HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE, HEYDON, KIEFEL AND BELL JJ

GLENN ANDREW JOSEPH HICKSON APPELLANT

AND

GOODMAN FIELDER LIMITED RESPONDENT

Hickson v Goodman Fielder Limited [2009] HCA 11
12 March 2009
S470/2008

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 24 April 2008.*

3. *In lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

A S Bell SC with D J Hooke for the appellant (instructed by Beilby Poulden Costello)

J T Gleeson SC with P Kulevski for the respondent (instructed by Eakin McCaffrey Cox Solicitors)

CATCHWORDS

Hickson v Goodman Fielder Limited

Workers' compensation – Contributory negligence – Worker recovers workers' compensation as a result of injury – Worker brings damages claim against third party tortfeasor – Damages claim settled – Employer seeks recovery of workers' compensation pursuant to *Workers Compensation Act* 1987 (NSW), s 151Z(1)(b) – Whether *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 10(2) operates to reduce amount of repayment on account of worker's contributory negligence where damages claim settled.

Statutes – Interpretation – Whether *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 10(2) operates on damages recovered by way of settlement – Whether reduction of repayment proportionate or by specific amount.

Words and phrases – "damages recoverable", "to the same extent".

Law Reform (Miscellaneous Provisions) Act 1965 (NSW), ss 9, 10.
Workers Compensation Act 1987 (NSW), s 151Z(1), (5).

1 GUMMOW J. The appeal should be allowed and consequential orders made as proposed by Bell J. I agree with her Honour's reasons.

2 HAYNE J. I agree with Bell J.

3 HEYDON J. I agree with Bell J.

4 KIEFEL J. I agree with the orders proposed by Bell J for the reasons given by her Honour.

5 BELL J. On 12 March 2003, the appellant ("Mr Hickson") suffered serious injury as the result of a collision between his pushbike and a motor vehicle driven by Mr Ala. The accident occurred while Mr Hickson was on a journey to which s 10 of the *Workers Compensation Act* 1987 (NSW) ("the Compensation Act") applies. Accordingly, his injury for the purposes of the Compensation Act is taken to have occurred in the course of his employment with the respondent ("Goodman Fielder"). Goodman Fielder made compensation payments to Mr Hickson. Mr Hickson also had rights in tort against Mr Ala.

6 Mr Hickson sued Mr Ala in tort in the District Court of New South Wales ("the tortfeasor action"). Goodman Fielder was not a party to that action. Mr Ala filed Notice of Grounds of Defence containing extensive particulars of Mr Hickson's alleged contributory negligence. It was common ground in the later litigation between Goodman Fielder and Mr Hickson that contributory negligence had been a live issue in the tortfeasor action.

7 The tortfeasor action was settled by Mr Hickson and Mr Ala. Effect to the settlement was given by an order in the District Court (Charteris DCJ) for judgment in favour of Mr Hickson for $2.8 million plus costs. The order was pronounced orally on 6 June 2006. No formal order was settled and entered.

8 Goodman Fielder commenced proceedings in the District Court on 7 June 2006 against Mr Hickson seeking repayment of the amount of the compensation which it had paid to Mr Hickson, a sum of $607,315.43, pursuant to s 151Z(1)(b) of the Compensation Act[1] ("the repayment action").

9 The Compensation Act manifests a policy against the receipt of what might be called "double compensation". This is evident in provisions in Pt 5 which include those of s 151Z. In a case such as this, in which a worker recovers, first, compensation and, secondly, damages from a person other than the employer, s 151Z(1)(b) provides that the worker is liable to repay out of those damages the amount of compensation which has been paid in respect of the injury and that the worker is not entitled to any further compensation.

10 Under s 9(1)(a) of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW)[2] ("the Law Reform Act"), Mr Hickson's claim against Mr Ala was not defeated by his contributory negligence but the damages recoverable by him were subject to reduction on this account[3]. Section 10(2) of the Law Reform Act provides for the reduction in the liability of the worker to repay workers'

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1 The appropriate text of the Compensation Act is found in Reprint No 8.

2 The appropriate text of the Law Reform Act is found in Reprint No 3.

3 Section 9(1)(b) of the Law Reform Act.

compensation in a case in which the damages recoverable at common law are reduced on account of contributory negligence.

11 In answer to Goodman Fielder's claim, Mr Hickson pleaded that his actions on 12 March 2003 contributed to his injuries and that his liability to repay compensation to Goodman Fielder was reduced to the same extent that the damages recoverable by him against Mr Ala were reduced.

12 The principal question raised by the appeal is whether the reduction in the liability provided by s 10(2) of the Law Reform Act operates only where the third party tortfeasor is sued to judgment and the court has made a finding of the extent to which it is just and reasonable that the damages recoverable are reduced having regard to the worker's share in responsibility for the damage.

13 In the repayment action the District Court was asked to determine three questions separately. The first question was whether s 10(2) of the Law Reform Act can operate to reduce the amount of workers' compensation benefits repayable to Goodman Fielder from damages recovered as the result of a settlement of Mr Hickson's action against Mr Ala without any determination by a court concerning contributory negligence and the quantum of damages (question 1(a)). Kearns DCJ answered this question "yes". His Honour went on to hold, subject to the rules of evidence, that evidence was admissible in the repayment action to establish the extent to which the damages recovered by Mr Hickson as a result of the settlement of the tortfeasor action were in fact reduced on account of his contributory negligence (question 1(b)). His Honour answered the third question, which was expressed to be in the alternative to the second, holding that evidence was admissible to establish the degree of Mr Hickson's contributory negligence and the quantum of the damages to which he would have been entitled without reduction for contributory negligence (question 3)[4].

14 An appeal by Goodman Fielder to the New South Wales Court of Appeal was successful (Giles JA and Hislop J; Hodgson JA dissenting)[5]. The Court of Appeal set aside the answers to the questions given by the District Court and answered "no" to question 1(a) with the result that questions 1(b) and 3 did not arise.

15 By special leave Mr Hickson appeals to this Court. He seeks reinstatement of the position established in the District Court and an order dismissing the appeal from that Court to the Court of Appeal. For the reasons

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4 The numbering of the questions 1(a), 1(b) and 3 is unexplained.

5 *Goodman Fielder Ltd v Hickson* [2008] NSWCA 69.

which follow, the appeal to this Court should be allowed and the consequential orders sought by Mr Hickson should be made.

The legislative antecedents of Pt 5 of the Compensation Act

16 It is appropriate to refer to the legislative antecedents of the relevant provisions of Pt 5 of the Compensation Act. Section 6 of the *Workmen's Compensation Act* 1897 (UK) ("the 1897 Act") stated:

> "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person."

17 The 1897 Act was replaced by the *Workmen's Compensation Act* 1906 (UK) ("the 1906 Act"). Section 6 of that Act spelled out more fully both the prohibition upon double recovery by the worker and the obligation of the tortfeasor to indemnify the employer. Section 6 of the 1906 Act stated:

> "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof –
>
> (1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and
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> (2) If the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, 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, by consent of the parties, by arbitration under this Act."

18 In *Tickle Industries Pty Ltd v Hann*[6] this Court considered a similar provision of the Northern Territory workers' compensation legislation.

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6 (1974) 130 CLR 321; [1974] HCA 5.

Barwick CJ said that s 6 of the 1906 Act had provided the origin of the workers' compensation legislation as developed throughout Australia[7]. In New South Wales like provision was later made in s 64 of the *Workers' Compensation Act* 1926 (NSW) ("the 1926 Act").

19 The tripartite legal relationship between worker, employer and tortfeasor, which was regulated in the United Kingdom by s 6 of the 1897 Act, by s 6 of the 1906 Act and, in New South Wales, by s 64 of the 1926 Act, differed in a significant respect from the tripartite relationship between Mr Hickson, Goodman Fielder and Mr Ala. Before the enactment of the Law Reform Act the position in New South Wales was that Mr Hickson's claim in tort against Mr Ala was liable to defeat upon proof of contributory negligence and no apportionment was possible under the common law[8].

20 The effect of the decision of the Court of Appeal is that s 10(2) of the Law Reform Act does not operate on the amount of compensation repayable by Mr Hickson to reflect the common ground between Goodman Fielder and Mr Hickson that contributory negligence had been a live issue in the settled tortfeasor action. It is accepted that this would not have been so had the tortfeasor action proceeded to trial with a determination by the District Court of the total damages that would have been recoverable had there been no contributory negligence by Mr Hickson[9].

21 Section 9(1)(b) of the Law Reform Act states:

> "the damages recoverable in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

22 The issue to which question 1(a) was directed in the District Court concerns the construction of s 10(2) of the Law Reform Act, which reads:

> "If the claimant is liable to repay compensation to his or her employer under section 64(1)(a) of the [1926 Act] or under section 151Z of the [Compensation Act], the amount of compensation so repayable is to be reduced to the same extent as the damages recoverable by the claimant are reduced under section 9."

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7 (1974) 130 CLR 321 at 326 and see also *Government Insurance Office of New South Wales v C E McDonald (NSW) Pty Ltd* (1991) 25 NSWLR 492 at 495-496.

8 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 11 [21]; [1999] HCA 6.

9 As required by s 11 of the Law Reform Act.

23 As noted, the effect of the decision of the Court of Appeal is that a critical determinant is the settlement of the tortfeasor action.

24 The predecessor of s 10(2) (s 10(1)(d)) did not refer to the extent of the damages "reduced under section 9". Section 10(1)(d) as originally enacted was in these terms:

> "where the claimant is liable to repay compensation to his employer pursuant to section 64(a) of the [1926 Act], the amount of compensation so repayable shall be reduced to the same extent as the damages recoverable by him".

25 The *Law Reform (Miscellaneous Provisions) Amendment Act* 2000 (NSW) ("the Amendment Act") inserted a new Pt 3 into the Law Reform Act dealing with contributory negligence. The evident purpose of the amendments introduced by the Amendment Act was to overcome the decision of this Court in *Astley v Austrust Ltd*[10]. In the Parliamentary Secretary's speech on the second reading it was said that the Bill "also rewrites the apportionment provisions in plainer language."[11] It does not appear that the amendments were intended to alter the effect of s 9 and s 10 as originally enacted.

The Court of Appeal's reasons

26 The reasoning of the Court of Appeal did not depend upon the inclusion of the words "under section 9" in s 10(2). The majority considered that the Law Reform Act as originally enacted was against reduction of the liability to repay compensation in cases in which the tortfeasor action was settled. Giles JA said that while the words of s 10(2) differed in some respects from the words of its predecessor, s 10(1)(d), the two provisions were to the same effect, which is that the reduction in liability is tied to "the objective fact of the court-determined reduction, ascertainable through the recording required by s 11."[12]

27 Giles JA considered that a "trial within a trial", in the repayment action, as to the damages recoverable by the worker and the extent of the reduction produced an unsatisfactory situation[13]. He pointed out that the worker's concern in the repayment action will have changed, in the tortfeasor action it would have

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10 (1999) 197 CLR 1.

11 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 November 2000 at 10295.

12 *Goodman Fielder Ltd v Hickson* [2008] NSWCA 69 at [17].

13 *Goodman Fielder Ltd v Hickson* [2008] NSWCA 69 at [24].

been to deny or minimise contributory negligence, in the repayment action it will be to admit and maximise it. The language of the provision, in his Honour's view, was against permitting the question to be litigated in the repayment action since the court would be determining what the court hearing the tortfeasor action would have considered just and equitable by way of reduction. This would not allow of a reduction to the same extent as "the damages recoverable by the claimant *are* reduced under section 9"[14]. His Honour considered that the measure of the reduction under s 10(2) is the court's determination and that this reflected the legislature's preference for certainty[15]. He was mindful that most workers' claims, including those in which there is a question of contributory negligence, are resolved by settlement and that s 151Z(5) recognises settlements[16]. The text of s 151Z(5) is set out later in these reasons[17].

28 Hodgson JA, in dissent, considered the question to be not to what extent the damages "recovered" by the claimant are reduced but to what extent are the damages "recoverable by the claimant reduced"[18]. His Honour considered that the court hearing the repayment action may come to its own view as to what a court hearing the case between the claimant and the tortfeasor would reasonably have thought to be a just and equitable reduction[19].

The notice of contention

29 Before addressing the submissions on the appeal it is convenient to deal with the Notice of Contention by which Goodman Fielder sought to affirm the judgment of the Court of Appeal on a ground that was not argued before that Court. The contention is that s 10(2) of the Law Reform Act when read with s 151Z of the Compensation Act operates to reduce the amount of the repayment by the worker to the employer only in circumstances in which the damages recovered by the worker from the tortfeasor, as reduced under s 9 of the Law Reform Act, are less than the amount of workers' compensation that is otherwise repayable. Since the point was one of pure construction the Court entertained argument on it. For the reasons that follow the contention should be rejected.

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14 *Goodman Fielder Ltd v Hickson* [2008] NSWCA 69 at [25] (emphasis in original).

15 *Goodman Fielder Ltd v Hickson* [2008] NSWCA 69 at [31].

16 *Goodman Fielder Ltd v Hickson* [2008] NSWCA 69 at [26].

17 At [42].

18 *Goodman Fielder Ltd v Hickson* [2008] NSWCA 69 at [40].

19 *Goodman Fielder Ltd v Hickson* [2008] NSWCA 69 at [40].

30 The provisions of s 151Z that are relevant to the issue raised by the contention are set out below.

"**151Z Recovery against both employer and stranger**

(1) If the injury for which compensation is payable under this Act was caused under circumstances creating a liability in some person other than the worker's employer to pay damages in respect of the injury, the following provisions have effect:

(a) the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for payment of that compensation, but is not entitled to retain both damages and compensation,

(b) if the worker recovers firstly compensation and secondly those damages, the worker is liable to repay out of those damages the amount of compensation which a person has paid in respect of the worker's injury under this Act, and the worker is not entitled to any further compensation,

(c) if the worker firstly recovers those damages the worker is not entitled to recover compensation under this Act,

(d) if the worker has recovered compensation under this Act, the person by whom the compensation was paid is entitled to be indemnified by the person so liable to pay those damages (being an indemnity limited to the amount of those damages),

(e) if any payment is made under the indemnity and, at the time of the payment, the worker has not obtained judgment for damages against the person paying under the indemnity, the payment is, to the extent of its amount, a defence to proceedings by the worker against that person for damages,

(e1) if any payment is made under the indemnity and, at the time of the payment, the worker has obtained judgment for damages against the person paying under the indemnity (but judgment has not been

satisfied), the payment, to the extent of its amount, satisfies the judgment,

…"

31 Goodman Fielder submitted that the purpose of s 151Z is to ensure that the worker retains on a net basis the greater of amounts of statutory compensation actually paid and the damages recovered from the tortfeasor. Once contributory negligence ceased operating as a complete defence, and provision was made for apportionment of damages, the prospect of the damages recovered by the worker being less than the amount of compensation paid by the employer became a real one[20]. Understood in this light, the purpose of s 10(2) (and its predecessor) is said to be to ensure that the worker is relieved of liability to repay compensation "to the full extent of the damages ignoring their reduction for contributory negligence." The words "to the same extent" in s 10(2), Goodman Fielder submitted, convey that the amount of damages out of which the repayment is to be made is identified *after* making the same deduction as was made for contributory negligence in the tortfeasor action.

32 The Law Reform Act was enacted following the report of the New South Wales Law Reform Committee, which adopted the report and recommendations of a Sub-Committee chaired by Herron CJ[21]. The Sub-Committee's recommendation was that the contributory negligence of a plaintiff no longer be a defence in bar to an action for damages based on the negligence of another and that in such a case the damages recoverable be reduced to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage[22]. The Sub-Committee noted that if its recommendation was accepted, a number of "fringe problems" would require solution. It appended its comments on these problem areas, including on the impact of the proposed reform on the worker's obligation to repay workers' compensation. In this respect the Sub-Committee reported[23]:

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20 See *Watson v Newcastle Corporation* (1962) 106 CLR 426 at 446 per Windeyer J; [1962] HCA 6.

21 New South Wales, Law Reform Committee, *Contributory Negligence*, Interim Report No 3, (1962).

22 New South Wales, Law Reform Committee, *Contributory Negligence*, Interim Report No 3, (1962) at 8.

23 New South Wales, Law Reform Committee, *Contributory Negligence*, Interim Report No 3, (1962) at 9-10; set out in New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 7 December 1965 at 2921.

"In New South Wales in considering the effect of the proposed reform in relation to Workers' Compensation the following matters have been posed by all who attended before the Sub-committee and particularly in the valuable report of the New South Wales Bar Association:

(i) Where a worker first recovers Workers' Compensation and then a reduced verdict at law against a Third Party should his obligation to repay the Workers' Compensation be to repay it in full (as Section 64(a) [of the 1926 Act] now requires) or should his obligation be to repay it reduced by an amount proportionate to the diminution of his damages.

(ii) Where a worker recovers Workers' Compensation but does not pursue any right of action he may have at law, and the employer sues a tort feasor at law (as Section 64(b) enables) should any contributory negligence on the worker's part be effective to reduce the amount which the employer might be able otherwise to recover.

The problems posed by (i) and (ii) above have been considered and dealt with by legislation in England, Queensland, Tasmania and Western Australia, which the Sub-committee have considered …

Whilst contributory negligence has been an absolute bar to success in actions at law, on the other hand the trend of Workers' Compensation has been that with few exceptions (eg serious and wilful misconduct) the fault of the worker has not deprived him of or cut down his workers' compensation. It is the view of the Sub-committee that – (a) it is just and equitable that the worker under S 64(a) should be obliged to repay compensation in an amount reduced in proportion to the diminution of his damages by reason of his own contributory negligence and (b) the same reductions be applied for the benefit of a tort feasor in an action by an employer under the provisions of Section 64(b) and (c) consequentially there should be a similar reduction in the amount taken as satisfaction under S 64(a)."

33 The Law Reform (Miscellaneous Provisions) Bill was introduced into the Parliament on 30 November 1965. Part III (cll 8-11) of the Bill dealt with contributory negligence. The Bill did not make provision for reduction of the repayment of workers' compensation in cases in which the damages recoverable by the worker were reduced on account of contributory negligence.

34 An amendment, inserting the predecessor to s 10(2) into the Bill, was moved and approved in the Legislative Council and adopted in the Legislative Assembly. The Hon R Downing, the leader of the Opposition in the Legislative Council, moving the amendment in the Legislative Council, gave as an illustration the case of a worker injured on his way to or from work by a negligent driver and who, at the prompting of his workers' compensation insurer,

brings proceedings in negligence against the third party. Mr Downing went on to say[24]:

> "If perchance the worker entitled to compensation is guilty of any degree of negligence, his verdict would be cut down. For example, suppose his verdict were cut down by 50 per cent because the court came to the conclusion that the worker's negligence contributed 50 per cent to the accident. The fact that he contributed 50 per cent to the accident by his own negligence would not debar him from receiving compensation. He gets compensation and it is to the advantage of the employer and the employer's insurer that he should take this action against the third party. … If workers' compensation payments have been made to an employee, and under the Act at present he is required to repay the sum to the insurer, the amount that he has to repay to the insurer under the Workers' Compensation Act should be reduced by the same amount as his verdict has been reduced by the jury or judge."

35 In supplementary written submissions filed on Goodman Fielder's behalf, the Court's attention was drawn to the legislative history, and it was acknowledged that the argument in the Notice of Contention was weakened by this background material insofar as it bore on the intent of the Legislature.

36 The contention does not address the reference in s 151Z(1)(b) to the repayment of the amount of the compensation "out of those damages". It is not necessary to determine whether sub-s (1)(b) confers upon the employer a preferential or secured interest in the damages recovered[25]. The point to be made is that the damages out of which the repayment is to be made are those recovered by the worker. In the event that the damages are less than the compensation paid there is no fund from which to repay that part of the compensation which exceeds the damages recovered. This further weakens the argument in support of the contention.

37 Goodman Fielder submits that the operation of those provisions of s 151Z(1) which confer an indemnity on the employer against the tortfeasor, pars (d), (e) and (e1), provide support for its contention. An employer who brings proceedings pursuant to the statutory indemnity is said to be entitled to full recovery of the amount of the compensation paid. This is said to be inconsistent with reduction in the amount of the repayment by the worker under s 10(2) in any but the confined circumstances asserted. The submission

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24 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 7 December 1965 at 2920.

25 Cf *Workers' Compensation and Injury Management Act* 1981 (WA), s 92(c).

overlooks that s 10(2) speaks to s 151Z(1)(b) and not to pars (d), (e) and (e1). It is not necessary to consider the operation of pars (d), (e) and (e1) for the determination of the appeal. However, it is to be observed that there is no necessary incongruity under a statutory no-fault compensation scheme in treating the injured worker differently from the tortfeasor.

38 The text of s 10(2) is against acceptance of Goodman Fielder's contention, since that contention requires reading into the provision the limitation that is asserted and there is no warrant to do so.

The resolution of the appeal

39 Returning to the appeal, the provisions of s 149(1) of the Compensation Act define "damages", for the purposes of Pt 5, as including:

> "(a) any form of monetary compensation, and
>
> (b) without limiting paragraph (a), any amount paid under a compromise or settlement of a claim for damages (whether or not legal proceedings have been instituted)".

40 The definition excludes certain matters including compensation under the Compensation Act itself (s 149(1)(c)). The opening words of s 151Z(1) and the words of par (a) reflect antecedents in the United Kingdom legislation of 1897 and 1906. In the paragraphs that follow this statement of general principle, provision is made in temporal sequence. If the worker first recovers those damages against the tortfeasor, the worker is not entitled to recover compensation under the Compensation Act (s 151Z(1)(c)). This was not the sequence of events in determining the liabilities between Mr Hickson, Goodman Fielder and Mr Ala. Before recovering in the tortfeasor action, Mr Hickson had received compensation payments from Goodman Fielder. This situation is governed by s 151Z(1)(b). As noted, s 10(2) of the Law Reform Act is linked directly to s 151Z(1)(b). It is necessary to consider the operation of the two provisions in combination. All questions relating to matters arising under s 151Z are, in default of agreement, to be settled by action (s 151Z(1)(f)). This provides the statutory basis for the action by Goodman Fielder against Mr Hickson for repayment under s 151Z(1)(b)[26]. The reference to the recovery of damages in par (b) has antecedents in the 1897 Act and the 1906 Act. Authorities dealing with those provisions established that the term "recover" was not confined to

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26 See *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 313 [65]; [1998] HCA 20.

recovery by legal process: a worker had recovered compensation, for example, if the employer recognised a claim by making payment[27].

41 In *Watson v Newcastle Corporation*[28] Windeyer J, speaking of s 64 of the 1926 Act, said:

> "Moreover, throughout s 64 the word 'recover' must, it seems, mean not the recovery of a judgment for damages or of an award of compensation, but the actual receipt of moneys, whether as the result of satisfaction of a judgment or award or by the settlement of a claim."

42 Section 151Z(5), which was inserted by the *Workers Compensation Legislation (Amendment) Act* 1994 (NSW), provides:

> "For the avoidance of doubt, this section applies and is taken always to have applied to the recovery of compensation or damages, whether or not the compensation or damages were paid under an award or judgment. For example, compensation or damages may be paid under an agreement."

43 When read with s 9(1), the opening expression in s 10(2) of the Law Reform Act, "[i]f the claimant …", is apt to identify Mr Hickson. This is because Mr Hickson is a person who suffered the damage as a result partly of his failure to take reasonable care and partly of the wrong of Mr Ala. The case for Goodman Fielder is that the closing words of s 10(2) cannot apply to the circumstances of this case because the amount paid under a settlement of Mr Hickson's claim against Mr Ala for damages was not "reduced under section 9". However, the relevant condition which triggers the operation of s 10(2) is identified in the terms of the sub-section as the liability of Mr Hickson under s 151Z and, as has been explained above, the "damages" to which s 151Z speaks include any amount paid, as here, under the settlement of the tortfeasor action. The closing words of s 10(2) describe the measure of the reduction, which is to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

44 The circumstance that in the repayment action the court may be required to determine the damages recoverable by Mr Hickson and the extent of reduction under s 9 is a reflection of the fact that the parties in the repayment action are not the same as in the tortfeasor action. The fact that this may involve a "trial within a trial" is an incident of the working out of the respective liabilities under the statutory scheme and the common law. As Giles JA noted, under s 151Z(2) the

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27 *Page v Burtwell* [1908] 2 KB 758 at 762, 763, 764; *Woodcock v London and North Western Railway Company* [1913] 3 KB 139 at 145.

28 (1962) 106 CLR 426 at 445.

court is called upon to determine the damages which the worker could have recovered from the employer in order to arrive at a reduction in the worker's damages[29]. The desirability of finality does not justify reading s 10(2) as confined to those cases in which the tortfeasor action proceeds to judgment with a curial determination of the extent of the worker's contributory negligence under s 9(1)(b).

Absolute or proportionate reduction under s 10(2)?

45 On the appeal the parties made submissions concerning one aspect of the interpretation of s 10(2) of the Law Reform Act which was not raised by the questions that Kearns DCJ was asked to determine. It concerns the amount of the reduction and depends upon the meaning of the words "to the same extent" in the provision. Mr Hickson submits that his liability to repay the compensation is reduced by the amount by which the total damages that would have been recoverable are reduced on account of his contributory negligence. This, it is submitted, ensures that to the extent Mr Hickson is under-compensated by Mr Ala because of Mr Hickson's own fault he does not lose the benefit of his no-fault statutory compensation.

46 The significance of the distinction is illustrated in the submissions made on Mr Hickson's behalf. Assume a worker is 25 per cent responsible for his injury and at the date of resolution of his common law claim has received $800,000 in workers' compensation. The worker's undiscounted damages are assessed at $4 million. After reduction for his contributory negligence, the worker is entitled to an award of $3 million damages on his common law claim. His damages have been reduced under s 9 of the Law Reform Act on account of his contributory negligence by an amount of $1 million. On the interpretation of s 10(2) favoured by Mr Hickson there is no liability to repay any of the compensation received because it is less than the amount by which the damages have been reduced on account of contributory negligence. On the alternative interpretation, for which Goodman Fielder contends, the liability to repay the compensation is reduced by 25 per cent being the proportion by which the damages were reduced. In this example the worker is required to repay the compensation less 25 per cent, an amount of $600,000, and in the result the worker retains a total of $2.4 million in common law damages.

47 Although the issue is not raised by the appeal, it is appropriate to say something about it since it was addressed in the parties' submissions and it is a question of construction that may well arise when the proceedings are returned to the District Court.

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29 *Goodman Fielder Ltd v Hickson* [2008] NSWCA 69 at [24].

48 Mr Hickson submitted that the legislative history provides support for the reduction under s 10(2) being the actual amount by which the damages are reduced. This is because Mr Downing, moving the amendment to the Law Reform (Miscellaneous Provisions) Bill in the Legislative Council, proposed that the amount the worker has to repay be reduced "*by the same amount as* his verdict has been reduced"[30].

49 The extrinsic material does not assist Mr Hickson. In the debate that followed Mr Downing's proposed amendment, the Minister, after making extensive reference to the report of the Sub-Committee (including the passage that is extracted earlier in these reasons), expressed his understanding that the Bill gave effect to all of the Sub-Committee's recommendations[31]. Mr Downing's stated concern was that effect had not been given to the Sub-Committee's recommendation with respect to the reduction in repayment of compensation[32]. The view of the Sub-Committee (contained in the passage of the report that I have set out) was that the reduction should be proportionate.

50 It is clear that the reduction for which s 9(1)(b) of the Law Reform Act provides involves an exercise in apportionment[33] and that the words "to such extent" are used to convey "to the degree". While, in some contexts, "extent" may mean "amount"[34], the use of the formulation "to the same extent" in s 10(2) in a context in which it is linked to the reference "to such extent" in s 9(1)(b) is against finding that it is intended to refer to the amount in money and not to proportionate reduction. It strains the language of s 10(2) to read "to the same extent" as meaning "in the same amount". The reduction in liability to repay compensation for which s 10(2) provides is proportionate to the reduction in the damages recoverable on account of the worker's contributory negligence[35].

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30 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 7 December 1965 at 2920 (emphasis added).

31 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 7 December 1965 at 2922.

32 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 7 December 1965 at 2925.

33 Section 15 of the Law Reform Act.

34 *The Oxford English Dictionary*, 2nd ed (1989).

35 This conclusion is consistent with the analysis of the operation of s 10(1)(d) of the Law Reform Act (the predecessor to s 10(2)) in association with s 64(a) of the 1926 Act: *Government Insurance Office of New South Wales v C E McDonald (NSW) Pty Ltd* (1991) 25 NSWLR 492 at 498-499 per Handley JA (Priestley JA and

(Footnote continues on next page)

Orders

51 For these reasons the orders that I propose are as follows:

1. Appeal allowed with costs.

2. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 24 April 2008.

3. In lieu thereof, order that the appeal to that Court be dismissed with costs.

Hope AJA concurring); and s 10(2) and s 151Z(1) in *Tamerji v Rhee* [2008] NSWCA 314 at [44] per Campbell JA (Beazley and Ipp JJA concurring).