67/76

SUPREME COURT OF VICTORIA

HOCKEN v WAVERLEY SQUASH CENTRE PTY LTD

Lush J

6 May 1976

HEALTH – BUILDING A PRE-SCHOOL CENTRE BEING A DAY NURSERY OR CRECHE – FACILITIES FOR WOMEN TO LEAVE THEIR CHILDREN – MEANING OF "CARE" – WHETHER CHILDREN LEFT IN BUILDING FOR CARE – MEANING OF "PRE-SCHOOL CENTRE" (PUBLIC BUILDING) – WHETHER BUILDING A PRE-SCHOOL CENTRE – FINDING BY MAGISTRATE THAT CHARGES PROVED – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, SS200, 389(1).

The defendant company was convicted under Regulation 10 of the *Pre-School Centres Building Regulations* 1951 ("being the proprietor of a pre-school centre, being a day nursery or creche, did fail to comply with the provision of Regulation 10 etc. — this allegation was supported by seven headings of particulars and further convicted under s191(2) of *Health Act* 1958 ("the defendant was liable to a penalty in that being the proprietor of a public building, to wit, pre-school centre, being a day nursery or creche, the defendant did without the approval of the Commission of Public Health permit the said public building to remain open").

The judgment recites a history of the making of relevant proclamations and regulations (power sections of *Health Act* 1958 are s389(1) and s200), the result was the bringing into force of *Pre-School Centre Regulations* 1951 which defines "pre-school centre" as meaning "any building or portion of a building not being a registered school in which more than five children under the age of six years are received for care or training" and further defines "day nursery or creche" as meaning "pre-school centre at which children under the age of six are assembled for periods of up to 12 hours".

In 1965 Part XIA of the *Health Act* concerning child minding centres came into operation which included s208B. This section deemed a person to be carrying on the business of child minding if he receives for custody or care five or more children under the age of six for career training, but expressly excepted for this direction any pre-school centre required under Part XIA of the *Health Act* 1958 to be registered as a child-minding centre.

The defendant company ran a complex of gymnasium facilities, and provided a converted shop (a few yards away from the gymnasium) for women using the facilities to leave their children. No charge was made although four women were employed at the shop whose duties were to take care of the children, and facilities were provided for the entertainment or self-entertainment of the children.

The convictions were reviewed on the grounds:—

> (a) that the minimal control of the children exercised by the defendant could not be said to amount to 'care or training' referred to in the proclamation and the regulations, as it was really a different concept namely child minding, and
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> (b) that there was no evidence that the defendant was a proprietor of a public building to wit, a pre-school centre, being a day nursery or creche.

HELD: Order nisi discharged.

1. In relation to the submission that 'care' must mean something more than bare supervision, this cannot be accepted. The answer to it can be indicated by postulating two questions. If the question is raised: Why did the mothers leave their children at the building in question?, the answer must be that they left them there so that someone could take care of them. If one asks the question: For what purpose did the defendant engage the services of the four women to whom I have referred?, the answer, again, must be that they were engaged to take care of the children.

2. The phrase 'pre-school centre' in the proclamation and in the regulations did not have an educational connotation. A pre-school centre must be a building, and it refers to a building regularly used for the reception of children. That inference is derived from the use of the word 'centre', which when applied to a building implies a regular use for a particular purpose, and the phrase indicates only that the children who are to be received in it, or who are received in it, are those under school age, or include those under school age.

3. In the context of the *Health Act*, it is not necessary to go beyond this and say that the children

so received must be received for the purpose of instruction or training. If that view be correct, it was certainly open to the Magistrate on the evidence to hold that this building was a pre-school centre; but if it be not correct, it was nevertheless open to the Magistrate to hold that the building was either a creche in respect of very young children, or a day nursery in respect of children of a slightly older age. The word 'creche' and the expression 'day nursery' are not defined for the purposes of the proclamation, although the word 'day nursery' is given a meaning for the purposes of the regulations.

LUSH J: ... Mr Hansen, who appeared to move the order absolute, argued, upon the first ground, that the word 'care' had to be interpreted in a context comprised of the use of the words 'pre-school centre' to describe the relevant building, and its association with the word 'training'. He submitted that there was a contrast between the expression 'care or training' in the *Pre-School Centres Building Regulations* and the expression 'custody or care' in s208B of the *Health Act*. The point of his argument was substantially that which had been submitted to the Magistrate below, as I understand the position, namely, that 'care' must mean something more than bare supervision.

I join with the learned Magistrate in being unable to accept this submission. It seems to me that the answer to it can be indicated by postulating two questions. If the question is raised: Why did the mothers leave their children at the building in question?, the answer must be that they left them there so that someone could take care of them. If one asks the question: For what purpose did the defendant engage the services of the four women to whom I have referred?, the answer, again, must be that they were engaged to take care of the children.

Accordingly, it appears to me to be impossible to sustain Mr Hansen's argument on the first ground of the order nisi.

Mr Hansen submitted – under the cover, he contended, of the second ground – that there was no evidence that the building was a pre-school centre. This argument reveals some difficulty in the drafting of the various documents. There is nowhere a definition of 'pre-school centre' which may be used in interpreting the proclamation. The proclamation was made under a power to proclaim a class of buildings, or particular building, to be a public building. It must, therefore, be taken that the words 'pre-school centres' in the proclamation were meant to describe a class of buildings. The class, apparently, is to be determined by function; and that leaves to be answered the question: What function in relation to a building is described by the word 'pre-school' or by the whole phrase 'pre-school centre'?

The definition is assisted by the express inclusion of four activities; those of creche, kindergarten, day or residential nursery or play centre. In my opinion, these four activities or uses relating to buildings which are said in the proclamation to be included in the phrase 'pre-school centre' should not be regarded as artificial inclusions or the inclusion of matters by process of deeming.

On the contrary, I think that they should be regarded as included by way of an elaboration and clarification of the meaning intended to be conveyed by the expression 'pre-school centre'.

Mr Hansen's argument was that without the aid of any outside definition, and taking the starting point that 'pre-school centre' must be, in these proclamations and regulations, a building, it must be a building in which children are received preparatory to attending school and in which they are supervised or managed in a manner involving preparation of them for subsequent attendance at schools for children within the ordinary bracket of school ages. He therefore submitted that the concept of a pre-school centre suggested activities involving instruction and training, and he submitted that the words of inclusion referred to establishments within the general class or pre-school centres

He then submitted that the facts of the present case constituted the antithesis of this idea: there was no instruction, no training, nor was any offered or expected. Accordingly, he submitted that the building could not be described as a 'pre-school centre'. And he submitted that the word 'care' and the phrase 'care of training' should be given a construction appropriate to the meaning in relation to buildings of the phrase 'pre-school centres' and, in that sense, the children did not receive care at the premises in question.

He submitted further that a construction to the contrary of his argument would extend the

operation of the regulations into some unexpected and inappropriate fields, and he cited to me authority, which I shall not list, for the proposition that I should prefer a construction which had no inappropriate consequences.

Mr Smith argued on the substance of the matter that, in the context a pre-school centre simply meant a building used for the purpose of receiving children of pre-school age, the extent or purpose of the reception being that dealt with in the proclamation; and he submitted that the specific inclusion in the concept of 'pre-school centre' of creches, kindergartens, day or residential nurseries or play centres, established this construction.

I, if I may say so, had been puzzled by the form of the information laid under the regulations which alleged that the defendant was the proprietor of the pre-school centre, being a day nursery or creche. There are no particular building requirements applicable to day nurseries or creches as distinct from other pre-school centres dealt with by the regulations. I now think that there is a reason for the allegation in that and other informations that the defendant was the proprietor of a pre-school centre being a day nursery or creche, and that the reason is that the informant did not wish to concern himself with the question whether, in general terms, the establishment was a pre-school centre, but wished to make his allegation that it was such a centre because it was a day nursery or creche. In my opinion, the phrase 'pre-school centre' in the proclamation in question and in the regulations does not have an educational connotation. A pre-school centre must be a building, and though the phrase used is elaborate perhaps to the point of being pretentious, I think that it refers to a building regularly used for the reception of children. I derive that inference from the use of the word 'centre', which I think when applied to a building implies a regular use for a particular purpose, I also think that the phrase indicates only that the children who are to be received in it, or who are received in it, are those under school age, or include those under school age.

In the context of the *Health Act*, I do not think that it is necessary to go beyond this and say that the children so received must be received for the purpose of instruction or training. If that view be correct, it was certainly open to the Magistrate on the evidence to hold that this building was a pre-school centre; but if it be not correct, it was nevertheless open to the Magistrate to hold that the building was either a creche in respect of very young children, or a day nursery in respect of children of a slightly older age. The word 'creche' and the expression 'day nursery' are not defined for the purposes of the proclamation, although the word 'day nursery' is given a meaning for the purposes of the regulations.
