claimed from the defendant further compensation under the Act; (v) that, upon a dispute arising as to the defendant's liability to pay further worker's compensation, the worker filed an application for determination before the Workers' Compensation Commission; and (vi) that notice of such application was duly served upon the defendant and, subsequently, notice of the day fixed for hearing of the application was also served upon the defendant.

The Full Court held that proof of the above facts did not necessarily answer the cause of action pleaded. We agree with the conclusion that judgment of the demurrer should be for the plaintiff, but for reasons different from those of the Full Court.

The Full Court's opinion was that "satisfaction" of a worker's rights to compensation under the Act must be established before he can be barred of his common law remedy in respect of the same injury. In accordance with this opinion, it was held that the facts set out in the plea stopped far short of an award or any other form of "satisfaction" under the Act.

In our opinion, the vice of the third plea is that it fails to allege that the worker ever became aware of his alternative right to proceed at common law, so that he could be said to have proceeded "at his option" under the statute. Our reasons for so holding are set forth in *Harbon* v. *Geddes* (1), *Latter* v. *Muswellbrook Corporation* (2), and *O'Connor* v. *S. P. Bray Ltd.* (3).

(1) (1935) 53 C.L.R. 33.
(2) *Ante*, p. 422.
(3) *Post*, p. 464.

We think that, for the purpose of this appeal, the fourth and fifth pleas of the defendant should not be regarded as answering the declaration. The fourth plea certainly introduced the allegation that the worker " exercised his option and elected to proceed under the said Act." But, in our opinion, this allegation was intended merely as an argumentative submission to the effect that the other facts alleged in the plea were equivalent in law to the position that the worker did " at his option " proceed under the Act in the sense required by sec. 63 (2). This interpretation of the fourth plea was borne out (i) by the manner in which counsel for the defendant conducted the argument on the special leave application in this court, and (ii) by the failure of the Full Court to advert to any contention that the fourth plea was intended to cover any matter of fact additional to those set out in the third plea and dealt with in its judgment.

The fifth plea is in the same category as the fourth. It is open to the special objection that it alleges on the worker's part " full knowledge of all the material facts " without condescending to specify any of such facts. But we do not regard the fifth plea as having been intended to raise, or as properly raising, any issue of law independently of that raised by the third plea. As in the case of the fourth plea, the Full Court's judgment gave no separate consideration to the fifth plea.

In our opinion, we should not here deal further with the question of the interpretation of sec. 63 (2) of the Act, because the defendant's liberty to amend his pleas remains, and a perfectly good formal plea may be pleaded by strictly following the terms of the section without unnecessary and dangerous flourishes. It is seldom satisfactory to determine questions like the present upon demurrer.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Norton, Smith & Co.*

Solicitors for the respondent, *Kennedy, Daniel & Co.*

J. B.