

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, CRENNAN, KIEFEL AND BELL JJ

WORKCOVER QUEENSLAND

APPELLANT

AND

AMACA PTY LTD & ANOR

RESPONDENTS

WorkCover Queensland v Amaca Pty Ltd [2010] HCA 34
20 October 2010
B10/2010

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the answers to questions 4 and 5 in the order of the Court of Appeal of the Supreme Court of Queensland made on 27 March 2009, and in their place order that questions 4 and 5 of the amended case stated be answered as follows:*
 - (a) *Question 4: No.*
 - (b) *Question 5: The respondents should pay the costs of the plaintiff WorkCover Queensland in the amended case stated before the Court of Appeal.*

On appeal from the Supreme Court of Queensland

Representation

W Sofronoff QC Solicitor-General of the State of Queensland with K F Holyoak for the appellant (instructed by Bruce Thomas Lawyers)

D F Jackson QC with R C Morton for the respondents (instructed by Holman Webb Lawyers and CLS Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

WorkCover Queensland v Amaca Pty Ltd

Practice and procedure – Action – Death of worker – Survival of cause of action – Section 66(1) of *Succession Act* 1981 (Q) ("Succession Act") provided causes of action vested in deceased person shall survive for benefit of person's estate – Section 66(2) limited damages recoverable "in any action brought" where cause of action survives under s 66(1) – Whether s 66(1) creates new cause of action – Discussion of history of survival of causes of action.

Workers' compensation – Insurance – Statutory scheme – Insurer's right of indemnity against third party for compensation paid – Insurer paid compensation to worker exposed to asbestos manufactured and supplied by respondents – Worker died and no proceedings instituted by worker or estate against any persons – Section 207B(7) of *Workers' Compensation and Rehabilitation Act* 2003 (Q) ("Compensation Act") gave insurer, in these circumstances, right of indemnity against third party up to amount of compensation paid to worker, but only "to the extent of that person's liability for the damages" – Whether s 66(2) of Succession Act limits amount recoverable under right of indemnity in s 207B(7) of Compensation Act – Nature of cause of action created by s 207B(7) – Difference between liability and damages recoverable – Relevance of history of s 66(2) of Succession Act.

Words and phrases – "in any action brought", "liability", "to the extent of that person's liability for the damages".

Common Law Practice Act 1867 (Q), s 15D.

Succession Act 1981 (Q), s 66.

Workers' Compensation and Rehabilitation Act 2003 (Q), s 207B.

Law Reform (Miscellaneous Provisions) Act 1934 (UK), 24 & 25 Geo V c 41, s 1.

1 FRENCH CJ, GUMMOW, CRENNAN, KIEFEL AND BELL JJ. On 22 June 2007 the appellant ("WorkCover") commenced proceedings in the Supreme Court of Queensland pursuant to s 272(7)¹ of the *Workers' Compensation and Rehabilitation Act 2003* (Q) ("the Compensation Act") to recover the quantum of compensation previously paid by it to Mr Rex Noel Thomson. Mr Thomson was a carpenter and builder, and "worker" within the meaning of the Compensation Act, who had died on 20 June 2006 from malignant mesothelioma contracted as a result of inhaling asbestos contained in building products manufactured by the respondents. WorkCover now sought to recover by indemnity from the respondents the payments made by it to Mr Thomson under the Compensation Act. It will be necessary to refer further to the relevant facts later in these reasons.

2 From the pleadings four broad issues emerged. On 2 September 2008, Dutney J ordered the referral of a case stated to the Court of Appeal pursuant to r 483(2) of the Uniform Civil Procedure Rules 1999 (Q). The appeal by WorkCover to this Court, from the decision of the Court of Appeal (de Jersey CJ and Muir JA; McMurdo P dissenting)², concerns the fourth question in the case stated:

"Is the quantum of the indemnity [WorkCover] is entitled to recover pursuant to [s 207B(7) of the Compensation Act] reduced by the operation of [s 66 of the *Succession Act 1981* (Q) ("the Succession Act")] if the worker dies after compensation is paid and before the trial of [WorkCover's] action to recover the indemnity?"

Contrary to the decision of the majority of the Court of Appeal, that question should be answered "no" and the appeal by WorkCover should be allowed. We turn to explain why this is so.

The facts

3 Mr Thomson had been born on 30 June 1931 and had worked for various employers in the State of Queensland between 1947 and 1983. Throughout that time he was a "worker" for the purposes of the *Workers' Compensation Act 1916*

1 Section 272 subsequently was renumbered as s 207B: *Workers' Compensation and Rehabilitation and Other Acts Amendment Act 2007* (Q), s 24.

2 *WorkCover Queensland v Amaca Pty Ltd* [2009] 2 Qd R 181.

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(Q), the *Workers' Compensation Act 1990* (Q), the *WorkCover Queensland Act 1996* (Q) and, finally, the Compensation Act.

4 During the course of his employment, Mr Thomson was exposed to asbestos manufactured and supplied by the respondents. As a consequence he contracted mesothelioma and applied to WorkCover for payment of compensation. On 18 April 2006, WorkCover paid to Mr Thomson the sum of \$340,000 by way of compensation to which he was entitled under the Compensation Act for his contraction of mesothelioma.

5 Before his death, Mr Thomson had not instituted any proceedings upon any cause of action he may have had against persons who may have been liable for his injury. That circumstance entitled WorkCover to pursue its right of indemnity under s 207B(7)(a) of the Compensation Act.

The relevant legislative provisions

6 Section 207B, formerly s 272, of the Compensation Act relevantly provides:

"(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 ...

...

(7) If a person who has received compensation *has not recovered, or taken proceedings to recover*, damages for the injury from another person, other than the worker's employer –

- (a) the insurer is entitled to be indemnified for the amount of the compensation by the other person *to the extent of that person's liability for the damages*, so far as the amount of damages payable for the injury by that person extends; and
- (b) to that end, the insurer is subrogated to the rights of the person for the injury.

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(10) In this section –

damages includes damages under a legal liability existing independently of this Act, whether or not within the meaning of section 10." (emphasis added)

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There was no issue between the parties that the threshold in s 207B(1) had been met. The appeal turns upon the interaction, if any, between s 207B(7) of the Compensation Act and s 66 of the Succession Act. The heading to s 66 reads "Survival of actions", and the section relevantly provides:

"(1) Subject to the provisions of this section and with the exception of causes of action for defamation or seduction, on the death of any person after the 15 October 1940 *all causes of action* subsisting against or vested in the person *shall survive* against, or, as the case may be, for the benefit of, the person's estate.

(2) *Where a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable in any action brought –*

(a) shall not include damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life; and

...

(d) where the death has been caused by the act or omission which gives rise to the cause of action – shall be calculated without reference to –

(i) loss or gain to the estate consequent upon the death save that a sum in respect of funeral expenses may be included; or

(ii) future probable earnings of the deceased had the deceased survived." (emphasis added)

The opening words of sub-s (2), with their reference back to sub-s (1), and the following words "in any action brought" are significant for this appeal. In short, when read together they identify the subject of the qualifications upon heads of

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damages recoverable as those recoverable in an action which survives for the benefit of the deceased estate, and they do not speak to recovery in any action otherwise arising, including that between WorkCover and the respondents.

The Court of Appeal

8 It is necessary first to refer to the text of s 207B(7). The majority of the Court of Appeal held that s 207B(7)(a) contains two distinct subject matters. The first is the existence of the indemnity. The second is the calculation of damages to determine how far that indemnity extends. The calculation of the extent of the right of indemnity is determined by "the extent of [the wrongdoer's] liability for the damages [for the injury] so far as the amount of damages payable for the injury by [the wrongdoer] extends" (s 207B(7)(a)). The majority held that the extent of the indemnity is to be determined by the damages that would be recoverable by the worker, or his estate in the event of death, in an action brought against the wrongdoer, as at the date of judgment in the indemnity proceedings³. The finding that the damages are to be calculated as at the date of judgment in the indemnity proceedings is not the subject of an appeal to this Court.

9 Mr Thomson having died on 20 June 2006, the majority found that the calculation of damages in the subsequent indemnity proceedings brought by WorkCover necessarily would be subject to the limitations found in s 66(2) of the Succession Act. Section 66(2) would have limited the damages payable by the wrongdoer to the estate of the worker had the estate sued.

10 McMurdo P, dissenting, concluded that as an insurer would not need to rely on s 66(1) of the Succession Act to bring a claim for indemnity under s 207B(7)(a) of the Compensation Act, the limitations on damages found in s 66(2) would not apply; rather, s 207B(7)(a) requires a hypothetical assessment of damages as at the date of judgment which is not dependent on the operation of s 66(1)⁴.

11 Her Honour also gave a further reason why the quantum WorkCover is entitled to recover under par (a) of s 207B(7) of the Compensation Act should not be reduced by reason of s 66(2) of the Succession Act⁵:

3 [2009] 2 Qd R 181 at 192, 200.

4 [2009] 2 Qd R 181 at 198.

5 [2009] 2 Qd R 181 at 198.

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"In any case, s 66(2) in its terms specifically relates to a cause of action which survives under s 66(1) for the benefit of the estate of a deceased person. A plaintiff insurer's claim under [s 207B(7)] is not such a cause of action."

12 The point made by McMurdo P may be expressed by asking whether s 66(2), in light of the words "[w]here a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable *in any action brought ...*" (emphasis added), is concerned not with imposing limitations on the cause of action of the deceased, but only with imposing limitations "in any action brought" for the benefit of the estate. In its supplementary written submissions, filed by leave after the conclusion of oral submissions in this Court, WorkCover relies upon that construction of the legislation.

13 As already indicated, and for the following reasons, that submission should be accepted and the appeal should be allowed.

The cause of action created by s 207B(7) of the Compensation Act

14 It was not in contention between the parties that par (a) of s 207B(7) creates a cause of action separate to that vested in the deceased worker. In the past, that point has not been without its controversy.

15 After the conclusion of oral argument, the Court invited further submissions on the relevance to the present appeal of the decision of the New South Wales Court of Appeal in *WorkCover Queensland v Seltsam Pty Ltd*⁶. That case concerned the effect of the equivalent provision to par (b) of s 207B(7) then in force⁷ on the rights of WorkCover. It had been held by Gibb DCJ that the words "[the insurer] is subrogated to the rights of the person for the injury" meant that the nature of the right of the insurer was one of subrogation, such that the insurer could only bring an action in the worker's name⁸.

6 (2001) 53 NSWLR 518.

7 *WorkCover Queensland Act 1996* (Q), s 278(7)(b).

8 *WorkCover Queensland v Seltsam Pty Ltd* (2001) 53 NSWLR 518 at 520-521.

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16 However, the New South Wales Court of Appeal held⁹ that the predecessor to s 207B(7) created a statutory cause of action for indemnity vested in, and pursued in the name of, the insurer; par (b) merely gave the insurer an ancillary subrogation to the rights of the worker to the extent necessary to aid the indemnity granted. One such way in which subrogation may be necessary is to enable the insurer to give the notices required to be given by the worker prior to liability arising in a third party, as a failure to do so may otherwise limit the insurer's ability to recover under its right of indemnity¹⁰.

17 In their further written submissions, the respondents submit that the Court of Appeal in *Seltsam* unnecessarily read down the predecessor to par (b) of s 207B(7) by construing the right of subrogation as operative only in the limited circumstances described by the Court, namely, the giving of notices; rather, the Court should have found that the provision in par (b) confers an additional right of subrogation, not so limited, as needed adequately to satisfy the entitlement to indemnity given by par (a) of the sub-section. That additional right may be needed, as identified in *Seltsam*, for the giving of required notices in the worker's name. The respondents submit that it may also be used by the insurer, for example, in circumstances where it is more advantageous to seek recovery in the worker's name, such as in the Dust Diseases Tribunal of New South Wales¹¹.

18 It is not clear that the decision of *Seltsam* limited the right of subrogation to the extent submitted by the respondents, but in any event, it is not necessary for that issue to be decided in this appeal. That is because both parties accepted the proposition for which *Seltsam* does stand, that s 207B(7) creates a new cause of action vested in the insurer, WorkCover in this case.

9 *WorkCover Queensland v Seltsam Pty Ltd* (2001) 53 NSWLR 518 at 524 per Young CJ in Eq, Priestley JA and Ipp AJA agreeing.

10 See, eg, *Austral Pacific Group Ltd (In Liq) v Airservices Australia* (2000) 203 CLR 136; [2000] HCA 39.

11 Proceedings brought by WorkCover in its name may not be proceedings for "damages" that would confer the Dust Diseases Tribunal with jurisdiction pursuant to s 11(1) of the *Dust Diseases Tribunal Act* 1989 (NSW). See, generally, *Goliath Portland Cement Co Ltd v Bengtell* (1994) 33 NSWLR 414; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; [2004] HCA 61.

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19 The significance of *Seltsam* for this appeal is that it identifies the starting point for the consideration of the construction of par (a) of s 207B(7). This is the acknowledgment of the independence of the cause of action vested in the insurer by that provision from that of the person to whom that insurer had paid compensation, in this case the worker. It is the independence of this cause of action from that of the worker that, even prior to the existence of equivalent provisions of s 66(1) of the Succession Act, allowed the insurer to pursue an indemnity following the death of the worker¹². It is also why a right of indemnity exists even when the cause of action of the worker is time-barred under the relevant statute of limitations¹³.

20 But contrary to WorkCover's submission, it does not follow that, given the right of indemnity would exist under par (a) of s 207B(7) irrespective of the existence of s 66(1) of the Succession Act, the limitations on damages found in s 66(2) necessarily do not apply. The respondents correctly submit that the operation of par (a) of s 207B(7) involves two matters. The first is the existence of the right of indemnity. The second is the scope of that indemnity.

21 Whereas the right of indemnity is distinct from the cause of action of the person to whom compensation has been paid, the scope of the indemnity necessarily is tied to that cause of action. This is the effect of the words "to the extent of that person's liability for the damages". The reference to "that person" is a reference to the wrongdoer from whom the insurer seeks recovery under the indemnity. And the phrase "liability for the damages" refers back to the opening words of sub-s (7), being liability "for the injury" suffered by the "person who has received compensation", that person having "not recovered, or taken proceedings to recover, damages". By virtue of sub-s (10), "damages" includes any damages for which the wrongdoer is liable arising independently of the Compensation Act, whether the liability arises from statute or the common law¹⁴.

12 *Smith's Dock Co v John Readhead & Sons* [1912] 2 KB 323 at 327; *Tooth & Co Ltd v Tillyer* (1956) 95 CLR 605 at 610; [1956] HCA 49; *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 333; [1974] HCA 5.

13 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321.

14 Cf the construction of "those damages" in s 151Z(1)(d) of the *Workers Compensation Act 1987* (NSW): *Grant v Royal Rehabilitation Centre Sydney* (1999) 47 NSWLR 263 at 265.

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22 No issue was taken in this Court as to the meaning of the phrase "so far as the amount of damages payable for the injury by that person extends", which immediately follows the phrase "to the extent of that person's liability for the damages". In the Court of Appeal, the respondents submitted that the two phrases must be directed towards different ends; if they both referred to the limit on the quantum of the indemnity then one or the other would be otiose¹⁵. The Court of Appeal rejected that submission¹⁶ and appears to have read the two phrases together as referring to each respondent's liability for the whole of the damages payable.

23 That finding was not the subject of a cross-appeal by the respondents to this Court, and in oral argument the respondents appeared to adopt the construction given to those two phrases by the Court of Appeal.

24 However, the preferable construction may be that the two phrases are directed to two distinct limitations on the quantum of the right of indemnity. The phrase "to the extent of that person's liability for the damages" limits the insurer's right of indemnity against a wrongdoer as extending only up to the amount of damages for which the wrongdoer is liable to the person who received compensation. The phrase "so far as the amount of damages payable for the injury by that person extends", on the other hand, reinforces the proposition that the amount payable under the indemnity, being an amount up to "the amount of damages payable for the injury by that person", is not to extend beyond "the amount of compensation" paid by the insurer. Whether that construction is to be preferred to that of the Court of Appeal is a question that need not be determined for the resolution of this appeal.

Difference between liability and damages recoverable

25 The respondents submit, and WorkCover appears to accept, that the phrase "to the extent of that person's liability" in par (a) of s 207B(7) requires a hypothetical assessment of damages that would have been payable had the person to whom compensation has been paid brought an action against the wrongdoer. Yet construing the limitation in this way is apt to mislead. We turn to explain why this is so.

15 [2009] 2 Qd R 181 at 185, 193.

16 [2009] 2 Qd R 181 at 194, 196, 200.

26 Paragraph (a) of s 207B(7) does not limit the indemnity to the amount that would have been received by the person to whom compensation has been paid had they, or their personal representative upon their death, brought an action. Rather, it limits the indemnity "to the extent of ... liability" of the wrongdoer. That point was made by Winneke P¹⁷, in a passage approved by this Court in *Victorian WorkCover Authority v Esso Australia Ltd*¹⁸, in relation to a similar provision in Victoria. It is a "notional liability at common law [or under a statute other than the Compensation Act] for pecuniary and non-pecuniary loss"¹⁹, having regard to limitations *on the liability* of the wrongdoer *to the person* who has received compensation.

27 In this regard, reference was made by the Court of Appeal in this case (as it had been by this Court in *Esso*²⁰) to the treatment of the term "liable" in a similar Northern Territory provision by Barwick CJ, with whom McTiernan J agreed, in *Tickle Industries Pty Ltd v Hann*²¹. His Honour said²²:

"'Liable' must therefore be given a meaning consistent with the evident purpose of the legislation and cannot be confined to meaning liable to be sued by the workman or his dependants. In other words, both in the expression 'the person liable to pay the damages' and in the expression 'for which that person is liable' the reference is to the tortfeasor, the person who, in the circumstances of the occurrence out of which the compensable injuries arose, appeared at that time to be the person responsible therefor and thus liable to pay damages."

The policy of the legislation to which Barwick CJ referred was that an employer, or insurer, as the case may be, who paid compensation to a worker (or his or her

17 *Esso Australia Ltd v Victorian WorkCover Authority* (2000) 1 VR 246 at 257.

18 (2001) 207 CLR 520 at 527-528 [14]; [2001] HCA 53.

19 *Esso Australia Ltd v Victorian WorkCover Authority* (2000) 1 VR 246 at 252, approved in *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 530 [20].

20 (2001) 207 CLR 520 at 527-528 [13]-[15].

21 (1974) 130 CLR 321.

22 (1974) 130 CLR 321 at 331.

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dependants) for injury (or death) caused by the wrongful act or omission of another was entitled to be indemnified against the payment of that compensation by that wrongdoer²³.

28 The outcome in *Tickle Industries* turned upon whether the insurer could recover from the wrongdoer under an indemnity in circumstances where the worker (or the dependants in that case) was barred from bringing a claim against the wrongdoer under the applicable statute of limitations. This Court (Barwick CJ and McTiernan J; Menzies J dissenting) held that the right of indemnity would exist so long as the wrongdoer had legal responsibility for the injury or death at some point in time²⁴.

29 The respondents submit that *Tickle Industries* was only concerned with the existence of the right of indemnity; it did not concern the further question of the quantification of that indemnity. However, in considering the Northern Territory ordinance, which contained a limitation on the right of indemnity similar to that found in par (a) of s 207B(7), Barwick CJ said²⁵:

"The limitation of the indemnity given by [s 22(d) of the Workmen's Compensation Ordinance 1949 (NT)] to the amount of the damages caused is but an expression of a limitation implicit in the grant of the right of indemnity and clearly, in my opinion, evidences no departure from the settled policy of workers' compensation legislation."

It would be inconsistent with the policy of the legislation and the reasoning of Barwick CJ to construe the present statute as providing for the existence of a right of indemnity and then denying recovery under that indemnity on the footing that had the person who received compensation brought an action it would have been time-barred. It was not necessary for Barwick CJ in that case to take the next step and specify why, when assessing the limit of the indemnity, the statute of limitations would not apply.

23 (1974) 130 CLR 321 at 326-327.

24 (1974) 130 CLR 321 at 333. See also *Smith's Dock Co v John Readhead & Sons* [1912] 2 KB 323.

25 (1974) 130 CLR 321 at 333.

30 However, in *The Commonwealth v Mewett*²⁶, Gummow and Kirby JJ said of the effect of statutes of limitations:

"[A] statutory bar, at least in the case of a statute of limitations in the traditional form, does not go to the jurisdiction of the court to entertain the claim but to the remedy available and hence to the defences which may be pleaded. The cause of action has not been extinguished. Absent an appropriate plea, the matter of the statutory bar does not arise for the consideration of the court²⁷. This is so at least where the limitation period is not annexed by statute to a right which it creates so as to be of the essence of that right²⁸."

That is especially so in the context of the *Limitation of Actions Act 1974 (Q)*, whereby a limitation period may also be extended in certain actions for personal injury or death in the circumstances provided for in s 31²⁹.

31 Accordingly, a general limitation on a personal action does not affect the liability of the wrongdoer; rather it acts as a bar, when pleaded, to any remedy the plaintiff may seek when bringing an action for damages pursuant to that liability. Paragraph (a) of s 207B(7) of the Compensation Act requires an assessment of the liability of the wrongdoer to the person who has received compensation, and the circumstance that the time for the bringing by that person of an action has expired will not affect an assessment of the right of the insurer to indemnity.

32 In the Court of Appeal, de Jersey CJ referred³⁰ to the decision in *Xpolitos v Sutton Tools Pty Ltd*³¹. There compensation had been paid to the dependant

26 (1997) 191 CLR 471 at 534–535; [1997] HCA 29.

27 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 473–474; [1990] HCA 39.

28 *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488–489; [1962] HCA 13; *Pedersen v Young* (1964) 110 CLR 162 at 169; [1964] HCA 28; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 497–498; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 43; [1991] HCA 56.

29 See *Queensland v Stephenson* (2006) 226 CLR 197; [2006] HCA 20.

30 [2009] 2 Qd R 181 at 191–192.

31 (1977) 136 CLR 418; [1977] HCA 25.

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child of the worker, who had been killed in the course of his employment, and it exceeded that which would have been recovered by the child in a Lord Campbell's Act action. *Xpolitos* decided that which for the purposes of the present litigation is made explicit by par (a) of s 207B(7) of the Compensation Act: a right of indemnity of the person who has paid the compensation extends only up to the amount for which a third-party wrongdoer would be liable to the worker. How, then, does this state of affairs under the Compensation Act engage s 66 of the Succession Act?

Section 66 of the Succession Act

33 The issue is whether the limitation in s 66(2) applies to the liability of the wrongdoer to the person who received compensation, or imposes a limitation that only applies when the person's cause of action is brought "for the benefit of the estate of a deceased person". The resolution of this question requires an examination of the provenance of s 66 and the context in which the limitations the subject of this appeal arose.

34 Prior to the enactment of s 66 in Queensland, the common law maxim *actio personalis moritur cum persona* provided that a cause of action in tort died with the person in whom it was vested. This was the first of two common law rules preventing civil actions upon the death of a person which legislatures have, in the past few centuries, addressed through legislation³². The second was that the death of a person could not be complained of as an injury³³, a rule overturned in part by the Lord Campbell's Acts³⁴. The distinction between these two rules was emphasised by Lord Atkin in *Rose v Ford*³⁵.

35 Although there has been discussion of the justifications for the second rule³⁶, there is little by way of explanation of the first rule. It merely seems to

32 See *Fitch v Hyde-Cates* (1982) 150 CLR 482 at 487; [1982] HCA 11.

33 *Baker v Bolton* (1808) 1 Camp 493 [170 ER 1033].

34 Currently to be found, in Queensland, in the *Supreme Court Act* 1995 (Q), Pt 4, Div 5 (ss 17-23D).

35 [1937] AC 826 at 833.

36 *Admiralty Commissioners v SS Amerika* [1917] AC 38 at 43-50 per Lord Parker of Waddington; Holdsworth, "The Origin of the Rule in *Baker v Bolton*", (1916) 32 *Law Quarterly Review* 431.

have been assumed³⁷. In *Finlay v Chirney*³⁸ Bowen LJ (with the agreement of Fry LJ) explained that, in the earliest times of English law, survival of causes of action was the rare exception and non-survival the rule. It was only since the reign of Queen Elizabeth I, when actions of assumpsit were introduced, that exceptions to the maxim evolved for actions in contract or for wrongs that involved property.

36 A logical justification for the maxim is nonetheless given by Professor Ames in lecture XVIII of his legal history lectures, published in 1913. He explained that a private action always presupposed a personal relationship between two individuals; a right of action in the injured person and a corresponding duty in the tortfeasor; such a personal relationship could not survive the death of one of the parties³⁹.

37 The submissions of WorkCover sought to construe s 66 as conferring a statutory right upon the estate of a deceased person to sue in tort for actions vested in the deceased. Section 66 was characterised in this way to support WorkCover's general submission that par (a) of s 207B(7) of the Compensation Act and s 66 of the Succession Act did not speak to each other; they were concerned with the creation of different rights, neither of which depended on the other. But that characterisation is not critical to acceptance of the general submission.

38 Section 66 does not create a fresh cause of action in favour of the deceased estate. Rather, it largely displaces the operation of the common law maxim *actio personalis moritur cum persona* which had applied to all but a few

37 *Russel v Prat* (1590) 4 Leo 44 [74 ER 718]; *Pinchon's Case* (1611) 9 Co Rep 86 [77 ER 859].

38 (1888) 20 QBD 494 at 502-504.

39 Ames, *Lectures on Legal History*, (1913) at 211-212.

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tort actions⁴⁰. The cause of action of the deceased and that pursued under s 66 by the estate are one and the same⁴¹.

39 The origin of s 66 can be traced to the *Law Reform (Miscellaneous Provisions) Act 1934 (UK)*⁴² ("the 1934 Act"), and, in turn, to 19th century legislation in North American jurisdictions, including that of New York in 1847⁴³, Connecticut in 1848⁴⁴ and Ontario in 1886⁴⁵. In 1940, Queensland largely adopted the 1934 Act and, with effect from 16 October 1940, inserted s 15D into the *Common Law Practice Act 1867 (Q)* ("the CLP Act")⁴⁶. Section 15D was the immediate predecessor to s 66 of the Succession Act.

40 Neither the 1934 Act nor s 15D of the CLP Act as originally enacted contained the limitations the subject of the present litigation and now found in pars (a) and (d)(ii) of s 66(2) of the Succession Act. Section 15D(2) of the CLP Act, as enacted, excluded only exemplary damages and all damages in an action for breach of a promise to marry other than the damage to the estate of a person who was the victim of the breach. It also provided that the damages recoverable by the estate were to be calculated without reference to any loss or gain to the estate consequent upon a person's death, except for sums in respect of medical and funeral expenses.

40 *Phillips v Homfray* (1883) 24 Ch D 439 at 456-457; *Woolworths Ltd v Crotty* (1942) 66 CLR 603 at 612-615; [1942] HCA 35; Malone, "The Genesis of Wrongful Death", (1965) 17 *Stanford Law Review* 1043 at 1045-1047.

41 *Rose v Ford* [1937] AC 826 at 834 per Lord Atkin, 839-840 per Lord Russell of Killowen, 845 per Lord Wright, 855-856 per Lord Roche; *Fitch v Hyde-Cates* (1982) 150 CLR 482 at 497 per Mason J.

42 24 & 25 Geo V c 41, s 1.

43 See *Brown v Buffalo and State Line Railroad Co* 22 NY 191 at 192-193 (1860).

44 See *Murphy v The New York and New Haven Railroad Co* 30 Conn 184 at 188 (1861); Malone, "American Fatal Accident Statutes – Part I: The Legislative Birth Pains", (1965) *Duke Law Journal* 673 at 707.

45 *Statute Amendment Act 1886* (49 Vic c 16), s 23 (Ont).

46 *Common Law Practice Act Amendment Act 1940 (Q)*, s 2.

41 The exclusions now found in s 66(2) for damages for pain and suffering, loss of expectation of life and loss of future earning capacity were introduced into the CLP Act in 1972 by s 3 of the *Common Law Practice Act Amendment Act 1972* (Q). That amendment was proposed by the Queensland Law Reform Commission when conducting a review into the Lord Campbell's Act⁴⁷. The Commission's report noted that such exclusions were made in New South Wales⁴⁸ and Victoria⁴⁹ in cases where the death was caused by the injury in question, and in all circumstances in South Australia⁵⁰. The Commission recommended adopting the approach taken in South Australia⁵¹.

42 The justification given by the Commission for the exclusion of certain types of damages in a claim brought for the benefit of the estate was the perception that the awarding of such damages to the estate was contrary to the principle of compensatory damages. Damages for pain and suffering, bodily or mental harm and the curtailment of expectation of life (all now excluded by par (a) of s 66(2)) were being paid to people who had not suffered those injuries⁵². Arguments of that nature may insufficiently appreciate the characterisation of provisions like s 66(1) as a mere continuation of the deceased's choice in action. Nevertheless, they appear to have persuaded the Queensland legislature to insert such limitations in 1972⁵³.

47 Queensland, Law Reform Commission, *Report in Relation to an Examination of the "Fatal Accidents Acts" with a View to the Elimination of Anomalies*, (1971).

48 *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 2(2)(d).

49 *Administration and Probate Act 1958* (Vic), s 29(2)(c)(ii).

50 *Survival of Causes of Action Act 1940* (SA), s 3(a).

51 Queensland, Law Reform Commission, *Report in Relation to an Examination of the "Fatal Accidents Acts" with a View to the Elimination of Anomalies*, (1971) at 6.

52 See Fleming, *The Law of Torts*, 3rd ed (1965) at 697.

53 In introducing the 1972 amendment, the then Attorney-General for Queensland, Sir William Knox, noted that the new s 15D was responding to criticism of the recovery by the estate of such damages as it seemed contrary to "the whole concept of common law to compensate a person who has not suffered": Queensland, *Parliamentary Debates* (Hansard), 11 October 1972 at 904.

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43 Less apparent is the rationale for the limitation on the recovery of future probable earnings of the deceased had he or she survived, now found in par (d)(ii) of s 66(2). A similar exclusion was not made in other Australian jurisdictions until after the decision of the New South Wales Court of Appeal in *Fitch v Hyde-Cates*⁵⁴, upheld on appeal to this Court⁵⁵. *Fitch* overturned the assumption that damages for loss of earning capacity for a period after the date of death were not recoverable by the estate, and was followed throughout Australia by a flurry of amendments to exclude the recovery of such damages in terms similar to those found in s 66(2)(d)(ii)⁵⁶.

44 Prior to the 1972 Queensland amendment, in *Oliver v Ashman*⁵⁷, Holroyd Pearce LJ said that there was no room for treating any differently a claim brought by a person whilst alive and that brought by the estate upon their death. This point was not critical in *Oliver v Ashman*, as the Court of Appeal went on to determine that not even a person whilst alive could recover for their lost earning capacity taking into account the probable period of their working life had they not been injured. This Court refused to follow *Oliver v Ashman* in *Skelton v Collins*⁵⁸. There then was a risk that, in line with the observations of Holroyd Pearce LJ, the estate could recover for lost earning capacity referable to a period following the actual death of the deceased.

45 The reasons, at the time of the 1972 amendment, why an estate should not be entitled to recover for the deceased's loss of earning capacity for a period

54 [1980] 2 NSWLR 757.

55 *Fitch v Hyde-Cates* (1982) 150 CLR 482.

56 *Law Reform (Miscellaneous Provisions) Amendment Act 1982* (NSW); *Administration and Probate (Survival of Actions) Act 1982* (Vic); *Survival of Causes of Action Act Amendment Act 1982* (SA); *Law Reform (Miscellaneous Provisions) Amendment Act 1982* (WA); *Administration and Probate Amendment Act 1983* (Tas); *Law Reform (Miscellaneous Provisions) Amendment Act 1986* (NT); *Law Reform (Miscellaneous Provisions) (Amendment) Ordinance 1982* (ACT).

57 *Oliver v Ashman* [1962] 2 QB 210 at 227-228. See also *Fitch v Hyde-Cates* (1982) 150 CLR 482 at 489 per Mason J.

58 (1966) 115 CLR 94; [1966] HCA 14.

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following death were succinctly explained in 1971 by Professor Atiyah (then holder of a Chair at the Australian National University) in response to an argument to the contrary. Professor Atiyah wrote⁵⁹:

"Since the dependants already have their claim under fatal accidents legislation, policy obviously is overwhelmingly against allowing such a claim to be made for the benefit of a deceased, while admitting it for a living plaintiff."

46 Later, following the decision in *Fitch*, the Chief Justice's Law Reform Committee of Victoria explained that the problem with allowing the estate to recover for the "lost years" of earning capacity of the deceased was the risk of the damages payable by the tortfeasor being greater than the actual loss to the dependants⁶⁰. Arguments of that nature had been discussed by Taylor J in *Skelton v Collins*⁶¹, and by Mason J in *Fitch*⁶².

47 From this narrative, it is apparent that the limitations on recovery for pain and suffering, bodily or mental harm and curtailment of expectation of life found in par (a) of s 66(2) were directed to a particular, perceived problem: that the recovery by the estate of damages for heads of loss it had not, or would not, suffer was contrary to the rationale of compensatory damages. The limitation in par (d)(iii) of s 66(2) on the recovery of future probable earnings of the deceased had the deceased survived was directed to the same problem. It may have also been directed to a perceived problem of double liability, but this does not clearly appear from the extraneous materials at the time of the 1972 amendment.

48 In an action under s 207B(7) of the Compensation Act, there is no apprehension about the recovery of damages for heads of loss not suffered. WorkCover is not seeking damages for something it has not suffered. To the contrary, the policy of the Compensation Act, as explained above, indicates that WorkCover is entitled to be indemnified for moneys it paid in compensation to Mr Thomson. That he has since died is not to the point.

59 "Loss of Earnings or Earning Capacity?", (1971) 45 *Australian Law Journal* 700.

60 *Report on Survival of Causes of Action for Personal Injury and Matters Related to Claims for Wrongful Death*, (1982) at 4.

61 (1966) 115 CLR 94 at 114.

62 (1982) 150 CLR 482 at 495-499.

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49 The primary concern of the amendment to s 15D of the CLP Act in 1972 was to avoid the perceived violence that actions brought by the estate would do to the notion of compensatory damages if all damages which had been recoverable by the deceased thereafter could be recoverable by the estate of that person.

50 It now is convenient to return to the opening words of s 66(2): "Where a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable *in any action brought ...*" (emphasis added). The perceived mischief which the 1972 amendment addressed arose only when an action was brought for the benefit of the estate. Accordingly, the phrase "the damages recoverable in any action brought" in s 66(2) refers not to any action in the general sense, but rather only to actions brought pursuant to s 66(1) "for the benefit of the estate of a deceased person". Section 66(2) is a limitation on the remedy available, applying only to an action brought by the estate of the person in whose favour a liability existed. It is not a limitation on the liability of a wrongdoer towards the deceased. In Victoria, Gillard J reached a similar conclusion concerning the construction of s 29 of the *Administration and Probate Act* 1958 (Vic), a provision that was first introduced in Victoria by the *Survival of Actions Act* 1942 (Vic)⁶³.

51 The respondents rely on a statement by Latham CJ in *Woolworths Ltd v Crotty*⁶⁴, namely, that

"a person who has died cannot bring an action for his own death, simply because he is dead and cannot bring an action for anything, and not by reason of the application of any rule of law".

From that apparent statement of the obvious, the argument for the respondents proceeds. The damages payable by the wrongdoer to the person who has received compensation could only be paid, when that person has died, to the estate of the person upon the estate bringing an action pursuant to s 66(1) yet subject to the limitations in s 66(2). It must therefore follow, it is said, that the damages payable *to WorkCover* under par (a) of s 207B(7) are also so limited. If these submissions were to be accepted, it would follow that, had there been no

⁶³ *Lotter v Salmon Street Ltd* [2006] VSC 495 at [66].

⁶⁴ (1942) 66 CLR 603 at 611-612.

equivalent to s 66 in existence, no damages would be recoverable by WorkCover. As explained already in these reasons, such a construction would be inconsistent with the policy of the Compensation Act and should be rejected. That construction also ignores the critical distinction between liability for damages and the damages that would be payable upon a person, or their estate, bringing an action.

Conclusion

52 Upon an action brought by WorkCover pursuant to its right of indemnity under par (a) of s 207B(7) of the Compensation Act, it is entitled to be indemnified by the respondents "to the extent of" their liability to Mr Thomson. The amount to which WorkCover is entitled is to be assessed by reference to the amount for which the respondents would be so liable at the time of judgment in the indemnity proceedings, taking into account all limitations at common law or by statute on that liability. It is not to be assessed by reference to the amount of damages that would be recovered in a hypothetical action brought by Mr Thomson, or his estate upon his death, against the respondents.

53 In the passage from *Esso*, referred to earlier in these reasons, it was pointed out that the statutory right of indemnity is not to be equated with the cause of action which the worker would have had. The claim to enforce the entitlement is a cause of action created by statute for an indemnity against a person liable to pay damages to another. That liability is best understood as an ingredient of the statutory right.

54 The limitations found in s 66(2) of the Succession Act apply to limit damages which would be recoverable by Mr Thomson's estate upon an action brought "for the benefit of" his estate, and do not apply to an action brought by WorkCover seeking indemnity from the respondents under s 207B(7)(a).

55 This follows as a matter of construction of s 66(2) and is consistent with the underlying policies to which that provision gives effect. Those policies have no application to the right of indemnity given by s 207B(7)(a) of the Compensation Act. Indeed they would be in conflict with it.

56 The respondents pointed to what was a perceived incongruity if it were concluded that s 66(2) did not apply to an action brought under s 207B(7). Relevantly for this submission, ss 207B(2)-(4) provide:

"(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

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for a period before the person becomes entitled to payment of damages by an employer or another 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.

- (3) An employer or other person from whom the damages are recoverable must pay the insurer the amount of the first charge or, if the damages are not more than the amount of the first charge, the whole of the damages.
- (4) Payment to the insurer under subsection (3), to the extent of the payment, satisfies the liability of the employer or other person for payment of the damages."

57 The respondents correctly point out that if the estate sued the respondents pursuant to s 66(1) of the Succession Act, s 66(2) would limit the damages available to the estate. Having paid compensation, WorkCover would then have a first charge on any damages recovered by the estate, and the respondents would be obliged to pay the insurer up to the amount of the charge. Assuming the damages recovered by the estate would be less than the amount of compensation paid by the insurer, by virtue of the limits on recovery in s 66(2), WorkCover would receive less than it would have had the estate not sought recovery and WorkCover pursued its right of indemnity under s 207B(7). The respondents submit that there was no evident policy indicating that the legislature would have intended an outcome whereby WorkCover would recover from a wrongdoer amounts which differed as a consequence of the time at which the wrongdoer was sued (if at all) by the worker or his estate.

58 However, this apparent conundrum is not sufficient to displace the construction that has been given to s 66(2) of the Succession Act in light of its history and purpose.

59 The fact that WorkCover might recover from the respondents an amount which differs from what Mr Thomson's estate might recover is simply a reflection of the operation of the different policies of the two Acts. So far as concerns the Compensation Act, the point is that WorkCover is recovering moneys from the respondents because it has paid compensation to Mr Thomson on account of his injuries. It cannot be gainsaid that what the respondents will pay will reflect their liability in respect of those injuries.

60 The amount that WorkCover recoups from a wrongdoer may differ in any event, depending upon when the amount representing a wrongdoer's legal

liability in respect of a worker's injuries is assessed. It might pay compensation and recover against a wrongdoer prior to the death of a worker from the injuries caused by the wrongdoer. In other cases, such as the present, proceedings could only be brought after death, which occurred shortly after the payment of compensation.

61 The amount recovered will ordinarily be assessed at the date of judgment, following the rule applied in cases involving personal injuries⁶⁵, although the rule may yield depending upon the circumstances⁶⁶. In the present case it was accepted by WorkCover that the time for assessment was at the date of judgment. So far as concerns the sum assessed, much will depend upon the facts then known about the injuries and their effects. An assessment of prospective damage involves a measure of speculation; it is otherwise when that damage (or its diminution) has become actual⁶⁷. In this case an assessment would take account of Mr Thomson's death. This may have the effect of limiting some heads of damage, although perhaps not to the extent which would result were the Succession Act to apply.

62 In any event the fact that the respondents might be required to pay a larger sum in proceedings brought by WorkCover does not displace the construction given to s 66(2) of the Succession Act, in light of its history and purpose.

Order

63 The appeal should be allowed and the answers to questions 4 and 5 in the order of the Court of Appeal made on 27 March 2009 set aside. In lieu thereof, question 4 should be answered "no".

64 Question 5 asked: "By whom should the costs of the Case Stated be paid?" The point which ultimately is determinative of these reasons is whether s 66(2) applied to limit the liability of the wrongdoer to the person who received compensation, or only applied to actions brought for the benefit of the estate. The respondents accept that if the appellant succeeds on that issue, they should bear

65 *O'Brien v McKean* (1968) 118 CLR 540 at 545; [1968] HCA 58.

66 *Johnson v Perez* (1988) 166 CLR 351 at 367; [1988] HCA 64.

67 *Willis v The Commonwealth* (1946) 73 CLR 105 at 109; [1946] HCA 22; *Johnson v Perez* (1988) 166 CLR 351 at 368-369.

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the costs of the successful appeal to this Court. In the Court of Appeal the present respondents recovered three-quarters of their costs of the case stated, this being stated as the answer to question 5. Given the significant measure of success by the appellant in this Court, the answer given by the Court of Appeal to question 5 should be set aside and replaced by an order that the respondents pay the costs of the appellant in the Court of Appeal.

