

32/90

## SUPREME COURT OF VICTORIA

**DEPT of SOCIAL SECURITY v CE HEATH UNDERWRITING and INSURANCE (AUST) PTY LTD**

Marks J

27 February, 9 March 1990

**STATUTORY INTERPRETATION – WORKERS COMPENSATION – EMPLOYER INSURED AGAINST LIABILITY – REQUEST MADE FOR PAYMENT OF REHABILITATION COSTS – "PERSON LIABLE TO PAY COMPENSATION" – WHETHER INCLUDES INSURER – WHETHER INSURER LIABLE TO PAY COSTS – WHETHER LEGISLATION VALID TO ENABLE SUCH RECOVERY: SOCIAL SECURITY ACT 1947 (CTH.), S135R; CONSTITUTION, S51(xxiiiA), (xxxix).**

**1. Section 135R of the *Social Security Act 1947* ('Act') gives power to the Director-General to recover costs associated with industrial rehabilitation from a "person liable to pay compensation" including an insurer who, under a contract of insurance is liable to indemnify an employer who becomes liable to pay compensation. Where an employer became liable to pay rehabilitation costs of an employee but was indemnified against such payment pursuant to a contract of insurance, the insurer became a "person liable to pay compensation" upon written notice from the Director-General.**

**2. The power provided by s135R of the Act whereby the Director-General may recoup rehabilitation costs from an insurer is within the power conferred by s51(xxiiiA) of the *Constitution* if not s51(xxxix).**

**MARKS J:** [1] On 4th June 1980 Boris Trenevski suffered a back injury in the course of his employment with Kenworth Trucks Pty Ltd ("Kenworth") for which on 17th March 1983 he was awarded \$24,000.00 by the Workers' Compensation Board of Victoria pursuant to the *Workers' Compensation Act 1958* ("The Victorian Act"). Under the Victorian Act, Kenworth was liable to pay the amount of the award and under s26(1)(i) the reasonable costs of hospital services which by s26(2)(c) included those provided for "industrial rehabilitation". The defendant was liable to indemnify Kenworth against its liability in both respects pursuant to a contract of insurance.

Kenworth entered into the contract of insurance in compliance with its obligations under the Victorian Act, the scheme of which included a requirement that employers insure against their liability to pay compensation under the Victorian Act. Prior to the award Boris Trenevski received rehabilitation treatment and training in respect of his back injury pursuant to Part VIII of the *Social Security Act 1947* (Commonwealth) ("the Social Security Act"). Section 135R of the *Social Security Act* (as Counsel accepted it stood at the relevant time) provided:- [*His Honour set out the section in full of which the following are particularly relevant*] ... [3]

(2) The Director-General may, by notice in writing served on a person (including the Commonwealth or an authority of the Commonwealth or a State or an authority of a State, and in this section referred to as "the person liable to pay compensation") who is liable to pay an amount of compensation to or on behalf of another person (in this section referred to as "the person entitled to receive compensation") who is receiving or has received treatment or training, inform the person liable to pay compensation that the Director-General proposes to recover from him the cost of the treatment or training, or both, so received.

(3) The Director may, by the same notice or by a subsequent notice in writing served on the person liable to pay compensation, specify:

(a) the cost of the treatment or training, or both, received by the person entitled to receive compensation; and  
(b) an amount (not exceeding the amount of that cost) payment of which is claimed by the Director-General;

and thereupon the person liable to pay compensation shall become liable to pay to the Director-General the amount so specified or the amount of the compensation, whichever is the less.

[4] (8) The reference in sub-section (2) to a person who is liable to pay an amount of compensation

to or on behalf of another person shall be read as including a reference to an insurer who, under a contract of insurance, is liable to indemnify the person liable to pay the amount of compensation against his liability.

On or about 11th March 1983 the delegate of the Director-General of the Department of Social Security served a notice on the defendant pursuant to sub-s(3) of s135R of the *Social Security Act* that the Director-General proposed to claim payment of \$9,558.90 in respect of the cost of Trenevski's rehabilitation treatment and training. The "cost" included charges for attendance at "Coonac" Rehabilitation Centre between 7th September 1981 and 7th August 1982 at rates per day therein specified together with medical expenses, the cost of artificial aids and fares. By summons issued out of the Magistrates' Court at Melbourne dated 9th September 1988 the plaintiff claimed the sum of \$9,558.90 from the defendant pursuant to s135R(3) of the *Social Security Act*.

The summons came on for hearing at the Magistrates' Court at Melbourne on 10 July 1989 on which occasion the [5] Magistrate upheld a submission on behalf of the defendant that the plaintiff was not entitled to recover the said sum under s135R because the defendant was not a person "liable to pay compensation" within the meaning of s135R(3) and dismissed the summons without hearing evidence.

On 7th August 1989 Master Evans granted an Order Nisi to Review the dismissal order on the grounds that the Magistrate erred in law:-

"(a) In holding that on the facts agreed between the parties, the Defendant was not a person liable to pay compensation within the meaning of section 135R(2)-(5) of the *Social Security Act* 1947 and was not liable to pay to the Plaintiff the amount specified in the notice served on it by the Plaintiff pursuant to section 135R(3) of that Act;

(b) In holding that section 135R(8) was only effective to enable service on an insurer of the notice referred to in section 135R(2) and not the notice referred to in section 135R(3) of that Act."

This is the return of the Order made by Master Evans. It was submitted by Mr Graham QC for the plaintiff that the Magistrate wrongly interpreted s135R. Section 135(8) had the effect, he submitted, of including an insurer such as the defendant in the meaning of the expression "the person liable to pay compensation" in sub-s(2) and that the latter expression had the same meaning where appearing thereafter in s135R. Accordingly the "person liable to pay compensation" referred to in sub-s(3) included an insurer under a scheme such as that embodied in the Victorian Act. Mr Dowling QC for the defendant submitted that such an enlarged meaning should not be given unless there [6] was a clear warrant by the words of the statute to do so. He submitted that sub-s(8) only applied to sub-s(2) not sub-s(3) – alternatively, it applied only if, under the contract of insurance, there were express provision to indemnify the employer against liability imposed by s135R of the *Social Security Act*.

In my opinion, the interpretation for which Mr Dowling QC contended has no accord with the language of the statute. Section 135R is well capable of being accorded its plain meaning. Sub-s(8) clearly provides that the expression in sub-s(2) "the person liable to pay compensation" includes an insurer who is liable under a contract of insurance to indemnify a person such as an employer (as was Kenworth here) who is liable to pay compensation. "Compensation" is defined in the section. Here, the cost of the treatment or training provided to Trenevski was a 'hospital service' within the meaning of s26(2)(c) of the Victorian Act of payment of which Kenworth was liable by virtue of s26(1) and the award which determined its liability to pay compensation.

The interpretation contended for on behalf of the defendant would, if accepted, have the consequence that a notice under sub-s(2) that the Director-General proposes to recover from an insurer the relevant costs would be valid but not a notice under sub-s(3) to pay it. Such an interpretation would make little, if any, sense of the section and contradict its clear meaning and purpose. The important words in sub-s(2) are "in this section referred to as 'the person liable to pay compensation'" (my [7] underlining). They mean that wherever in the section the expression "the person liable to pay compensation" appears "the person" is to be understood to include an insurer meeting the description in sub-s(8). The consequence is that "a person liable to pay compensation" in sub-s(3) includes an insurer of the kind referred to in sub-s(8). It is not disputed that the defendant at the relevant time was such an insurer and that the amount claimed was "compensation". The grounds are made out.

Mr Dowling QC submitted however that the dismissal of the information by the Magistrate was correct because so far as s135R sought to impose liability on the defendant to pay the costs of the relevant treatment and training it was invalid as beyond the power of the Commonwealth. Mr Dowling QC submitted that the plaintiff could not rely on any head of power under s51 of the Constitution to justify a provision in a statute which compelled a private individual to pay the costs of benefits provided by the Commonwealth. Alternatively, he submitted, if it is legitimate to require payment of such costs there must be sufficient connection between the individual who received the benefits or provision of the services and the person required to pay for them.

Mr Dowling said that his primary submission was that s135R was a law requiring payment by individuals of the cost of the provision of benefits by the Commonwealth and is not referable to any head of Commonwealth power, particularly s51(xxiiiA) which appears to be the most [8] relevant. Alternatively, he contended, it was a law which required payment of the cost of services provided by the Commonwealth from persons who are themselves unconnected with the provision of services or any cause resulting in the provision of services. So far as s51(xxiiiA) is concerned, the power is for the "provision" of benefits and any controls must be connected with the legislative scheme under which the benefits are provided. Here, he submitted, the legislation has gone beyond the limits because an insurer in the position of the defendant has no connection with the "provision".

Mr Dowling made no attack on the constitutional validity of the *Social Security Act* other than such part of s135R which enables recovery of the cost of providing treatment and training from an insurer such as the defendant. It follows, as was submitted by Mr Graham QC for the plaintiff, that the constitutionality of the service established by Part VIII of the *Social Security Act* and the general provisions for recoupment of the cost of treatment in s135R together with the related provisions by which the cost of sickness benefits provided to injured employees are recoverable from awards of compensation or damages paid by employers to employees are accepted as valid.

It is also accepted that the *Social Security Act* is empowered under s51(xxiiiA) and if necessary the incidental powers provided by s51(xxxix). I say "if necessary", because the law says that the heads of power themselves impliedly grant incidental powers. [9] In *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* [1987] HCA 6; (1987) 162 CLR 271 at p281; 69 ALR 631; (1987) 61 ALJR 171 the High Court said:-

"We come now to the substantial question in the case. Is the legislative scheme incidental to the provision of sickness and hospital benefits? It is unnecessary and indeed inappropriate to consider the application of s51(xxxix): unnecessary because the power conferred by par (xxiiiA) includes within it everything which is incidental to the subject matter; ...."

The Scheme of Part VIII of the *Social Security Act* includes by s135(1) the power of the Director-General to provide or arrange for the provision of treatment and training of (among others) pensioners and claimants for pensions. It was assumed by counsel, although it is not in evidence, that Trenevski was a pensioner or otherwise eligible. Section 135(2) provides that the treatment and training may include hospital treatment, occupational therapy, payment of tuition and "other like" fees in connection with training. Section 135B provides for the continuance of payment of a pension to a person during treatment and s135C empowers the payment of fares and living expenses to a person receiving treatment or training.

Section 135J provides that the cost of treatment and training provided for a person referred to in paragraph 135(1)(a) shall be borne by the Commonwealth. It is beyond dispute that the power given to the Commonwealth by the Constitution to provide for the benefits and services mentioned in s51(xxiiiA) necessarily includes power to make provision in relation to the costs of providing them and defining classes of persons for whom they will be provided. Insofar as a class of persons [10] receives services at no cost legislation may validly provide for recoupment of the costs to the Commonwealth from a person other than the beneficiary if that other person is for some reason legally liable to pay for them. The reason is that one purpose, at least, of the grant of power is to assist sick or disabled persons unable to pay for appropriate treatment. A legislative provision which promotes that purpose is clearly within power. Accordingly provision for recoupment of costs from persons other than the beneficiaries who are liable to pay for the services assist the capacity of the Commonwealth to provide under the scheme services to others for whose costs

no-one is liable. In other words, the powers of recoupment not only assist the implementation of the scheme generally but also the spread and quality of the services it provides.

In *Alexandra* the High Court considered s51(xxiiiA) in the context of certain provisions of the *National Health Act* 1953. Although the Court was there concerned with quite different arguments as to validity there underlay the reasons of the court an assumption that provision for costs of the scheme was within power. At p282-3 the Court said:-

"A system of controlling the number and location of approved nursing homes and of the number of beds in each approved home is substantially connected with the power. So is an arrangement for selecting patients because it ensures that those who are to be the beneficiaries of the legislative provision are in need of the care to be provided in the nursing home. Again, if the fees charged to the patients were not subject to control some of the more needy might not be able to gain admission to the home and thereby take advantage of the benefit. Furthermore ... the scheme had hitherto resulted in a highly protected industry in which it was essential to secure some form of cost control in order to preserve the effectiveness of the benefit."

[11] At p283:-

"There is an obvious relation between the fees charged and the amount of the subsidy that is required. It may be that the degree and nature of the controls ... are more stringent than are strictly necessary to achieve the objectives of the legislation ... But it is not for the Court to determine that argument or to pass upon the wisdom or the suitability of the particular scheme that the legislature has chosen to institute, so long as the court is unable to say that it lacks a sufficient connexion to the head of power."

At p283-4:-

"It seems to us to be impossible to say that the control of fees charged to qualified nursing home patients in an approved nursing home is not a reasonable and perhaps a necessary ingredient of a scheme designed to render effective the provision of sickness and hospital benefits to nursing home patients."

At p284 the Court said that the *British Medical Association v The Commonwealth* [1949] HCA 44; (1949) 79 CLR 201; [1949] ALR 865 provided an illustration of the way in which a legislative power to provide for a pharmaceutical benefit will authorise the imposition of controls on both doctors and pharmacists in order that a scheme for the provision of such a benefit may be effectively administered with due regard to the interests both of the intended recipient "and the revenue" (my underlining).

Properly understood, s135R of the *Social Security Act* does no more than empower direct recoupment from the defendant of \$9,558.90 which the defendant was in any case liable to pay to Kenworth under its contract of insurance. Mr Dowling QC did not dispute the validity of the provision in s135R empowering the Director-General to recoup the sum from Kenworth as the employer of the recipient of the services. Section 135R(3) in combination with sub-ss.(2) and (8) does not create a new liability. [12] The liability of the defendant arose from the insurance contract. The connection is through the Victorian Act, the relevant provisions of which enable payment for services of the kind which the Commonwealth provided. The connection between the liability of the defendant under the insurance contract and the scheme of Part VIII of the *Social Security Act* is sufficient, in my opinion, to make s135R in its entirety within the power of the Commonwealth. It does no more, in my opinion, than facilitate direct recoupment from the person *de facto* liable to pay for the services. The *de facto* liability arises from the total legislative scheme represented by the Victorian Act and the *Social Security Act*.

In *Tri-Continental Corp Ltd v Commission of Taxation* [1988] 1 Qd R 474; (1987) 87 FLR 453 at p464; (1987) 73 ALR 433; (1988) 12 ACLR 421; 18 ATR 827 the Full Court of the Supreme Court of Queensland expressed the opinion that:-

"... the requirement of direct payment to the Commissioner stands on no different footing from a requirement that moneys standing to the taxpayer's credit with his bank be so paid. In either case, the requirement would do no more than seize upon the taxpayer's property to discharge the taxpayer's obligation."

The Court in that case rejected an analogous invalidity argument concerning a provision

of the *Income Tax Assessment Act* 1936 (Commonwealth) enabling the Commissioner to give a notice to a debtor of the tax payer to pay the tax which the latter owed to the Commissioner. In my opinion, the power provided by s135R of the Director-General to recoup the subject payment from the defendant is within the power conferred by s51(xxiiiA) of the *Constitution*, if not s51(xxxix).

**[13]** Mr Dowling QC informed the Court that if the defendant were not successful it consented to an order for payment to the plaintiff of the amount claimed with costs and desired that the summons not be remitted to the Magistrates' Court. In the circumstances, the order nisi is made absolute with costs. The order of dismissal of the Magistrates' Court at Melbourne on 10th July, 1989 of the summons issued by the plaintiff against the defendant dated 9th September 1988 is set aside. Order that the defendant pay to the plaintiff \$9,558.90 with costs. Liberty to either parties to apply to the Magistrates' Court at Melbourne in the event that they do not agree in the quantum of costs of the said summons.

**APPEARANCES:** For the plaintiff Dept of Social Security: Mr D Graham QC with Mr KH Bell, counsel. Australian Government Solicitor. For the defendant CE Heath Underwriting: Mr MJL Dowling QC with Mr M O'Loughlen, counsel. Domenic M Lallo, solicitor.

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