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28, 1954

No. 22 of 1953.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

23 MAR 1955

INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL
FROM THE SUPREME COURT OF VICTORIA.

BETWEEN

JAMES PATRICK & CO. PTY. LTD. - - - - Appellant

38098

AND

DACIE ETHEL SHARPE - - - - Respondent.

Case for the Appellant.

10 1. This is an Appeal from a Judgment dated the 21st day of October 1952 of the Full Court of the Supreme Court of Victoria (Herring C. J. Lowe and Sholl J. J.) on a Case Stated by the Workers' Compensation Board of the State of Victoria dated the 12th day of June 1952.

2. The Appeal is brought by leave of the Supreme Court of Victoria given under Rule 2 (a) of the Orders in Council relating to Appeals to Her Majesty in Council from the State of Victoria.

20 3. The Appellant in this Appeal (hereinafter referred to as "the Appellant") was the respondent before the Workers' Compensation Board of the State of Victoria. The applicant for compensation was the abovenamed Respondent to this Appeal (hereinafter referred to as "the Respondent"). The claim for compensation was made by the Respondent in respect of the death of her husband Sydney Allan Sharpe deceased (hereinafter referred to as "the deceased").

30 4. The Board found that the deceased was aged fifty-one years, was at all times material a worker within the meaning of the Workers' Compensation Acts of the State of Victoria, was on the 4th day of December 1950 in the employ of the Appellant and left a widow (the Respondent) and one child under the age of sixteen years, both of whom were totally dependent upon the earnings of the deceased. The Board further found that while travelling between his place of residence and his place of employment on the 4th December 1950 the deceased suffered an auricular fibrillation as a direct result of which he died on the 4th December 1950 at his home. The Board also found that the post mortem disclosed microscopic evidence of degenerative changes in the heart muscle not specific of any disease, that no other abnormality was observed, that the deceased for some years prior to his death suffered from atherosclerosis and a degenerative and progressive heart disease, that the deceased's pathological condition was not known to or suspected by him and that the onset of the auricular fibrillation was a sudden physiological change unexpected and not designed by the deceased.

5. For the reasons set out in the decision of the Board, the Board found on the above facts that the deceased died as a result of personal injury by accident arising out of or in the course of his employment with the Appellant and on the 5th day of February 1952 made an award against the Appellant and in favour of the Respondent for £1025 with costs.

6. At the request of the Appellant the Board on the 12th day of June 1952 stated a case for the determination of the Full Court of the Supreme Court of Victoria. The question of law submitted in the Case Stated was whether upon the Board's findings of fact it was open to the Board to find that the deceased died "as the result of injury by accident arising out of or in the course of his employment" with the Appellant (the respondent before the Board.) The Full Court of the Supreme Court of Victoria by judgment dated the 21st October 1952 answered the said question in the affirmative and ordered the Appellant to pay the Respondent's costs. The Appellant contends that the judgment of the Full Court of the Supreme Court was erroneous and that the said question should be answered in the negative. 10

7. The main relevant operative provisions of the Workers' Compensation Acts of the State of Victoria were as follows:—

"Section 5 (1). If in any employment personal injury by accident arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of the Workers' Compensation Acts. 20

(2) Provided that—

(b)

(c) If it is proved that the injury to a worker is attributable to his serious and wilful misconduct (including being under the influence of intoxicating liquor) any compensation claimed in respect of that injury shall unless the injury results in death or serious and permanent disablement be disallowed. 30

(d)

(3)

(4)

(5) Without limiting the generality of the provisions of subsection (1) but subject to the provisions of paragraph (c) of subsection (2) of this section, an injury by accident to a worker shall be deemed to arise out of or in the course of the employment if the accident occurs—

(a) while the worker on any working day on which he has attended at his place of employment pursuant to his contract of employment—

(i) is present at his place of employment; or

(ii) having been so present, is temporarily absent therefrom on that day during any ordinary recess and does not during any such absence voluntarily subject himself to any abnormal risk of injury; or

(b) while the worker—

10 (i) is travelling between his place of residence and place of employment; or

(ii) is travelling between his place of residence or place of employment and any trade technical or other training school which he is required to attend by the terms of his employment or as an apprentice or which he is expected by his employer to attend, or is in attendance at any such school

Provided that any injury incurred while so travelling is not incurred during or after—

20 any substantial interruption of or substantial deviation from his journey made for a reason unconnected with his employment or unconnected with his attendance at the school, as the case may be; or any other break in his journey which the Board, having regard to all the circumstances, deems not to have been reasonably incidental to any such journey.”

The definition provisions of the Act include the following:—

Section 3 (1). “ Disease ” includes any physical or mental ailment disorder defect or morbid condition whether of sudden or gradual development and also includes the aggravation acceleration or recurrence of any pre-existing disease as aforesaid.

30 “ Injury ” means any physical or mental injury or disease and includes the aggravation acceleration or recurrence of any pre-existing injury or disease as aforesaid.

For purposes of convenience Counsel in argument and the learned Judges of the Supreme Court in their reasons for Judgment referred to the provisions of a Consolidating Victorian Workers' Compensation Act of 1951, the provisions of which were substantially identical with the law as it existed prior to consolidation. However, the consolidating Act did not come into operation until the 19th December 1951, whereas the deceased had died on the 4th December 1950 and the consolidating Act was not expressed to be retrospective. The provisions set out above are those in operation at the date of the deceased's death. In the 1951 consolidation Section 5 (1) bore the same number as it had under the pre-existing law, but Section 5 (5) of the pre-existing law became Section 8 (2) of the 1951 consolidation and is so referred to in Sholl J's reasons for judgment. 10

8. Save that the Board found that the deceased for some years prior to his death suffered from atherosclerosis and degenerative and progressive heart disease, the Board made no finding as to the existence or nature of the cause, if any, of the auricular fibrillation which resulted in the deceased's death. Accordingly the effect of the judgment of the Supreme Court and of the Board's decision is that if whilst a worker is travelling between his place of residence and place of employment there occurs some physiological condition unexpected and not designed by him which results in his death, compensation is payable under the Workers' Compensation Acts in respect of his death even although the physiological condition is unprovoked by any circumstance and is entirely autogenous. 20

9. It is contended for the Appellant that the judgment of the Supreme Court and the decision of the Board are contrary to the provisions of the Workers' Compensation Acts on the grounds that a physiological condition which is unprovoked by circumstance and entirely autogenous, although sudden, unexpected and not designed by the worker—

(a) is not *injury* within the context of section 5 of the Workers' Compensation Acts; 30

(b) is not an *injury caused to the worker* within the said context;

(c) is not an *injury by accident caused to the worker* within the said context.

10. As to (a) above, it is submitted that the proper conclusion to be drawn from the Board's findings in the Case Stated herein is that the auricular fibrillation (that is an abnormal functioning of the heart) which resulted in the worker's death was a natural development of the atherosclerosis and degenerative and progressive heart disease from which he was suffering. If on the other hand it is not possible to draw that conclusion from the Board's findings,

then there is no finding as to the cause of the auricular fibrillation. The Appellant contends that such a physiological condition cannot properly be described as an injury in the context of Section 5 of the Workers' Compensation Acts. In each case it is entirely autogenous. It is submitted that, in the context, for a condition to be an injury it must be provoked by some circumstance. A worker is not injured within the meaning of the section if some internal condition reaches a new stage of development simply through a natural progression whether healthy or unhealthy.

10 11. It is further submitted that the definitions in the Workers' Compensation Acts do not affect this conclusion. The contraction of a disease may in certain circumstances constitute an injury within the section. But an internal physiological condition unprovoked by circumstance is neither the contraction of a disease nor the aggravation or acceleration of it. Aggravation and acceleration in the context of Section 5 contemplate some provoking agency which worsens a pre-existing condition. But the facts in this case do not show the contraction or provoked aggravation or acceleration of a disease. It is submitted that the word "injury" was in effect given the foregoing meaning for which the Appellant contends in *Slazenger Australia Pty. Ltd. v. Burnett* 1951 A.C. 13.

20 12. Whilst an observable internal lesion provoked by some external agency may be an injury, in this case upon the findings of the Board there was no such lesion. The auricular fibrillation was no more than an abnormal functioning of the heart for some period of time. Death itself can never be the injury because the Second Schedule prescribes compensation only where death *results from* the injury.

30 13. As to (b) above, the presence of the word "caused" in Section 5 adds an additional consideration to those already derived from the use of the word "Injury" in the context. An injury cannot be *caused* to a worker if it is unprovoked by any circumstance. An autogenous condition is not caused to the worker in the relevant sense.

40 14. As to (c) above, the notion of accident emphasises and underlines what has already been conveyed by the notion of an *injury caused* to the worker. Even if the expression "injury by accident" means no more than accidental injury, a physiological condition unprovoked by circumstance and arising entirely from within cannot be said to be accidental. The concept of accidental injury connotes some provoking circumstance. In sub-section (5) of Section 5 of the Workers' Compensation Act there is express reference to "the accident", and the expression "the" or "an" accident occurs in various other places and sections throughout the Act. Whether in the context the expression is to be read literally as involving an accident or whether it means the accidental injury, an unprovoked internal physiological condition cannot be described as either an accident or an accidental injury.

15. It is submitted that throughout the decisions on the Imperial Workmen's Compensation Act there is involved the concept that for there to be an injury by accident within the meaning of that Act there must be some provoking circumstance and that it is quite inconsistent with this concept to treat a physiological condition unprovoked by any circumstance and arising entirely within as being injury by accident or accidental injury. The expression used in the Imperial Workmen's Compensation Act was "personal injury by accident arising out of and in the course of the employment". In these circumstances it had been said that the expression "arising out of" required a causal connection with the employment and that the expression "arising in the course of" required a temporal connection with the employment. The contention for the Respondent has been that the substitution in 1946 of the word "or" for the word "and" in the Victorian Workers' Compensation Acts produce the result that no more than a temporal connection is necessary and that accordingly any sudden unexpected and undesigned physiological condition occurring during the period of employment or the other times referred to in sub-section (5) of Section 5 entitles the worker to compensation. It is submitted that no such conclusion can properly be drawn from the decisions on the Imperial Workmen's Compensation Acts. What would have been necessary to constitute injury by accident caused to the worker if the word "or" had been substituted for the word "and" in the Imperial Act never arose. A workman was not entitled to recover compensation under the Imperial Statute in the absence of causal connection with his employment. It is submitted that this causal connection at one and the same time fulfilled two requirements. In the first place it constituted the necessary causal connection with the employment to make the injury by accident "arise out of" the employment. In the second place it provided the necessary provoking circumstance to constitute the occurrence an "injury caused to the worker."

16. Although the expression "personal injury by accident arising out of or in the course of the employment" did not arise for interpretation under the Imperial Statute it has been considered by the High Court of Australia. In *Hetherington v. Amalgamated Collieries* 62 C.L.R. 317, the High Court gave a decision on a Western Australian Statute in which the word "or" had replaced the word "and" in the expression. It is submitted that various members of the High Court by their reasoning indicated that a provoking circumstance of some kind was still necessary to entitle an applicant to compensation under such a form of words.

17. It is submitted that the judgment of the Full Court of the Supreme Court in the present case was erroneous. His Honour the Chief Justice, Sir Edmund Herring, felt obliged to follow the previous decision of the Full Court in the case of *Willis v. Moulded Products (Aust.) Ltd.* 1951 V.L.R. 58 and accordingly His Honour did not himself decide as to the correctness or otherwise of the Appellant's main contention. Lowe J. and Sholl J. also

followed the decision in *Willis v. Moulded Products* to which they had both been parties and they at the same time stated that in their opinion *Willis v. Moulded Products* had been correctly decided. The *ratio decidendi* of the decision in *Willis v. Moulded Products* was stated by Sholl J. in the present case to be as follows:—

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RECORD p. 15
Line 16

“ First, it was decided that in order to constitute injury by accident during a protected period—in that case a journey—deemed to arise out of or in the course of employment and caused to a worker, no causal relationship in the ordinary sense need be established between the injury by accident and the employment, or between the injury by accident and the journey or other ‘ protected period ’, as those periods of employment, or statutory extensions of periods of employment, now referred to in section 8 of the Act of 1951, have come to be called. A merely temporal relationship was sufficient. Next, it was held that ‘ injury by accident ’ merely meant accidental injury in the sense of injury that was unexpected and undesigned by the worker. Lastly, it was held that an unexpected cerebral haemorrhage, even though the result of antecedent disease, was such an injury by accident.”

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18. The Appellant contends that the decision in *Willis v. Moulded Products* was erroneous. It is respectfully submitted that in *Willis v. Moulded Products* and the present case the reasoning of Lowe J. (with whose reasons Barry J. agreed) and Sholl J. is based upon the error that because it had been established that injury by accident meant accidental injury, it is sufficient to establish injury by accident if it is shown that there was present some condition of the worker unexpected and undesigned by him, even although unprovoked by any circumstance. (See Lowe J. in 1951 V.L.R. at pages 59-60 and Sholl J. in 1951 V.L.R. at pages 68-9 and His Honour’s statement of the *ratio decidendi* of the case set out in para. 17 above). Lowe J. also said in the present case—

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“ The legislative foundation of the worker’s right both in England and in this State originally might be said to have contemplated a causal connection between the worker’s injury and his employment at two points in the complex phrase set out in the section viz:—

RECORD p. 10
Line 12

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“ (a) in the phrase ‘ injury by accident ’ and in the words ‘ arising out of and in the course of the employment ’. It was early decided that ‘ injury by accident ’ did not import a causal relation but meant merely ‘ accidental injury ’. The importance of a causal connection then depended on the phrase ‘ arising out of and in the course of the employment ’ and a reference to the many cases cited in Willis’s Workmen’s Compensation shows that the decisions requiring that the employment shall be at least a contributing cause of the injury are based upon that phrase ”.

Sholl J. said in the present case:—

RECORD p. 18
Line 6

“ In Willis’ Case, we took the view that long-standing authority
“ in England, up to and including *Fife Coal Co. v. Young* (above), had
“ established that injury by accident meant merely accidental injury;
“ that there was accidental injury when an injury happened which was
“ unexpected by the worker; and that an event internal to the worker’s
“ body could constitute such an accidental injury ”.

It is submitted that the English decisions did not involve the conclusion
that an occurrence unexpected by the worker was without more accidental
injury. All that those decisions involved was that the notion of accidental
injury did not involve an unusual event and that the performance of the
worker’s ordinary work was enough. But in all the cases in which compensa-
tion was held to be payable some contributing circumstance at one and the
same time satisfied two requirements, namely, the element of “ arising out of
the employment ” and the element of “ injury caused to the worker ”.
But it is submitted that the contributing circumstance was a vital part of both
elements. Indeed, in the present case Sholl J. said—

RECORD p. 18
Line 48

“ In England the phrase ‘ if injury by accident arising out
“ of and in the course of the employment is caused to a workman ’ was
“ from at least 1903 held to mean ‘ if accidental injury—i.e. injury
“ not expected or designed by the worker—is occasioned to a workman
“ by reason of the work he is employed to do, and when he is doing
“ something in discharge of the duties imposed by his contract of
“ service ’. It followed from the words which I have italicised that the
“ conjunction of circumstances postulated by the whole expression
“ would always include as a direct contributing cause the workman’s
“ work, which must of course be external to him.”

Despite the conclusions which Sholl J. drew from the English cases His
Honour said in *Willis v. Moulded Products* (1951 V.L.R. at page 65)—

“ But in truth, I think it unsafe to assume that any of the English
“ Judges ever really adverted to the question of what was, in relation
“ to the progress of a disease, an injury by accident in abstracto,
“ independently of the rest of the words of the statute.”

It is submitted that there is no warrant for the conclusion drawn from the
English cases by Lowe, Barry and Sholl JJ., namely, that if an injury is
unexpected and unprovoked by any circumstance it is thereby injury by
accident caused to the worker. It is also submitted that their judgment was
wrong in that it involved the conclusion that a physiological condition
unexpected and undesigned by the worker was an injury within the context
of Section 5, even although it was unprovoked by circumstance and was
entirely autogenous.

19. In the present case all the members of the Full Court refused to conclude from the Board's findings that the auricular fibrillation was a manifestation of the heart disease from which the deceased was suffering. The Appellant contends that this conclusion should be properly drawn from the facts found by the Board. However, if such conclusion be not drawn, then there is no finding as to the cause of the auricular fibrillation and in particular there is no finding that it was provoked by any circumstance or arose otherwise than from within. Accordingly on either view, the Appellant contends that the auricular fibrillation was not injury by accident caused to
 10 the worker.

20. The Appellant submits that this Appeal should be allowed and that the judgment of the Supreme Court should be set aside and that in lieu thereof it may be ordered that the question in the Case Stated be answered in the negative for the following, amongst other

REASONS

- (1) BECAUSE the auricular fibrillation suffered by the deceased was not an injury within the context of Section 5 of the Victorian Workers' Compensation Acts.
- 20 (2) BECAUSE the said auricular fibrillation was not an injury caused to the deceased within the said context.
- (3) BECAUSE the said auricular fibrillation was not an injury by accident caused to the deceased within the said context.
- (4) BECAUSE a physiological condition, unprovoked by circumstances and arising from within, even though sudden, unexpected and not designed by a worker, is not an injury or an injury by accident or an injury by accident caused to a worker within the meaning of the Victorian Workers' Compensation Acts.
- 30 (5) BECAUSE on the findings of the Board the auricular fibrillation was but a step in the progressive degeneration of the deceased which was not provoked by any circumstance whatever, whether of the employment, or of the journey, or otherwise.
- (6) BECAUSE on the Board's findings it was not open to the Board to find that an injury by accident arising out of or in the course of his employment with the Appellant was caused to the deceased.
- (7) BECAUSE the reasoning of their Honours the Supreme Court Judges is erroneous.

Peter Oliver

In the Privy Council.

ON APPEAL
from the Supreme Court of Victoria

BETWEEN
JAMES PATRICK & CO.
PTY. LTD. - - - - - *Appellant*

AND

DACEY ETHEL SHARPE - *Respondent.*

Case for the Appellant.

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