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No. 22 of 1953.

# In the Privy Council.

UNIVERSITY OF LOND W.C.1.
23 MAR 1955
INSTITUTE OF LANC LEGAL STUDIES

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**ON APPEAL**  
*FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA.*

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IN THE MATTER of the Workers' Compensation Acts (Victoria).

38099

BETWEEN

10 JAMES PATRICK & COMPANY PROPRIETARY LIMITED (Respondent) . . . . . *Appellant*

AND

DACIE ETHEL SHARPE (Applicant) . . . . . *Respondent.*

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## Case for the Respondent

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RECORD.

1. This is an appeal from an order of the Full Court of the Supreme Court of the State of Victoria (Herring, C.J., Lowe and Sholl, J.J.) dated the 21st October 1952 which answered a question submitted by way of Case Stated at the request of the Appellant by the Workers' Compensation Board of Victoria, arising out of a claim made by the Respondent for Workers' Compensation in respect of the death of her husband Sydney Allan Sharpe. The appeal is brought pursuant to leave granted by the said Supreme Court on the 19th December 1952.

p. 5.  
p. 24.

2. The question submitted to the Supreme Court was whether on the facts set out in the Case Stated it was open to the Workers' Compensation Board to find (as it had) that Sydney Allan Sharpe died as the result of injury by accident arising out of or in the course of his employment with the Appellant. The Supreme Court unanimously answered the question, Yes.

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p. 5.

3. The facts are not in dispute, inasmuch as the Workers' Compensation Board has made findings of fact on which to base its question. Those findings of fact are as follows :—

p. 4.

(A) The deceased Sydney Allan Sharpe late of 39 St. Vincent Street Albert Park Shore Shipwright aged fifty-one years was at all times material a worker within the meaning of the Workers' Compensation Act of the State of Victoria and on the 4th December 1950 was in the employ of the Respondent.

(B) The deceased worker left a widow (the Applicant) and one child under the age of sixteen years both of whom were totally dependent upon the earnings of the deceased worker.

(C) While travelling between his place of residence and his place of employment on the 4th December 1950 the worker suffered an auricular fibrillation.

(D) As a direct result of such auricular fibrillation the worker died on the 4th December 1950 at his home.

(E) The post mortem disclosed microscopic evidence of degenerative changes in the heart muscle not specific of any disease. 10  
No other abnormality was observed.

(F) The worker for some years prior to his death suffered from atherosclerosis and a degenerative and progressive heart disease.

(G) The worker's pathological condition was not known to or suspected by him.

(H) The onset of the auricular fibrillation, was a sudden physiological change unexpected and not designed by the worker.

p. 1.

4. The Respondent's claim was made pursuant to the Workers' Compensation Act 1928 of the State of Victoria as from time to time amended, and the principal relevant provisions are as follows :— 20

(A) " 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 this Act."

Section 5 (i) as amended by Section 3 (i) (a) of Act No. 5128.

(B) " Where the worker's death results from the injury the compensation shall be a sum in accordance with the Second Schedule."

Section 7 as amended by Section (4) (i) of Act No. 5128.

(C) " In this Act unless inconsistent with the context or 30  
subject matter :—

' 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 . . .

' 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."

(Amendment of Section 3 added by Section 3 of Act No. 5128.)

(See (A)  
above)

(D) " Without limiting the generality of the provision of 40  
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

10 (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—

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

20 (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—

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.”

30 (New subsection (5) added to Section 5 by section 3 (1) (e) of Act No. 5128.)

(Paragraph (c) of subsection (2) above referred to is irrelevant to the case, as it relates to injuries attributable to the worker's serious and wilful misconduct.)

5. The Workers' Compensation Board in its reasons for Award <sup>p. 3.</sup> considered that the occurrence of the auricular fibrillation during the journey between the worker's place of residence and his place of employment was injury by accident bringing the case within the principle of *Willis v. Moulded Products (Australia) Ltd.* (1951), V.L.R., p. 58, and accordingly made an award for compensation.

40 6. *Willis v. Moulded Products (Australia) Ltd.* was a decision by the Full Court of the Supreme Court of Victoria to the effect that the occurrence of a cerebral hæmorrhage, not due to any cause external to the worker, on a similar journey, was injury by accident within the meaning of the Workers' Compensation Act. On the hearing before the Supreme Court, James Patrick & Co. Pty. Ltd., the Appellant (Respondent), sought to

argue that *Willis v. Moulded Products (Australia) Ltd.* was wrongly decided, but the Court, after being informed of the substance of the contention to this effect and the cases relied upon in support of it, decided to follow that case, and the Appellant's argument was then limited to an attempt to distinguish that case on the facts.

The distinction, it was argued, was between an "injury" in the form of a lesion observable ante or post mortem that is, a tearing or breaking of physical tissue, and an occurrence which presented no visual evidence of such a character, but was a sudden and unexpected onset of a functional failure of the heart muscles. Such an occurrence, it was argued, was not "injury." The Supreme Court, however, rejected this argument. 10

pp. 8, 23.

7. Herring, C.J., and Sholl, J., considered that, by reason of the statutory definitions of "injury" and "disease," the auricular fibrillation suffered by the worker was an injury within the meaning of the Act. Sholl, J., also pointed out that, under the legislation formerly in force in the United Kingdom, the following authorities showed that a functional failure, not involving any physical lesion, could amount to an injury :—

pp. 20-21.

*Falmouth Docks & Engineering Co. Ltd. v. Treloar* [1933] A.C. 481.  
*Partridge Jones & John Paton Ltd. v. James* [1933] A.C. 501.  
*Walker v. Bairds & Dalmellington Ltd.* [1935] S.C. (H.L.) 28. 20  
*Walkinshaw v. Lochgelly Iron & Coal Co. Ltd.* [1935] S.C. (H.L.) 36. *Fife Coal Co. v. Young* [1940] A.C. 479.

Lowe, J., considered that the Board's findings of fact brought the case directly within the authority of *Willis v. Moulded Products (Australia) Ltd.* He also pointed out that since the decision in that case the Victorian Legislature had re-enacted the legislation in the same language as that interpreted by the Full Court in that case.

8. The Respondent submits that the decisions of the Workers Compensation Board and of the Supreme Court in the present case are correct, and that *Willis v. Moulded Products (Australia) Ltd.* was also 30 correctly decided.

The Respondent submits that :—

(A) In cases falling within Section 5, subsection (5), of the Act, no causal connection between the injury and the journey is required. This was in fact conceded before the Supreme Court in *Willis v. Moulded Products (Australia) Ltd.* ((1951), V.L.R., at p. 59) and in the present case ((1953), V.L.R., at p. 217).

(B) The expression "injury by accident" means no more than injury not expected by the worker and not designed by him. This was established in *Fenton v. Thorley* [1903] A.C. 443 and has been 40 frequently reaffirmed, for example, in—

*Clover Clayton v. Hughes* [1910] A.C. 242. *Hetherington v. Amalgamated Quarries of W.A. Ltd.* (1939), 62 C.L.R. 317.

The argument advanced by the Appellant before the Supreme Court, that the phrases "injury by accident" and "is caused to the worker" import some contributory cause external to the

worker is, it is submitted, unsound and contrary to the current of authority. The Respondent adopts in this regard the analysis and conclusions of Sholl, J., in (1953), V.L.R., at pp. 217-220, and especially the following passage at p. 219 :—

10 “ So far as ‘ injury ’ was concerned, it came to be established that an internal physiological occurrence, unexpected by the workman, if for the worse, and defined and separable, was enough. When in Victoria and other jurisdictions the word ‘ and ’ was changed to ‘ or, ’ it might have been argued that that alone was enough to produce the result that the unexpected  
 20 conjunction of circumstances need no longer include anything external to the worker, save that he should be at the time doing something in discharge of the duties imposed by his service. But the amendment, in Victoria at all events, was not limited to the substitution of ‘ or ’ for ‘ and ’. The Act of 1946 added to sec. 5 of the Act of 1928 provisions which, with certain further additions, now appear as sec. 8 of the Act of 1951. They in effect enacted that, in respect of ‘ injuries by accident ’ occurring while the worker was at his place of employment, or was absent  
 30 therefrom during certain other protected periods, the conjunction of circumstances should be *deemed to include* the circumstances that a direct contributing cause was the worker’s work or the circumstance that at the material time he was doing something in discharge of the duties imposed by his contract of service. Neither circumstance need actually exist—i.e., neither the original postulate of a direct contributing cause in the work itself, or the originally cumulative but now alternative postulate of a temporal relation between the injury and the performance of duties required by the service . . . Given the unexpected injury—e.g., a distinct and separate lesion or functional failure of his body, even though entirely internal to him, and the temporal environment postulated by section 8 (i.e., sec. 5 prior to the consolidating Act of 1951)—the remainder of the concept referred to in sec. 5 (1) is now supplied by statutory fiction. No such situation has ever been considered in England, nor I believe, in any of the cases from other jurisdictions which have reached the High Court. There is nothing in the curious development of the law in Victoria to warrant the Courts in  
 40 now attributing to the words ‘ by accident ’ or ‘ is caused ’ (which never had the role before) the function of importing as a requirement a defined and separable external incident, however trivial, and not necessarily connected with the work or the journey of the worker.”

Since the decision in *Willis v. Moulded Products (Australia), Ltd.*, which involved the rejection of this contention of the Appellant, the Victorian Legislature has re-enacted, in a consolidating and amending statute, the expressions dealt with in that case (See Act No. 5601, which was assented to on 11th December 1951 and accordingly does not directly govern the present case).

50 (c) The form in which subsection (5) of Section 5 is expressed, taken together with the alteration of “ and ” to “ or ” in the

expression "arising out of and in the course of the employment" and the use of the word "occurs" in subsection (5) show that the legislature did not intend that the expression "is caused to" when used in conjunction with "injury by accident", should import any requirement that some external circumstance should have contributed to the injury.

(D) The authorities referred to in paragraph 7 of this Case show, in the words of Sholl, J. (1953 V.L.R. at p. 220), that "mere sudden failure of the functions of a bodily organ, or of bodily mechanism, producing incapacity or death, is compensatable," or, 10 in other words, that it is not essential to the concept of injury by accident that there should be a physical lesion.

(E) An auricular fibrillation is an "injury" within the meaning of the statutory definition of "injury," whether it is to be regarded as having occurred independently of the pre-existing heart disease, or whether it was a stage in the development of that disease. It is, however, submitted that the facts found by the Board do not include or imply any finding that the auricular fibrillation was connected with the pre-existing heart disease.

p. 5.

9. The Respondent submits that the order of the Full Court of the 20 Supreme Court was rightly made, and that this appeal should be dismissed, for the following amongst other

### REASONS

- (1) BECAUSE on the facts found by the Workers' Compensation Board the auricular fibrillation, from which the death of the worker resulted, constituted "injury by accident" within the meaning of that phrase established by the authority of decided cases.
- (2) BECAUSE on those facts the auricular fibrillation was an "injury by accident" within the proper meaning 30 of that phrase construed in the light of the definitions contained in the Act, and in the light of the other provisions thereof.
- (3) BECAUSE the phrase "injury by accident . . . caused to the worker" does not on its true construction import a causal connection between the injury and some circumstance or circumstances external to the worker, whether in relation to the employment of the worker, the journey on which he may be engaged, or any other matter. 40
- (4) BECAUSE the Full Court of the Supreme Court of the State of Victoria has correctly interpreted the legislation and has correctly applied such interpretation in answering the question asked by the Worker's Compensation Board.

R. M. EGGLESTON.

HAROLD BROWN.

**In the Privy Council.**

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**Case for the Respondent**

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**WATERHOUSE & CO.,**  
1 New Court,  
Lincoln's Inn,  
London, W.C.2.

Agents for—

**MAURICE BLACKBURN & CO.,**  
of Melbourne,  
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*Solicitors for the Respondent.*