[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH OIL REFINERIES LTD. RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 20.

Latham C.J., Rich, Starke and Dixon JJ.

Workers' Compensation—Action by worker for damages for negligence in respect of injury—Receipt of three weekly payments of compensation—Refusal to accept further compensation—Return of moneys received as compensation—Workers' Compensation Acts 1916 *to* 1936 (*Q.*) (6 *Geo. V. No.* 35—1 *Edw. VIII. No.* 21), *sec.* 9 (1)*, *Schedule, clause* 24.

Clause 24 of the Schedule to the *Workers' Compensation Acts* 1916 *to* 1936 (Q) provides: "When the injury for which compensation is payable by the Insurance Commissioner under this Act was caused under circumstances creating also a legal liability in some other person to pay damages in respect thereof—(i) The worker may both take proceedings against that person to recover damages and may apply for compensation under this Act, but is not entitled to recover both damages and compensation."

Held:—

(1) That receipt of weekly sums as compensation amounts to recovery of compensation even if the full amount which the worker is to receive under the Acts has not been paid.

* Sec. 9 (1) of the *Workers' Compensation Acts* 1916 *to* 1936 provides: "Each worker who is injured by accident, whether at the place of employment or on his journey to or from such place or (being in the course of his employment or while under his employer's instructions) away from the place of employment, or his dependents in case of death of the worker, shall receive out of the State Accident Insurance Fund compensation in accordance with this Act, and except as in this Act is otherwise provided such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever."

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(2) That a worker who repays the money which he has received as compensation is not restored to the position of a worker who has not recovered compensation.

Decision of the Supreme Court of Queensland (Full Court): *Smith* v. *Commonwealth Oil Refineries Ltd.*, (1938) Q.S.R. 180, affirmed.

APPEAL from the Supreme Court of Queensland.

In an action commenced in the Supreme Court of Queensland Frederic Thornton Smith, a waterside worker, sought to recover from the Commonwealth Oil Refineries Ltd. £2,000 damages for injuries sustained by him by reason of the negligence of the defendant's servants in driving a motor-truck. The defendant, by its defence, denied that the plaintiff's injuries were caused by the negligence of its servants and alleged that they were caused or contributed to by the plaintiff's own negligence and alleged that the plaintiff's injuries were injuries for which compensation was payable by the Insurance Commissioner under the *Workers' Compensation Acts* 1916 *to* 1936 (Q.) and that the plaintiff had applied for and recovered under the Acts compensation in respect of his injuries, namely, three weekly payments, by reason whereof the plaintiff was not entitled to damages from or against the defendant in the action. The plaintiff, by his reply, admitted that the injuries referred to in the statement of claim were injuries for which compensation was payable under the *Workers' Compensation Acts* 1916 *to* 1936 and that he applied for and received in respect of his injuries payment of compensation under the Acts for three weeks, the last payment of which was received by him on the 2nd June 1937 in respect of the week ended 1st June 1937. It was further alleged in the reply that soon after the receipt of the said last payment the plaintiff informed the Insurance Commissioner that he would not accept any further payment of compensation under the Acts and the plaintiff refused to receive any further payments of compensation, and that, on the 10th July 1937, the plaintiff returned to the Insurance Commissioner the said three weeks' compensation.

The defendant then moved for judgment on the admissions of fact on the pleadings. The motion was referred to the Full Court of the Supreme Court, and it was held that the plaintiff had recovered compensation within the meaning of clause 24 of the schedule to

the *Workers' Compensation Acts* 1916 *to* 1936 and that judgment in the action should be entered for the defendant: *Smith* v. *Commonwealth Oil Refineries Ltd.* (1).

From that decision the plaintiff appealed *in forma pauperis* to the High Court.

Lehane, for the appellant. Compensation is not recovered by a worker until compensation has been received in full. The three weekly payments received by the appellant were not the total compensation to which he was entitled under the *Workers' Compensation Acts*. The appellant returned the moneys received, and it cannot be said that he has recovered compensation under the Acts. On the true construction of sec. 9 (1) it is only payment in accordance with the Act, i.e., the actual payment of the full amount prescribed, which takes away the worker's right of an action for damages. Sec. 9 (1) is the basic section and indicates the general intention of the legislature. The compensation mentioned in clause 24 is the compensation to which the worker is entitled under sec. 9 (1) of the Act. The appellant cannot be said to have recovered both damages and compensation unless this action were continued and judgment and satisfaction thereof obtained. It is the ultimate result that is the true test. [Counsel referred to *Aldin* v. *Stewart* (2); *Cumberland* v. *Lanarkshire Tramways Co.* (3); *Harbon* v. *Geddes* (4); *Harrison* v. *Wythemoor Colliery Co.* (5); *Huckle* v. *London County Council* (6); *Latter* v. *Muswellbrook Corporation* (7); *O'Connor* v. *S. P. Bray Ltd.* (8); *Oliver* v. *Nautilus Steam Shipping Co. Ltd.* (9); *Page* v. *Burtwell* (10); *Rouse* v. *Dixon* (11); *Union Steamship Co. of New Zealand Ltd.* v. *Burnett* (12); *Woodcock* v. *London and North Western Railway Co.* (13).] In all these cases the decisions are consistent with the worker having received the full compensation to which he was entitled. The dicta in those cases should not be applied to this case. In *Reid* v. *Stevenson* (14) the question as to

(1) (1938) Q.S.R. 180.
(2) (1916) S.C. 13.
(3) (1927) S.C. 407.
(4) (1935) 53 C.L.R. 33.
(5) (1922) 2 K.B. 674.
(6) (1910) 26 T.L.R. 580; 27 T.L.R. 112.
(7) (1936) 56 C.L.R. 422.
(8) (1937) 56 C.L.R. 464.
(9) (1903) 2 K.B. 639.
(10) (1908) 2 K.B. 758.
(11) (1904) 2 K.B. 628.
(12) (1937) 56 C.L.R. 450.
(13) (1913) 3 K.B. 139.
(14) (1928) S.C. 799.

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whether three weekly payments constituted recovery of compensation was not decided. The question decided there was a question of fact and not as to whether the worker had received payment in full. [Counsel also referred to *Attorney-General* v. *Arthur Ryan Automobiles Ltd.* (1)]. The decision in that case does not conclude this matter. That was a case of indemnity in respect of weekly payments received and retained by the worker. In this case the weekly payments have been returned so that the appellant is no longer in the position of a worker who has recovered compensation and therefore he is not debarred by clause 24 of the schedule to the Acts from pursuing this action.

McGill K.C. (with him *O'Sullivan*), for the respondent. If the appellant has recovered workers' compensation he is not entitled to recover damages. Compensation is recovered when the claim is allowed or at the latest when the first payment is received by the worker. Weekly payments constitute a recovery of compensation. It is immaterial that the whole compensation has not been received (*Reid* v. *Stevenson* (2) ; *Aldin* v. *Stewart* (3) ; *Oliver* v. *Nautilus Steamship Co. Ltd.* (4) ; *Page* v. *Burtwell* (5) ; *Woodcock* v. *London and North Western Railway Co.* (6) ; *Huckle* v. *London County Council* (7)). This case is concluded by *Attorney-General* v. *Arthur Ryan Automobiles Ltd.* (1).

LATHAM C.J. This is an appeal from an order made by the Full Court of the Supreme Court of Queensland directing that judgment be entered for the defendant in an action brought by Frederic Thornton Smith against the Commonwealth Oil Refineries Ltd.

On 11th May 1937 the driver of a motor truck belonging to the defendant collided with the plaintiff, who was riding a bicycle. The plaintiff claimed damages for negligence. By the defence it is alleged in par. 4 that the plaintiff's said injuries referred to in the statement of claim are injuries for which compensation is payable by the Insurance Commissioner under the *Workers' Compensation*

(1) (1938) 1 All E.R. 361.
(2) (1928) S.C. 799.
(3) (1916) S.C. 13.
(4) (1903) 2 K.B. 639.
(5) (1908) 2 K.B. 758.
(6) (1913) 3 K.B. 139.
(7) (1910) 26 T.L.R. 580 ; 27 T.L.R. 112.

Acts 1916 to 1936, and that the plaintiff has applied for and recovered under the said Acts compensation in respect of his said injuries, namely, three weekly payments of £4 3s. 4d. each, by reason whereof the plaintiff is not entitled to recover damages from or against the defendant in this action.

Par. 1 of the reply states : " The plaintiff admits that the injuries referred to in the statement of claim are injuries for which compensation is payable under the *Workers' Compensation Acts* 1916 *to* 1936, and that he applied for and received from the Insurance Commissioner in respect of the said injuries payment of compensation under the said Acts for three weeks at £3 2s. 8d. per week the last payment of which was received by him on 2nd June 1937 in respect of the week ended 1st June 1937."

Par. 2 of the reply states : " At the time of the said application and receipt of payment, the plaintiff was a patient in hospital suffering very seriously as a result of the said injuries and his wife required the money in order to meet necessary expenditure."

Par. 3 of the reply states : " Soon after the receipt of the said last payment the plaintiff informed the Insurance Commissioner that he would not accept any further payments of compensation under the said Acts and the plaintiff has refused to receive any further payments of such compensation."

Par. 4 states : " On 10th July 1937 the plaintiff returned to the Insurance Commissioner the said three weeks' compensation."

In that state of the pleadings the defendant moved for judgment, contending that clause 24 of the schedule to the *Workers' Compensation Acts* 1916 *to* 1936 of Queensland supplied the defendant with an answer to the claim made by the plaintiff.

Clause 24 of the schedule is introduced into the system of workers' compensation by sec. 15 of the Act. Clause 24 is as follows : " When the injury for which compensation is payable by the Insurance Commissioner under this Act was caused under circumstances creating also a legal liability in some other person to pay damages in respect thereof—(i.) The worker may both take proceedings against that person to recover damages and may apply for compensation under this Act but is not entitled to recover both damages and compensation ; and (ii.) if the worker has recovered compensation under

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this Act, the Insurance Commissioner shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall in default of agreement be settled by action, or, if the parties consent, by an industrial magistrate under this Act."

The defendant contends that the admitted receipt of three weekly payments of compensation amounted to recovery of compensation within the meaning of clause 24 of the schedule, par. 1, and therefore prevents the plaintiff from recovering damages, the plaintiff having already, if the contention is valid, recovered compensation.

The Act is an Act which, under sec. 8, requires employers to insure against liability to pay workers' compensation, and, under sec. 9, confers a right on a worker who is injured by accident whether at his place of employment or on his journey to or from such place or (being in the course of his employment or while under his employer's instructions) away from the place of employment to receive out of the State Accident Insurance Fund compensation in accordance with the Act, provided such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

Sec. 14 sets out the scale of payments, and provides in case of death for payment of sums specified in the Act and in the case of total or partial incapacity for weekly payments with certain limits as set out in the section.

Sec. 16 contains provisions relating to the civil liability of the employer. The employer may be liable at common law for negligence. The section contains provisions dealing with the civil liability of the employer and specifies the conditions under which a worker may enforce his rights under the Act or his rights independently of the Act. It is not necessary on this appeal to deal with this rather difficult section.

Clause 24 of the schedule (which I have already quoted) relates to the case where injury for which compensation is payable by the Insurance Commissioner was caused in circumstances creating a legal liability in some other person to pay damages in respect thereof.

In this case, on the basis of the allegations in the statement of claim, there was a legal liability in the defendant to pay damages in respect of injuries caused to plaintiff with respect to which he had

received the weekly payments mentioned. Therefore the case falls within the introductory words of clause 24. The question is whether the plaintiff has recovered compensation under the Act.

The learned judges of the Full Court have held by a majority judgment that the plaintiff has recovered compensation and therefore is not entitled to recover in the action which he has now brought. It is contended for the plaintiff—first, that upon the true construction of clause 24 there is no recovery of compensation by a worker unless the full amount of compensation which he is to receive under the Act has been paid to him. Secondly, it is contended that if partial payment has been made as, for example, by way of weekly payments, but the full amount has not been recovered, and, even if this should be held to amount to recovery of compensation, yet, if the moneys received have been repaid, the worker is no longer in the position of a worker who had recovered compensation under the Act, and therefore clause 24 constitutes no obstacle to success in the action.

In the first place there are several authorities which decide that under such a provision as this neither making a demand or claim under the *Workers' Compensation Acts* on the one hand, nor obtaining judgment at common law on the other hand, amounts to recovery. Recovery for the purpose of such a provision as this means receipt of moneys. It has been so held in *Cumberland* v. *Lanarkshire Tramways Co.* (1).

There are provisions similar to this clause 24 in other legislation. Reference has been made to the decisions of this court in *Harbon* v. *Geddes* (2) and in *Union Steamship Co. of New Zealand Ltd.* v. *Burnett* (3), and to some other cases which, however, deal with sec. 63 of the New South Wales *Workers' Compensation Act*, which is a section analogous to but not identical with sec. 16 of this Act. These decisions, I think, are not of assistance in this case.

The words of clause 24 appear to be reasonably clear. The worker "is not entitled to recover both damages and compensation." If the word "recover" is interpreted as involving receipt, then if the worker receives a sum of money and that sum of money is paid as,

(1) (1927) S.C. 407.
(2) (1935) 53 C.L.R. 33.
(3) (1937) 56 C.L.R. 450.

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and received as, compensation it would appear prima facie to be the case that he has recovered compensation under the Act and therefore would be excluded from recovering damages. This view is supported by actual decisions of the courts—decisions on identical provisions. Sec. 6 of the English Act of 1906 and sec. 30 of the English Act of 1925 are in the same terms as clause 24 of the schedule in this case, except that in the English statutes there is no reference to the Insurance Commissioner.

Reference has been made to a number of cases dealing with this provision which do not, as I think and as Mr. *Lehane* has shown, decide the point now before the court. In *Page* v. *Burtwell* (1) it was decided that recovery meant "apply for and receive" compensation, but there the court merely read the statement of facts as consistent with the view that the worker had received payment in full, and it appears to me that that case cannot be regarded as an authority directly in point. In *Aldin* v. *Stewart* (2) there was actual receipt of payments and it was held this amounted to recovery, but no question was raised as to whether payment in full was necessary in order to make the provisions of the relevant section applicable.

But in *Reid* v. *Stevenson* (3) there is a decision that appears to me to be directly in point. In that case three payments of weekly sums have been made to a worker in respect of an injury due to an accident. He had actually received them, and it was found that he knew that the last payment was made as compensation. He then refused to accept other payments. It was held that in those circumstances the provisions of sec. 30 of the *Workers' Compensation Act* of 1925 applied because he had recovered in fact compensation in respect of injuries.

A more recent case, *Attorney-General* v. *Ryan Automobiles Ltd.* (4), is a case in which a claim was made on behalf of an employer for indemnity under sec. 30 of the *Workmen's Compensation Act* 1925 —a provision corresponding with clause 24 of the schedule. It was made in these circumstances. Weekly payments had been made to the worker, and the employer sought to establish a right of

(1) (1908) 2 K.B. 758.
(2) (1916) S.C. 13.
(3) (1928) S.C. 799.
(4) (1938) 1 All E.R. 361.

indemnity against the person responsible for the injury to the worker, and got judgment; further payments were then made to the worker, and another action was brought for indemnity, and it was contended as a defence that *res judicata* was an answer. That defence failed, and an order made for indemnity on the second occasion was upheld.

This decision is necessarily based on the view that receipt of weekly sums as compensation under the *Workers' Compensation Acts* means recovery of compensation under such provision even if further payments may still fall due, in fact even if those payments be actually made. Each receipt of such weekly sums is a recovery. In my opinion, the first contention of the appellant fails.

The second contention is that repayment of the moneys received as compensation places the appellant in the position of a worker who has not recovered compensation. This matter has been considered by the Court of Appeal in the case of *Huckle* v. *London County Council* (1). It was there held that the fact of recovery constituted a bar and that subsequent repayment was irrelevant; when a worker had "recovered," he then lost the right which he might otherwise have exercised; and he was not restored to the position of a worker not having recovered by reason of repaying the money.

In my opinion, the appeal should be dismissed.

RICH J. I concur.

STARKE J. I concur.

DIXON J. I concur.

Appeal dismissed.

Solicitors for the appellant, *F. J. O'Sullivan & Ruddy.*
Solicitor for the respondent, *Neil O'Sullivan.*

B. J. J.

(1) (1910) 26 T.L.R. 580; 27 T.L.R. 112.