

## HIGH COURT OF AUSTRALIA

Cain

Vs.

Malone

(Latham C.J., Rich, Starke, McTiernan and Williams JJ.)

1 September 1942

Latham C.J.

Sec. 64 of the *Workers' Compensation Act 1926-1938* N.S.W. provides that when the injury for which compensation is payable under the Act is caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation but shall not be entitled to recover both damages and compensation. It was held in *Farmer & Co. Ltd. v. Griffiths*<sup>[1]</sup> that where moneys have been paid to an infant worker as compensation under the Act the infant is not on that account prevented from recovering damages against a third party whose negligence caused the injury if it is not for the benefit of the infant to receive compensation from the employer rather than to recover damages from the third party.

The present appeal raises the question of the construction of sec. 63 (3) (a) of the Act, inserted by the *Industrial Arbitration and Workers' Compensation (Amendment) Act 1938*, sec. 5. This subsection includes the following provision: "Where any payment by way of compensation under this Act in respect of the injury is received by the worker after the date upon which the assent of His Majesty to the Industrial Arbitration and Workers' Compensation (Amendment) Act, 1938, is signified, no proceedings against the employer, independently of this Act, in respect of the injury, shall be maintainable by any person whomsoever unless such proceedings are instituted within six months after the date upon which such payment was so received by the worker, or where more payments than one have been so received by the worker, unless such proceedings are instituted within six months after the date upon which the first of such payments was so received by the worker." An amendment made by Act No. 13 of 1942 does not affect the present case.

The question which arises upon this appeal is whether the payment of compensation by the employer and the receipt thereof by an infant worker bring the sub-section into operation, or whether it is necessary also to show that the receipt of compensation was for the benefit of the infant before the time limit prescribed by the section becomes applicable.

It is conceded for the appellants that they cannot succeed in this appeal unless the Court is prepared to overrule the case of *Farmer & Co. Ltd. v. Griffiths*<sup>[2]</sup>.

After careful consideration of the reasoning in that case and of the English authorities upon which it is based I can see no reason for overruling the case. A decision of three Justices (as in *Farmer's Case*<sup>[3]</sup>), especially with one Justice dissenting, can certainly be overruled by a Bench of five Justices: See per *Higgins J.* in *Gray v. Dalgety & Co. Ltd.*<sup>[4]</sup>. But the power to overrule a prior decision should be exercised with great caution and only in a clear case—where, as it has been said,

the prior decision is "manifestly wrong" (*The Tramways Case [No. 1]*[5]). The point decided in *Farmer's Case*[6] is one of some difficulty and there is room for difference of opinion upon it, as is shown by the dissenting judgment of *Dixon J.* in that case. But the decision, applying a decision in the English Court of Appeal, cannot be described as manifestly wrong. In my opinion the decision is right. If Parliament disapproves the decision, the statute can readily be amended. *Farmer's Case*[7] should not, in my opinion, be overruled.

The appeal should be dismissed.

Rich J.

In this case both before the Supreme Court and this Court counsel for the defendants (appellants) expressly waived any technical grounds raised by the demurrer. He asked for a decision whether "for the purpose of sec. 63, any de-facto receipt by an infant of money paid to him by way of worker's compensation, irrespectively of the circumstances in which it was paid, is a binding receipt which, coupled with the lapse of the appropriate time, precludes him from commencing an action, notwithstanding that it may not have been for the infant's benefit that the payment should have been received." The Supreme Court gave judgment for the plaintiff on the demurrer, following its previous decision in *Farrell v. Motor Body Repairing & Welding Pty. Ltd.*[8], which was treated as governed in principle by the decision of this Court in *Farmer & Co. Ltd. v. Griffiths*[9]. The appeal to this Court is in effect an application to reconsider and overrule the case last mentioned. The propriety of reconsidering our prior decisions was considered by *Isaacs J.*, as he then was, in *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia*[10], and after reviewing the relevant authorities his Honour concluded "that where a former decision is clearly wrong, and there are no circumstances countervailing the primary duty of giving effect to the law as the Court finds it, the real opinion of the Court should be expressed"[11]. Similarly it was said in *The Tramways Case [No. 1]*[12]: "But we should not interfere with settled law for light cause", and should not "set aside a considered decision of this Court unless we were convinced that it was wrong." Recently we were asked, and consented, to overrule a considered judgment of this Court in *Waghorn v. Waghorn*[13]. So far as I am concerned I did so for the purpose of securing uniformity in decisions of the English Court of Appeal and this Court. I should, I think, be reversing the position I then took up if I expressed an opinion in favour of reversing the case of *Farmer & Co. Ltd. v. Griffiths*[14], which follows the principle laid down in *Stimpson v. Standard Telephones & Cables Ltd.*[15]. In these circumstances I am not "convinced that the decision in *Farmer's Case*(1940) [1940] HCA 19; 63 C.L.R. 603. was wrong" and should be overruled.

I agree that the appeal should be dismissed.

Starke J.

The *Industrial Arbitration and Workers' Compensation (Amendment) Act 1938*, No. 36, of New South Wales, sec. 5, enacts that where any payment by way of compensation under this Act in respect of the injury is received by the worker no proceedings against the employer, independently of the Act, in respect of the injury shall be maintainable by any person whomsoever. The words seem explicit and "if the text is explicit the text is conclusive alike as to what it directs and what it forbids" (*Attorney-General for Ontario v. Attorney-General for Canada*[17]). But it seems that the text is not sufficiently explicit to preclude the application of the law relating to the transactions of infants. *Farmer & Co. Ltd. v. Griffiths*[18], though decided under another section, is to that effect.

Still the words of the statute ought to be the paramount consideration, and an approach to the statute which assumes, because a person is an infant, that he is not bound by any transaction not proved to have been for his benefit cannot be justified as a method of construction. But it is the method which the majority of the Justices appeared to have adopted in *Farmer's Case*[19] and which now finds favour with the Chief Justice and my brethren.

*Farmer's Case*[20], I agree, cannot be distinguished in principle from this case, though I think it was wrongly decided.

McTiernan J.

I agree with the conclusion and reasons of the Chief Justice.

*Stephens v. Dudbridge Ironworks Co. Ltd.*[21] and *Murray v. Schwachman Ltd.*[22] show that the decision in *Farmer's Case*[23] is a correct application of the principle stated by *Greene* M.R. in *Stimpson v. Standard Telephones and Cables Ltd.*[24]. The principle has been applied in the construction of this Act for at least forty years.

Williams J.

I agree that the appeal can only succeed if this Court is prepared to overrule its previous decision in *Farmer & Co. Ltd. v. Griffiths*[25]. I think that this decision is in accordance with the statement in the judgment of *Greene* M.R. in *Stimpson v. Standard Telephones and Cables Ltd.*[26] that "quite apart from cases involving an actual contract, where there is need of a mental operation of the infant, whether it is in the exercise of the option before receiving payment, or whether it is looked at from the point of view of actual receipt of payment, the question must always be investigated, was it for the infant's benefit that the payment should be made?" and that it should be followed.

The appeal should therefore be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, Stephen, Jaques & Stephen.

Solicitor for the respondent, Aidan J. Devereux.

[1] [1940] HCA 19; (1940) 63 C.L.R. 603.

[2] [1940] HCA 19; (1940) 63 C.L.R. 603.

[3] [1940] HCA 19; (1940) 63 C.L.R. 603.

[4] [1916] HCA 35; (1916) 21 C.L.R. 509, at p. 551.

[5] (1914) 18 C.L.R., at p. 58.

[6] [1940] HCA 19; (1940) 63 C.L.R. 603.

[7] [1940] HCA 19; (1940) 63 C.L.R. 603.

[8] (1941) 58 W.N. (N.S.W.) 216.

- [9] [\[1940\] HCA 19; \(1940\) 63 C.L.R. 603.](#)
- [10] [\[1913\] HCA 41; \(1913\) 17 C.L.R. 261](#), at pp. 274 et seq.
- [11] (1913) 17 C.L.R., at pp. 278, 279.
- [12] (1914) 18 C.L.R., at p. 83.
- [13] [\[1942\] HCA 1; \(1942\) 65 C.L.R. 289.](#)
- [14] [\[1940\] HCA 19; \(1940\) 63 C.L.R. 603.](#)
- [15] (1940) 1 K.B., at p. 354.
- [16] [\[1940\] HCA 19; \(1940\) 63 C.L.R. 603.](#)
- [17] (1912) A.C. 571, at p. 583.
- [18] [\[1940\] HCA 19; \(1940\) 63 C.L.R. 603.](#)
- [19] [\[1940\] HCA 19; \(1940\) 63 C.L.R. 603.](#)
- [20] [\[1940\] HCA 19; \(1940\) 63 C.L.R. 603.](#)
- [21] (1904) 2 K.B. 225.
- [22] (1938) 1 K.B. 130, at pp. 146, 147, 151, 152.
- [23] [\[1940\] HCA 19; \(1940\) 63 C.L.R. 603.](#)
- [24] (1940) 1 K.B., at p. 354.
- [25] [\[1940\] HCA 19; \(1940\) 63 C.L.R. 603.](#)
- [26] (1940) 1 K.B., at p. 354.

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