

50/156

28, 1954

No. 22 of 1953.

In the Privy Council.

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

BETWEEN

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

AND

DACIE ETHEL SHARPE (Petitioner) *Respondent.*

RECORD OF PROCEEDINGS

NICHOLAS WILLIAMS & CO.,
88/90 CHANCERY LANE,
LONDON, W.C.2,
Solicitors for the Appellant.

WATERHOUSE & CO.,
1 NEW COURT,
CAREY STREET,
LONDON, W.C.2,
Solicitors for the Respondent.

UNIVERSITY OF LONDON
 W.C.1
 23 MAR 1955
 INSTITUTE OF ADVANCED
 LEGAL STUDIES

38097

No. 22 of 1953.

In the Privy Council.

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

On Case Stated by the Workers' Compensation Board of Victoria.

IN THE MATTER of the Workers' Compensation Acts.

BETWEEN

JAMES PATRICK & COMPANY PROPRIETARY LIMITED . *Appellant*

AND

DACIE ETHEL SHARPE *Respondent.*

RECORD OF PROCEEDINGS

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In the Privy Council.

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

On Case Stated by the Workers' Compensation Board of Victoria.

IN THE MATTER of the Workers' Compensation Acts.

BETWEEN

10 JAMES PATRICK & COMPANY PROPRIETARY
LIMITED *Appellant*

AND

DACIE ETHEL SHARPE *Respondent.*

RECORD OF PROCEEDINGS

No. 1.

NOTICE OF CLAIM.

NOTICE BY EMPLOYER THAT CLAIM FOR COMPENSATION
HAS BEEN MADE.

IN THE MATTER of the Workers' Compensation Acts.

20 To the Registrar,
Workers' Compensation Board,
412 Collins Street,
Melbourne.

*In the
Workers'
Compensa-
tion Board
of
Victoria.*

No. 1.
Notice of
Claim,
30th April
1951.

TAKE NOTICE that a claim for compensation has been made by or on
behalf of—

DACIE ETHEL SHARPE of 39 St. Vincent Street,
Albert Park Claimant

to

JAMES PATRICK & COMPANY PROPRIETARY
LIMITED of 35 William Street, Melbourne Employer

30 In respect of the death of Sydney Allan Sharpe late of 39 St. Vincent
Street Albert Park Carpenter deceased.

*In the
Workers'
Compensation Board
of
Victoria.*

No. 1.
Notice of
Claim,
30th April
1951,
continued.

PARTICULARS.

- (1) The claim was made on the 9th day of April 1951.
- (2) The claim is for compensation for the death of the deceased.
- (3) The deceased was a male aged 51 years.
- (4) The claim is made on behalf of the above-named claimant whose name and address is Dacie Ethel Sharpe of 39 St. Vincent Street Albert Park by her solicitors Messrs. Maurice Blackburn & Co. of 431 Bourke Street Melbourne.
- (5) The accident is alleged to have happened on the 4th day of December 1950. It is alleged that the deceased collapsed and died in the course of his employment by the employer. 10
- (6) The alleged injury by accident was unstated. He died at home on the said 4th December 1950.
- (7) No payment of compensation or otherwise was paid to the worker.
- (8) The claimant who claims as the widow of the deceased has received no payment from the employer as compensation or otherwise.
- (9) It is alleged that there was one child of the deceased under the age of 16 years at the date of his death. 20
- (10) The employer desires that the question of liability and proceedings in this claim be held over until further enquiries have been made.

The name and address of the employer's solicitors or agents is: Messrs. Middleton McEacharn & Shaw of 60 Market Street Melbourne.

Dated this 30th day of April 1951.

MIDDLETON McEACHARN & SHAW,
of 60 Market Street, Melbourne,
Employers' Solicitors.

Received by the Registrar.

30

No. 2.

REASONS FOR AWARD OF THE WORKERS' COMPENSATION BOARD.

This is a claim by the widow of Sydney Allan Sharpe who was employed by the Respondent and who died on the 4th December 1950. All the medical witnesses agree that there was some sudden event which was probably an auricular fibrillation, which set in train the final events which led to his death.

Both Professor Wright and Dr. Bowden whose evidence the Board accepts thought it more probable that this event occurred after the worker
 10 left home that morning. He acted normally around the house and felt normal and left home in apparent good health. On his arrival at work he was grey and obviously ill and distressed. He was unable to do any work, and his condition deteriorated over a few hours and he became completely disorientated and died the same day. We are satisfied on the evidence that the event or physiological change took place after he left home and while he was travelling to his place of employment. The case is one which falls within the principle of *Willis v. Moulded Products Ltd.* 1951 V.L.R. p. 58 and there will accordingly be an award in favor of the applicant for £1,025.0.0 with costs on the appropriate County Court
 20 Scale Certify a qualifying fee for Professor Wright and for any items which may be appropriate under Rule 60.

*In the
Workers'
Compensation Board
of
Victoria.*

No. 2.
Reasons for
Award of
the
Workers'
Compensation
Board.

No. 3.

CASE STATED.

At Request of Respondent for the Determination of the Full Court of the Supreme Court of the State of Victoria pursuant to Section 9, subsection (3) of the Workers' Compensation Act 1937.

No. 3.
Case
Stated,
12th June
1952.

1. This application for compensation was originated before the Board by Notice of Claim dated the 30th day of April 1951. A copy of the said Notice of Claim is annexed hereto, and marked "A." (See Record page 1.)
- 30 2. The Board on the 30th day of August 1951 directed that the following issues be tried between the Applicant and the Respondent :—
 - (A) Whether the deceased suffered personal injury by accident arising out of or in the course of his employment.
 - (B) Whether the death of the deceased resulted from personal injury by accident arising out of or in the course of his employment.
3. The application came on for hearing before the Board on the 5th day of February 1952 at 10.30 a.m. Both parties were represented by Counsel. Witnesses were called by both the Applicant and the Respondent and each Counsel addressed the Board.

*In the
Workers'
Compensation Board
of
Victoria.*

No. 3.

Case
Stated,
12th June
1952,
continued.

4. After consideration of the evidence the following facts were found by the Board :—

(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 Acts 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. 10

(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. 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. 20

(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.

5. For the reasons set out in the decision of the Board annexed hereto and marked " B " (See Record page 3) the Board found on the above facts that the said deceased died as a result of personal injury by accident arising out of or in the course of his employment with the Respondent and made an award for £1,025.0.0 with costs.

6. The question of law submitted for the opinion of the Full Court is 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 Respondent.

Dated the 12th day of June 1952.

WORKERS' COMPENSATION BOARD,

F. B. GAMBLE, Chairman.

JAMES WILKINSON	}	Members.
A. E. PARKES		

40

No. 4.
JUDGMENT.

*In the
Full Court
of the
Supreme
Court of
Victoria.*

IN THE SUPREME COURT OF VICTORIA.

IN THE MATTER of the Workers' Compensation Acts
and

IN THE MATTER of an Application made to the Workers'
Compensation Board in these Acts in which

No. 4.
Judgment
21st
October
1952.

DACIE ETHEL SHARPE was Applicant

and

10 JAMES PATRICK & COMPANY PROPRIETARY
LIMITED was Respondent.

Before the Full Court their Honours THE CHIEF JUSTICE SIR EDMUND
HERRING, Mr. JUSTICE LOWE and Mr. JUSTICE SHOLL.

Tuesday the twenty-first day of October 1952.

THIS CASE STATED by the Workers' Compensation Board dated the
twelfth day of June 1952 at the request of the Respondent herein coming
on for hearing upon the fifteenth, eighteenth, nineteenth days of August
1952 UPON HEARING the said Case Stated AND UPON HEARING
Mr. Eggleston of Queen's Counsel and Mr. C. W. Harris of Counsel for the
20 above-named Applicant and Mr. Menzies and Mr. Burbank of Queen's
Counsel and Mr. Menhennitt of Counsel for the above-named Respondent
THIS COURT DID ORDER that this matter should stand for judgment
and this matter standing for judgment this day THIS COURT DOTH
ANSWER the question submitted in the said Case as follows :—

Question : Whether on the facts set out in this Case it was open to the
Workers' Compensation 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 Respondent.

Answer : Yes.

30 AND IT IS ORDERED that the Applicant's costs of these proceedings
be taxed and when taxed be paid by the Respondent to the Applicant.
(L.S.)

By the Court.

£1
Duty Stamp
Cancelled.

REASONS for Judgment of Herring, C.J.

No. 5.
Reasons for
Judgment
of Herring,
C.J., 21st
October
1952.

This was a case stated by the Workers' Compensation Board, which submitted for the determination of this Court the question whether upon the findings of the Board it was open to it to find that the deceased Sharpe died "as the result of injury by accident arising out of or in the course of his employment" with the Respondent.

The case came before the Court first upon an application by Mr. Menzies for the Respondent, that a Full Court of five or more Judges be constituted to reconsider the decision of the Full Court, consisting of Lowe, Barry and Sholl JJ., in the case of *Willis v. Moulded Products (Australia) Ltd.* [1951] V.L.R. 58. He submitted that this case was wrongly decided. As both my learned brothers, who with me constitute this Court, were parties to that decision I have thought it proper, though I agree with the conclusion they have reached in this case, to state my views separately. 10

After hearing some argument from Mr. Menzies we decided that the case should take its place in the list, when we agreed he should be allowed to develop his argument further. Thereafter when the case was called on, he stated his reasons for submitting that *Willis' Case* was wrongly 20 decided.

In that case a worker died as the result of cerebral hæmorrhage suffered by him while travelling between his place of employment and his place of residence. And the question the Court had to decide was whether the cerebral hæmorrhage was a personal injury by accident arising out of or in the course of the employment caused to the worker in his employment within the meaning of Sec. 5 (1) of the Workers' Compensation Act 1928.

In approaching this question Lowe, A.C.J., with whose reasons Barry, J., agreed, referred to the statutory presumption that an injury by 30 accident to a worker shall be deemed to arise out of or in the course of the employment, if the accident occurs while the worker is travelling between his place of employment and his place of residence, Sec. 3 of Act No. 5128. His Honour then went on to say that there only remained for decision the question whether the facts found established "injury by accident," and concluded that the rupture of the cerebral artery, an event, which was unexpected by the worker and not designed by him, constituted an "injury by accident" within the meaning of the Workers' Compensation Acts. His Honour regarded the case as one, where the one 40 event, the bursting of an artery, constituted both the accident and the injury. And he held on the authority of *Fenton v. Thornley* (1903) A.C. 443, that "injury by accident" merely means "accidental injury," that is to say, injury that is unexpected and undesigned by the worker in contrast to injury that is expected or designed by him.

According to the Board's findings the condition of the worker's arteries as the result of atherosclerosis and hypertension, diseases from which he had suffered for some years prior to his death, had progressed to

such a critical stage, that in the language of the Board's finding, "the strain of the worker's normal living or activity of any kind was likely to and in the event did cause a cerebral haemorrhage."

*In the
Full Court
of the
Supreme
Court of
Victoria.*

10 Mr. Menzies relied upon this finding as the basis of his argument that *Willis'* case was wrongly decided. He submitted that an event, even though unexpected and not designed by a worker, which is no more than a step in the progress of a disease, from which he is suffering, whether it be of an organic or functional character, is not personal injury by accident caused to the worker, unless there is found to be some contributing cause, which gives it that character. And he relied upon the statement of Romer, L.J., as he then was, in *Ormond v. C. D. Holmes & Co. Ltd.* (1937) 2 All E.R. at p. 801, where he summarised the result of the decision as follows:—

No. 5.
Reasons for
Judgment
of Herring,
C.J., 21st
October
1952,
continued.

20 "If a man be incapacitated solely by reason of the fact that he is suffering from a disease, the incapacity is not due to personal injury by accident. It may be possible, in certain cases, to attribute the contraction of the disease to an accident, that is to say, to some unlooked-for mishap or untoward event, and when that can be done, and the disease results in an incapacity, it may rightly be said that the incapacity is one caused by that accident. But the disease itself is not an accident in the popular and ordinary sense of that word. If a man should die suddenly of heart disease, without any contributing cause, no one would say that his death was accidental or due to an accident. In some cases, however, incapacity is caused by a disease in conjunction with a contributory cause. A man, for instance, may be suffering from a disease of the heart that sooner or later is bound to cause his death. His death, however, from the disease may be accelerated by some particular, though not necessarily an unusual, act of exertion. In these cases, the death or incapacity can properly be said to be caused by an accident, and where the contributing cause is furnished by and in the course of the injured workman's employment, he is entitled to compensation under the Act."

30

Mr. Menzies accordingly contended that in *Willis'* Case His Honour, the acting Chief Justice, did not give full effect to the words "injury by accident caused to the worker," and that assuming an "injury" had been suffered by the worker in that case, it was not an "injury by accident" within the meaning of the Act. As it appeared, however, that all the authorities Mr. Menzies relied upon, with one exception, had been referred to the Court in *Willis'* Case and that the substance of his contention, without perhaps full emphasis on the words "caused to the worker," had been put and over-ruled, we decided that we should follow that case, and leave it to some higher tribunal to determine whether or not it was rightly decided. I therefore express no opinion on the question whether in the light of the numerous authorities on the subject, other than *Willis'* Case, the contention of Mr. Menzies can now prevail.

40

In the present case the Board found that the worker, while travelling between his residence and his place of employment on the 4th December 1950, suffered an auricular fibrillation, as a result of which he died on the same day at his home. It also found that the onset of the auricular

*In the
Full Court
of the
Supreme
Court of
Victoria.*

No. 5.
Reasons for
Judgment
of Herring,
C.J., 21st
October
1952,
continued.

fibrillation was a sudden physiological change unexpected and not designed by the worker. In the light of *Willis'* case this finding establishes that if the worker suffered "an injury" under the Act, it was "an injury by accident caused to the worker." In addition the Board found that the worker had for some years prior to his death suffered from atherosclerosis and a degenerative and progressive heart disease, but made no finding that connected the onset of the auricular fibrillation with that disease. As we are bound by the Board's findings we cannot infer, however probable it may seem, that there was any such connection, or treat the auricular fibrillation as merely a manifestation of the worker's heart disease, as we were invited to do by Mr. Menzies. 10

Approaching the matter in the light of the Board's findings and of what was decided by the Court in *Willis'* case, it seems to me that the only point open to the Respondent in the present case is whether the worker suffered an "injury" under the Act.

On this question Mr. Menzies sought to distinguish *Willis'* case by pointing out that in that case, what the worker suffered was an "injury" in the ordinary acceptation of the term. It was a *lesion observable ante* or post mortem. Auricular fibrillation on the other hand was no more, he said, than a functional disturbance, a disturbance of the heart function. 20

The Board made no finding as to the nature of the auricular fibrillation that caused the worker's death, but a reference to standard medical works shows that auricular fibrillation is a disorder or disturbance of the heart function, a functional failure of the heart muscle. And whether such a disorder or failure can properly be regarded as an "injury" under the Act, is a question with regard to which no assistance can in my opinion be derived from the decision in *Willis'* case, for such a disorder or failure is a very different thing from the lesion that occurred in that case.

The matter is however concluded in my opinion against the Respondent by the definitions contained in the Act. For the word "injury" by definition means *inter alia* "any disease," and "disease" by definition includes "any physical . . . disorder defect or morbid condition." And I think it is clear that the auricular fibrillation suffered in this case is comprehended by the words "physical disorder." 30

I think therefore the question stated by the Board should be answered "yes." The Respondent to pay the Applicant's costs of the proceedings in this Court with liberty to either party to apply to a single Judge of the Court in relation to the ascertainment thereof.

REASONS for Judgment of Lowe, J.

*In the
Full Court
of the
Supreme
Court of
Victoria.*

No. 6.
Reasons for
Judgment
of Lowe, J.,
21st
October
1952.

This was a case stated by the Workers' Compensation Board at the request of the Respondent for the determination of the Full Court whether upon the Board's findings of fact it was open to the Board to find that the deceased workman died as the result of injury by accident arising out of or in the course of his employment with the Respondent. I agree with the view expressed by Sholl, J., that this case is not out of time and proceed at once to the substance of the case. The Board's findings included the following: that the deceased was a worker within the meaning of the Workers' Compensation Acts and was on the 4th December 1950 in the employ of the Respondent: that while travelling between his place of residence and his place of employment on that day he suffered an auricular fibrillation as a direct result of which he died on the same day at his home: and that the onset of the auricular fibrillation was a sudden physiological change unexpected and not designed by the worker.

These findings of fact, which are not reviewable by this Court, bring the present case precisely within the authority of the case of *Willis v. Moulded Products (Australia) Ltd.* decided by this Court in December 1950 and lead to the question stated being answered "yes."

When the case was first called on on the 6th August 1952 Mr. Menzies, for the Respondent, asked us to constitute the Court, with at least five judges to reconsider the decision in *Willis'* case which, he submitted, was not correctly decided; but, since he could not show that there was a later decision of authority, which was inconsistent with *Willis'* case, or that any relevant decision was not considered in *Willis'* case, and since the decision had been so recently given, we felt that we should not accede to this request, but should leave him, if dissatisfied, to appeal to a higher Court.

Mr. Menzies on the hearing also argued that this case was distinguishable from *Willis's* case by reason of further findings of the Board set out in paragraphs (E) (F) and (G) of the special case and which I summarise as showing that the worker had for some years before his death suffered from a progressive degenerative condition of the heart not specific of any disease and from atherosclerosis. The findings do not connect the auricular fibrillation with this condition of the heart or with atherosclerosis and so far as I can discover from standard works of medical authority, if I am at liberty to consult them, there is no necessary connection between such conditions and auricular fibrillation. These paragraphs of the special case seem to be added to enable the Respondent to make what it could of them and were not intended to and do not modify the effect of the other findings to which I first referred.

In my opinion they do not afford any ground for distinguishing this case from *Willis's* case.

The burden of Mr. Menzies' argument in attacking the decision in *Willis's* case rested on the words "is caused" in Section 5 (1) of Act No. 5601, words which have appeared in all the preceding legislation in

*In the
Full Court
of the
Supreme
Court of
Victoria.*

No. 6.
Reasons for
Judgment
of Lowe, J.,
21st
October
1952,
continued.

relation to Workers' Compensation. He said there were four elements required by that section to be shown to establish the worker's right viz. : (1) personal injury by accident (2) arising out of or in the course of employment (3) is caused to a worker (4) in any employment ; and that *Willis's* case had overlooked the requirement postulated by the words " is caused to a worker." I have read the elaborate discussion of the matter by Sholl J. and will not enter on the ground he has traversed, but I should like to make these observations in regard to Mr. Menzies' arguments :—

(1) The matter we have to determine must be determined upon Victorian legislation, and decisions upon other legislation 10
are not decisive and may be misleading.

(2) 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. : (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 20
" 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. The words " is caused " seem to have been interpreted to mean no more than " occurs to " or " is suffered by." When in 1946 the language of the section " arising out of and in the course of " was in this State altered to the alternative form, a temporal relation between the employment and the injury was sufficient and thenceforward injury by accident i.e., accidental injury, occurring to or 30
suffered by the worker in the course of his employment became a basis for compensation. I need not emphasize that statutory presumptions have now extended the circumstances in which compensation is payable.

(3) Since the decision in *Willis's* case the Legislature has re-enacted the Legislation in the same language as that interpreted by the Full Court in *Willis's* case. But in any case this Court must follow *Willis's* case, so long as it is not over-ruled.

The question should be answered " yes " and the Respondent employer should pay the costs of this case as indicated in the judgment of Sholl J. 40

REASONS for Judgment of Sholl, J.

*In the
Full Court
of the
Supreme
Court of
Victoria.*

No. 7.
Reasons for
Judgment
of Sholl, J.,
21st
October
1952.

10 Since, at the hearing, some debate took place on the question whether the case which the Workers' Compensation Board has stated for the opinion of this Court was stated within due time, it is desirable at the outset to say something as to the construction of sec. 9 (3) of the Workers' Compensation Act (1937), the amendment of that subsection effected by sec. 15 of the Workers' Compensation Act 1946, and the consolidation of those provisions in sec. 56 (3) of the Workers' Com-
10 pensation Act 1951. The last-mentioned Act came into force on the 19th December 1951, and the case now before us was stated on the 12th June 1952. The Board's award, we are told, was made, and the Board's reasons for that award were pronounced, on the 5th February 1952. Accordingly I think the relevant provisions under which the case was stated are those of the 1951 Act, though the same result would be arrived at by reference to those of the Act of 1937 as amended in 1946.

Sec. 56 (3) of the 1951 Act provides :—

20 “ (a) When any question of law arises in any proceedings before the Board, the Board may of its own motion and shall, if either of the parties to such proceedings so requires before, or within one month after, the reasons for the decision of the Board have been pronounced, state a case for the determination of the Full Court of the Supreme Court thereon.”

30 Before 1946, the words “ before, or within one month after, the reasons for the decision of the Board have been pronounced ” were not in paragraph (A) and therefore no time limit was imposed by the Statute on the Board's power to state a case or on the right of either party to proceedings before it to require it to do so. But do the time limits first introduced in 1946 by the words which I have quoted above apply to the power or duty
30 of the Board to state a case, or merely to the right of the party to state his “ requirement ” ? In other words, does the adverbial expression introduced by amendment modify the verbs “ may state ” and “ shall state,” or the verb “ requires ” ? In my opinion, it modifies the verb “ requires.” The punctuation of the present paragraph, which in that respect is consistent with the precise statement of the amendment in the Act of 1946, supports that view, as does also the position in the whole sentence of the expression thus inserted. Furthermore, there is no doubt good reason for placing a time limit upon the right of a party to take a step which may remove a question of law from the arbitrament of the Board, whereas
40 there would be much less reason for providing that the actual statement of the case, whether voluntary or compulsory upon the part of the Board, should be ineffective unless completed within the named period. Accordingly, although the case was not stated until more than four months after the pronouncing of the Board's reasons, it was properly before us.

The Board stated, in paragraph 4 of the Case, the following facts :—

(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 Acts 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 10
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. 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. 20

In para. 5 of the Case, the Board said :—

“ For reasons set out in the decision of the Board annexed hereto and marked ‘ B ’ the Board found on the above facts that the said deceased died as a result of personal injury by accident arising out of or in the course of his employment with the Respondent and made an award for £1,025 0. 0. with costs.”

The Board then submitted for the determination of this Court the question 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 Respondent. 30

It appears from the reasons to which the Board referred in para. 5 of the Case that the Board made an award in favor of the applicant, the widow of the deceased man, for £1,025, with certain appropriate orders as to costs.

Some debate took place before us as to the relation, if any, between the auricular fibrillation referred to in paras. (C), (D) and (H) of the Board's findings of fact, and the heart disease and heart changes referred to in paras. (E) and (F), and, as I read it, para. (G), of those findings. For the Applicant it was said that this Court could not or at all events should not, proceed on the basis that the auricular fibrillation 40
was the consequence of, or necessarily related to, the diseases or changes referred to in paras. (E) and (F), since the Board had not so found; though Counsel for the Applicant was, even on either of those hypotheses quite prepared to defend the Board's decision. For the Respondent, whose counsel desired to argue that *Roberts v. Dorothea Slate Quarries Co.*

[1948] 2 All E.R. 201, and the line of previous authority referred to therein, were applicable to this case, it was contended that the Court should infer, from the circumstance that the Board included paras. (E), (F) and (G) in the case, that those paragraphs were intended to state facts which bore a causal relation to the auricular fibrillation. Although the Board in its reasons mentioned some further facts, not included in para. 4 of the case, they do not bear on that question. Even if they did, I should be of opinion, following the view which I expressed in *Willis v. Moulded Products* (1951) V.L.R. 58, at p. 71, that we could not refer to the reasons, even though annexed to the case, in order to supplement the facts upon which the Board has told us it desires our determination of the law; cf. *R. v. Reid*, 22 V.L.R. 395; *R. v. Murphy*, 4 W. W. & a'B. (L.) 63; *Thomas v. R.*, 59 C.L.R. 279, per Latham, C.J., at p. 286; per Dixon, J., at p. 311. No doubt it would be possible to refer the case back to the Board with a request for a fuller statement of facts, or an amplification or clarification of any findings already stated, but there is nothing to suggest that the Board had before it any evidence which would enable it to comply with any such request. Indeed, when one turns to standard works of reference in order to ascertain the ordinary meaning of the term "auricular fibrillation," one is the more ready to suppose that the omission of any statement of any connection between the heart disease and the auricular fibrillation was deliberate on the part of the Board, and that the facts stated in paras. (E), (F) and (G) are included—possibly, as Counsel for the Applicant suggested, at the request of the Respondent, in order that the Respondent may have an opportunity of contending, if so advised, that they have a relevance to and should affect the legal determination of the rights of the parties. At all events, I propose to consider the case on the basis that the auricular fibrillation is not found to have been related to the heart diseases or changes, though, as I shall have occasion later to point out, I do not think it would make any difference in this case if it were so found.

The Board has made no finding as to the nature or details of the auricular fibrillation referred to. We are left to ascertain those matters from standard works of reference, and from such statements as Counsel without objection made to us for our information. Counsel agreed that it was proper for us to refer not only to dictionaries but to standard medical works of reference, and even—though for myself I doubt the wisdom of it—to such judicial knowledge as we may from time to time have acquired from contact with other informed sources of repute. I am indebted to Lowe, J., for a reference to Pollock & Clutterbuck's *Legal Medical Dictionary* 1935 p. 36, where the term "auricular fibrillation" is thus defined:—

"An affection of the heart in which the muscle fibres of the walls of the auricles are in a state of extremely rapid contraction and relaxation; the beat of the heart is irregular both in force and frequency."

In the *British Encyclopædia of Medical Practice*, 2nd Ed., 1951, vol. V, p. 427, to which Lowe, J., also referred at the hearing, it is stated:—

"The cause of fibrillation remains obscure. It is independent of sensory or sympathetic innervation, occurring when these have been interrupted."

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This passage refers to muscular fibrillation generally, not merely auricular fibrillation, and at p. 426 there is a passage which distinguishes from fibrillation strictly so called, which the learned author, Professor Sir Henry Cohen, of Liverpool, limits to the irregular and spontaneous contractions of muscle fibres, a somewhat similar phenomenon, involving the irregular and spontaneous contraction of muscle bundles, which he terms "fasciculation." Of the latter he says that it has for long been regarded as evidence of a slowly destructive lesion of the anterior horn cells (scil., in the spinal column), as e.g., in certain motor neurone diseases. But he then proceeds to refer to other types of fasciculation which, as I gather, he does not ascribe to such a cause, and at page 427, in discussing the cause of fasciculation, he goes no further, as I understand him, than to ascribe it to some form of abnormal impulse. In vol. VI of the same work, at p. 312, in an article on heart diseases, Dr. M. Campbell, physician to the National Heart Hospital, London, refers to fibrillation as occurring with certain types of heart disease, but engages in no general discussion of it. 10

Webster's Dictionary, 2nd. American Ed., 1935, describes fibrillation as "a condition occurring in organic disease of the heart, in which various groups of muscle fibrils beat independently and without rhythm," and auricular fibrillation as a case where that condition occurs in the heart's auricles. 20

The Encyclopædia Britannica, 14th Ed., 1929, vol. XI, p. 309, in an article on Diseases of the Heart, says of the condition:—

"Here, as a result of pathological changes in the heart muscle, the auricles cease to contract rhythmically as a whole in a series of orderly beats; but the auricular musculature is in a constant state of incoordinate and futile twitchings."

On this diverse material, it is impossible safely to conclude that there was involved in the auricular fibrillation, and in the resultant death of the worker, in the present case, any organic disease, or any lesion, macroscopically or microscopically observable, in the sense of any tearing or breaking of physical tissue. Even if one may legitimately speculate as to how the auricular fibrillation caused death, one could only suppose that the irregular action of the heart brought about a deficiency in the blood supply to the brain and to the heart itself, so that in the end that mutual interrelation of nerve impulses and blood supply to the vital organs, which is necessary to sustain life, could no longer be maintained. This seems to me, in the present state of medical knowledge, so far as we at all events are able to draw on it, to involve the conclusion that the deceased died as the result of the sudden and unexpected onset of a functional failure of the heart muscle, resulting in a functional failure of the vital organs. There is no evidence that that sudden functional failure was due to any organic disease, or any lesion, in the sense above-mentioned. He simply died because his heart suddenly ceased to function properly. It may well be that in fifty years' time, the present-day forensic discussions of medical phenomena and medical theories will seem to our descendants as quaint and as outmoded as seem to us some of the discussions which we read in the workers' compensation reports of half a century ago. For recent studies in the electrical and chemical changes associated with nerve 40

and muscle action may well enable evidence to be presented to the courts that some at least of what we now call functional failures are produced by irreversible organic changes. The possible effect of advances in medical knowledge upon the work of the courts in workers' compensation cases was referred to by Lord Birkenhead, L.C., in *Innes v. Kynoch* [1919] A.C. 765, at pp. 770-1; and the difficulty of applying legal standards which are so expressed as to be affected by intricate and developing scientific concepts was referred to by Dixon, J. (as he then was), in *Hetherington v. Amalgamated Collieries*, 62 C.L.R. 317, at p. 332.

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10 For the purposes of this case, however, it becomes necessary to consider whether death from sudden functional failure or spasm, occurring as a defined and observable separate phenomenon, falls within the decision in *Willis'* case (above).

The Board, as its reasons show, held that it did. It thus is essential to see what was the actual *ratio decidendi* in that case. It was, I think, this. 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
20 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 sec. 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 hæmorrhage, even though the result [of antecedent disease, was such an injury by accident. So much appears from the judgment of
30 Lowe, A.C.J. (as he then was), at pp. 59-60, in which Barry, J., concurred. The same view is expressed in my own judgment, first at p. 62, where I stated what I called the Board's “second proposition,” and finally, at pp. 68-69, where I said :—

“It follows that I am prepared to uphold the Board's second proposition, viz., that the cerebral hæmorrhage in this case, having occurred in the course of a journey to which sec. 5 (5) (b) (i) applied, was a compensatable injury by accident, even if it was due solely to the progress of the diseases of hypertension and atherosclerosis, and notwithstanding that there was no temporal or causal connection with his employment, and notwithstanding
40 even that there was no event or circumstance physically external to the worker, not associated with his employment, contributing to the injury. And I am prepared so to hold on the basis at least of Mr. Eggleston's second submission, viz., that any ascertainable lesion, or lesion observable ante or post mortem, of part of the body occurring during a protected period is *per se* and of itself injury by accident and does not require any external element to make it such.”

It is clear from the foregoing that the actual principle of the decision in *Willis's* case does not cover this case, and that it is now necessary to

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decide whether we should adopt the extension of that principle which, at pp. 69–70 of the report of that case, I considered would be justifiable in appropriate circumstances. What I there said, at p. 69, was :—

“ But I am of opinion that it is unnecessary in this case to decide whether it is right to go so far as fully to uphold Mr. Eggleston’s first submission in support of the Board’s main proposition, viz., that the occurrence of any pathological change for the worse during a protected period is an injury by accident, independently of any external circumstances. Mr. Eggleston relied on the definitions of ‘ injury ’ and ‘ disease,’ and submitted that since disease includes a morbid condition of gradual development, and injury includes disease, a gradual development of a disease is an injury or a series of injuries. I do not think that follows. Disease includes, first the ailment itself (whether of sudden or gradual development), and secondly, any aggravation, acceleration, or recurrence of a pre-existing disease. The expression ‘ of gradual development ’ is adjectival only. There is much to be said however, for the view that an acceleration or aggravation of a disease, or even a development of it, may constitute a compensatable injury by accident if it constitutes a defined, separable, and observable step in a disease (though not amounting to a lesion and even though functional and not organic), which step of itself leads to incapacity or death. That is the view I should myself be disposed to take.”

And at p. 70 :—

“ I do not myself see why under the Victorian Act a defined, separate and observable step in the progress of a disease (occurring during a protected period) should not, if it produces incapacity or death, be compensatable. The cases in which such a step, such a physiological change for the worse, will be of importance will be only those where incapacity or death results therefrom.”

The phrase “ pathological change for the worse,” occurring in the first passage although in my opinion it is quite accurately used as including either organic or functional deterioration, may alternatively be expressed, as in the second passage, as “ physiological change for the worse,” adopting the language of Lord Romer in *Fife Coal Co. v. Young*, [1940] A.C., at p. 480, of Viscount Caldecote, at pp. 484–487, and of Lord Atkin at p. 488. That form of expression is no doubt derived originally from Lord McLaren’s words in *Stewart v. Wilson and Clyde Coal Co. Ltd.* (1902), 5 F. (Ct. of Sess.) 120, at p. 122—“ physiological injury.” It may not be in accordance with the precise medical terminology of to-day, but it has acquired a well-recognised and established meaning in workers’ compensation law.

Mr. Menzies in the first instance asked us to constitute a Full Court of five or more judges in order to reconsider *Willis’* case ; alternatively he asked the Court as it was then constituted to allow him to attack *Willis’* case, on the basis that a Court of three judges might, as they might in the Court of Appeal in England, refuse to follow a prior decision of the Full Court where it was found to be in conflict with co-ordinate or superior authority, antecedent or subsequent to it ; see *Young v. Bristol Aeroplane Co.* [1944] K.B. 718 ; [1946] A.C. 163. He said that he wished to contend that *Willis’* case was contrary to a decision of the Court of Appeal in

England, which had been approved by the House of Lords, contrary to a decision of the High Court, and contrary to another decision of the House of Lords. But it appeared, as his argument developed, that the decision of the Court of Appeal to which he referred was *Ormond v. C. D. Holmes & Co. Ltd.* [1937] 2 All E.R. 795, and that he really relied only on the particular treatment of the expression "injury by accident" by one judge in that case (Romer L.J.) ; that the first of the decisions of the House of Lords to which he had intended to refer was *Fife Coal Co. v. Young* [1940] A.C. 479, and that the decision of the High Court was *Hetherington's* case (above)—all authorities which had been exhaustively discussed in argument, and considered, in *Willis' case*. The other decision of the House of Lords to which he intended to refer was *Roberts v. Dorothea Slate Quarries* (above), which was the only one of his authorities not cited in *Willis' case*. To that I shall refer shortly. His argument was that, although, as he conceded, no direct causal connection between the employment, or the journey, or other protected period, and the injury by accident, need now be shown under the Victorian legislation, there ought still to be deduced from the retention of the two expressions "injury by accident," and "is caused," construed in the light of the decisions referred to, the necessity of showing that the injury relied on was brought about by some "contributing cause," external to the worker. Otherwise, he said, the injury was not "by accident," and was not "caused to the worker." After some debate, he further defined "contributing cause" as meaning "some circumstance, or conjunction of circumstances, external to the worker, the causal effect of which on the injury can be severed from the relationship to the accident of the general surrounding circumstances."

Thinking as I did that *Roberts' case* was distinguishable, and since substantially all the other arguments of Mr. Menzies had been put to the Court in *Willis' case*, I concurred in the refusal of both of his alternative applications. He then confined his argument to the submission that *Willis' case* was distinguishable (as clearly it is), and that the principle of the decision should not be extended to the present case.

Before I leave *Willis' case*, however, I should add certain further observations. Although the report in the V.L.R. is misleading on the point the case was in fact argued on the 6th, 7th and 8th December 1950, and lengthy and elaborate arguments were addressed to the Court by counsel on each side. The reasons of Lowe A.C.J., in which Barry J. concurred, had been prepared and considered in draft before they were delivered.

The argument we have heard in this case has not led me to think that the Court fell into error in that case. It is perfectly true, as Lord du Parc said in *Roberts v. Dorothea Slate Quarries* (above) at p. 208, that the deducing of supposed principles from earlier *dicta* may ultimately lead to an unwarranted extension of statutory provisions. But there have been many hundreds at least of reported decisions on the workers' compensation legislation in England and in English law countries. The legislation was in England and has been in Victoria re-enacted from time to time after such judicial interpretation. Almost every important word in the leading sections of the English provisions, as amended from time to time, has been the subject of numerous judgments, and the ascertainment of its meaning has been, as Lord Tomlin said in *Walker v. Bairds & Dalmellington Ltd.*

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(1935), S.C. (H.L.) 28, at p. 30, a progressive process. Of the phrase “injury by accident,” Viscount Caldecote, L.C., said, for example, in *Fife Coal Co. v. Young* (above) at p. 483, that it was possible to trace since 1897 a gradual but steady extension of its meaning. It would, moreover, be impossible to reconcile all the decisions of the Courts on any one phrase, even in England. 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. We further thought that by the substitution of “or” for “and” in the phrase “arising out of and in the course of the employment,” and by the enactment of what is now sec. 8, Parliament had removed the need for causally connecting the event with the employment and had neither preserved, nor introduced, a requirement that it should be causally connected with any other isolated and specific event or circumstance external to the worker. 10

Unless the observations of Isaacs J., in *Barry v. Melbourne Corporation*, 31 C.L.R. 174, at pp. 191 *et seq.*, can be applied to the authorities applicable to the meaning of the relevant words in sec. 5 of the Victorian Act of 1951, which I venture to doubt, the position now is that the Victorian Legislature has re-enacted in a consolidating and amending statute the expressions which we interpreted in *Willis’* case. 20

I do not recall that in that case Mr. Burbank exactly put Mr. Menzies’ present point, as to the importance of the expression “is caused,” though the Board in that case referred to it in its reasons. But I should not think that that meant more than “is produced by a cause or causes”—which may be internal to the worker, save so far as all environmental circumstances are, in the language of philosophy, a “cause” of any event. 30

This case, like *Willis’* case, relates to the “protected period” of a journey; but the phrase “injury by accident” is used in both sec. 5 and sec. 8 of the 1951 Act (sec. 5 of the 1928 Act, as it stood, with amendments, at the date of the death of the worker in this case on the 4th December 1950); i.e., the same kind of event is contemplated as possibly happening at work or away from work, during any protected period covered by sec. 8. Mr. Menzies conceded that, under sec. 8 (2) (a) (ii), a worker who had gone home to lunch, and suffered a cerebral hæmorrhage because he went up his front steps, or raised his hand to hang up his hat, or salute his neighbour, would suffer compensatable injury by accident; but he denied that that would be so if the same worker suffered a similar hæmorrhage because he walked fifty steps on level ground, or walked around the house on a level floor, or suffered it (albeit unexpectedly) without anyone being able to say just why it then suddenly happened. The unreality of these distinctions leads me to think that *Willis’* case did not omit to preserve some essential part of the concept of injury by accident. 40

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 50

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 follows 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. Even from the requirement involved in the words “ in the course of the employment,” as interpreted in, e.g., *Davidson v. McRobb* [1918] A.C. 304, and *St. Helen’s Colliery Co. v. Hewitson* [1924] A.C. 59, it followed

10 that the conjunction of circumstances would include action by the workman in discharge of the duties of his service. But 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 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

20 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 therefrom during certain other protected periods, the conjunction of circumstances should be deemed to include the circumstance that a direct contributing cause was the worker’s work or the circumstances 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

30 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. Both elements, including any necessary connection of the accidental injury with external circumstances so far as those elements imported it, disappeared as actual requirements in such cases, and were supplied by mere fiction. As to injuries occurring while the worker was at the place of employment, a temporal coincidence was enough ; so also as to injuries occurring when away from that place during other protected periods. During a protected period (and this case and *Willis’* case are

40 both cases of journeys, being protected periods), the worker might be, under what is now sec. 8 (2) (a) (ii), at home or anywhere else, and under sec. 8 (2) (b), on a journey of the character there described. Since sec. 8 appears to exhaust almost the whole possible time of the worker’s protection, whether at his place of employment, or travelling, or, in cases under sec. 8 (2) (a) (ii), anywhere else, the only external circumstances (if any) which in such cases it could now be said are included in the unexpected conjunction of circumstances required to constitute injury by accident are those constituting the general environment of the worker at the relevant time. In other words, the requirement of sec. 5 may now

50 wherever sec. 8 applies be expressed, “ if accidental injury—i.e., injury not expected or designed by the worker—is occasioned to a workman, while at his place of work, or travelling on (certain specified) journeys, or

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(in certain cases), anywhere.” That states the need for nothing external to the worker except his then environment during the protected period. Certainly it states the need for no actual “contributing cause” (in the sense of direct cause) in the shape of any specific separable or identifiable incident distinguishable from the environmental circumstances—still less any such incident involved in the worker’s work, or even in his journey. 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 sec. 8—the remainder of the concept referred to in sec. 5 (1) is now supplied by statutory fiction. 10

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 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.

I have added so much to what I said in *Willis’* case out of deference to the interesting and earnest argument of Mr. Menzies in the present case. 20

With regard to the *Dorothea Slate Quarries* case, that decided, as I understand it, that when a disease progresses by imperceptible stages, or stages so minutely progressive that no one incident, or definite and distinct series of incidents, can be pointed to as causing the incapacity or death, there is no injury by accident. Lord Porter puts the matter in a few sentences at p. 205, when he says:—

“In truth, two types of cases have not always been sufficiently differentiated. In the one type, there is found a single accident followed by a resultant injury, as in *Brintons Ltd. v. Turvey*, or a series of specific and ascertainable accidents followed by an injury 30 which may be the consequence of any or all of them, as in *Burrell (Charles) & Sons Ltd. v. Selvage*. In either case it is immaterial that the time at which the accident occurred cannot be located. In the other type, there is a continuous process going on substantially from day to day, though not necessarily from minute to minute or even from hour to hour, which gradually and over a period of years produces incapacity. In the first of these types, the resulting incapacity is held to be injury by accident. In the second it is not.”

There is nothing inconsistent with that in either the proposition adopted, 40 or the extension of that proposition tentatively suggested, in *Willis’* case.

This brings me to consider whether that tentative proposition (which I have previously set out in this judgment) should now be adopted. In my opinion, it should. If English authority as to what is injury by accident is applicable to the Victorian Act, there is ample authority in no less than five decisions of the House of Lords that mere sudden failure of the functions of a bodily organ, or of bodily mechanism, producing incapacity or death, is compensatable. In *Falmouth Docks v. Treloar* [1933] A.C. 481, the

deceased, when at work, raised his arm above his head, fell forward, and died. His dependant recovered. Lord Buckmaster at pp. 484-5, said this :—

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10 “ Now, that the man had heart disease is not in dispute. What the form of heart disease was has never been made clear, because there never was a post-mortem examination. It might have been myocarditis ; it might have been an aneurism ; or it might have been angina ; it is not quite clear which it was, but that he had one form or other of heart disease and died as the result of that disease that morning is beyond controversy.”

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And again :—

“ He (the arbitrator) was not bound to find what particular form of heart disease the man died from.”

In *Partridge Jones & John Paton Ltd. v. James* [1933] A.C. 501, the worker who had diseased coronary arteries, carried out a laborious operation, sat down, and shortly afterwards, died. The County Court Judge found that the arteries failed to supply the amount of blood necessary for the heart to function when the man was doing his ordinary work in the ordinary way, and that this failure resulted in angina pectoris and in failure of the heart
20 (p. 502). Lord Buckmaster, at p. 505, after referring to *Clover Clayton & Co. v. Hughes* [1910] A.C. 242, said :—

“ There appears to me to be no possible ground of distinction between this case and that, excepting that in that case the work that the man was doing caused his arteries to rupture, and in this case produced the condition described by the learned county court judge which caused his heart to fail to function and produced the attack of angina pectoris which resulted in his death.”

At p. 506, after referring to Lord McLaren’s words in *Stewart v. Wilsons & Clyde Coal Co.*, viz. :—

30 “ If a workman in the reasonable performance of his duties suffers a physiological injury as the result of the work he is engaged in, that is accidental injury in the sense of the Statute ”

he went on :—

40 “ My Lords, with that as a guidance to this House, it seems to me that, when the learned county court judge has held that the result of the work was the failure of the blood supply resulting in angina pectoris, and that it was because he was engaged in doing his ordinary work in this diseased condition that this failure arose, and that the work and the disease together contributed to the death, it would be impossible to deny that this case is within the actual meaning of the words I have quoted.”

In *Walker v. Bairds & Dalmeington Ltd.* (1935), S.C. (H.L.) 28, a worker, after standing in cold water “ contracted a chill which developed, within a short period, into broncho-pneumonia, from which he died.” His dependants were held entitled to recover. Lord Tomlin, at p .33, said this :—

“ The Sheriff Substitute was bound to hold that Walker’s death was caused by personal injury by accident arising out of and in the course of his employment. The disease resulted from the

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sudden and unexpected onset of a chill contracted in conditions normal in carrying out the workman's job in the accustomed manner, and frequently experienced by him on previous occasions without ill results. The onset of the chill, the direct result of doing the work, was 'an untoward event' and not 'expected' or "designed." In my view, based upon the previous pronouncements of your Lordships' House, the disease which was the injury was in these circumstances the result of accident, and it is not questioned that the injury by accident (if such it be within the meaning of the Act) arose out of and in the course of the employment." 10

In *Walkinshaw v. Lochgelly Iron & Coal Co. Ltd.*, *ib.*, 36, a worker who suffered from arteriosclerosis, enlarged heart, and kidney trouble, suffered at work a sudden attack of "cardiac insufficiency." The finding of the Sheriff Substitute (at p. 37) was as follows:—

"There was a definite change in the condition of the workman from the night of 29th–30th April 1933. He had suffered an attack of cardiac insufficiency—that is to say, the reserve capacity of his heart had broken down. Although he had a diseased condition of the heart and arteries which was unknown to himself or his medical attendant, and although that condition was progressive 20 and would in time gradually show evidence of cardiac insufficiency that cardiac insufficiency was suddenly manifested while the claimant was engaged in strenuous physical exertion, notwithstanding that the disease was only moderately advanced. The capacity of the heart was severely damaged."

The House of Lords held the worker entitled to recover. Lastly, in *Fife Coal Co. v. Young* (above), the worker suffered "dropped foot"—i.e., paralysis of the muscles of the leg, due to pressure on a nerve, which had been occasioned by his work over a period of a month, but which only resulted at last in the "dropped foot" on a particular and definable 30 day. Viscount Caldecote, L.C., at pp. 484–5, said this:—

"When the workman's claim is in respect of a progressive disease the difficulty of pointing to a definite physiological change which took place on a particular day is, in general likely to be almost insuperable, and in 1906 Parliament, in the case of certain diseases and later by an enlargement of the schedule of industrial diseases, relieved the workmen in the specified cases of this obligation. But if the circumstances of any claim in respect of incapacity due to disease are such as to make it possible to discharge this burden, I see no reason for thinking that what is called a disease is different 40 in principle from a ruptured aneurism as in *Clover, Clayton & Co. Ltd. v. Hughes*, or heart failure as in *Falmouth Docks and Engineering Co., Ltd. v. Treloar*."

Lord Atkin, at pp. 488–9, said:—

"It is necessary to emphasise the distinction between 'accident' and 'injury' which in some cases tend to be confused. No doubt the more usual case of an 'accident' is an event happening externally to a man. An explosion occurs in a mine, or a workman falls from

a ladder. But it is now established that apart from external accident there may be what no doubt others as well as myself have called internal accident.

A man suffers from rupture, an aneurism bursts, the muscular action of the heart fails, while the man is doing his ordinary work, turning a wheel or a screw, or lifting his hand. In such cases it is hardly possible to distinguish in time between 'accident' and injury; the rupture which is accident is at the same time injury from which follows at once or after a lapse of time death or incapacity. But the distinction between the two must be observed."

*In the
Full Court
of the
Supreme
Court of
Victoria.*

No. 7.
Reasons for
Judgment
of Sholl, J.,
21st
October
1952,
continued.

10 He added the last sentence because, since he was speaking in an English case, he went on to say that the "accident" must be related to the employment. The worker was held entitled to compensation. The four earlier cases in the House of Lords which I have previously quoted were referred to with approval, and applied.

No doubt some of the medical concepts referred to in those cases might be differently expressed to-day, and terms such as "the onset of a chill" might be more precisely defined in terms of physiological or pathological processes. But the point is that in all those cases functional failure, or what was assumed to have been, or possibly to have been, functional failure, was treated as constituting injury by accident.

30 But as I said in *Willis'* case, and as the learned Chief Justice again pointed out during the argument in the present case, the English cases were all dealing with what Scott, L.J., has called the "complex conception" which there necessarily included always the causal relation of the employment to the injury. Accordingly it may be doubted whether the reasoning of those cases can validly be applied to present Victorian legislation. I prefer to rest my conclusion on this branch of the case on the definitions of "disease" and "injury" inserted in the legislation by the
40 Act of 1946, and now appearing in sec. 3 of the Consolidating Act of 1951. They are set out at p. 63 of the report of *Willis'* case, and I need not again quote them. It appears to me to be undeniable that the auricular fibrillation in the present case, if it be regarded as independent of the antecedent heart disease, was a physical ailment or physical disorder or physical defect, and so a "disease." Accordingly it was an "injury," by definition. If, however, it be regarded as an end result, or even merely as a stage in the development of, the antecedent heart disease, it was clearly, according to all the works of reference I have seen, an aggravation of a pre-existing physical ailment or physical disorder or physical defect, and so again, by definition, a "disease" and an "injury." I do not think the absence of a specific finding of aggravation prevents that conclusion. On either view, it was a sudden, a separately definable and observable, and an unexpected event, and so injury by accident.

In my opinion, the question stated by the Board should be answered "Yes."

If this decision means, as Counsel for the employer suggested, that a good many cases of death from disease while at work or on a protected

In the Full Court of the Supreme Court of Victoria.

journey will fall within the Act, I can only say that such a consequence will in my opinion be likely to surprise few of those who have practised in that jurisdiction over the years, and have been familiar with the continual amendment of the legislation and with the industrial and political discussions which accompanied it.

No. 7.
Reasons for Judgment of Sholl, J., 21st October 1952, continued.

The Respondent employer should pay the Applicant's costs of the proceedings in this Court, with liberty to either party to apply to a single Judge in relation to the ascertainment thereof; see [1951] V.L.R. at pp. 71-2.

No. 8.
Order granting Conditional Leave to Appeal to Her Majesty in Council, 19th December 1952.

No. 8.

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ORDER granting Conditional Leave to Appeal to Her Majesty in Council.

IN THE SUPREME COURT OF VICTORIA.
In the Full Court.

IN THE MATTER of the Workers' Compensation Acts
and

IN THE MATTER OF—

DACIE ETHEL SHARPE (Respondent) . . . Applicant
against

JAMES PATRICK & COMPANY PROPRIETARY
LIMITED (Appellant) Respondent. 20

Before the Full Court their Honours THE CHIEF JUSTICE SIR EDMUND HERRING, Mr. JUSTICE LOWE and MR. JUSTICE SHOLL.

Friday, the Nineteenth day of December 1952.

UPON MOTION made unto this Honourable Court, on the seventh and eleventh days of November 1952 and this day in pursuance of the Notice of Motion dated the fifth day of November 1952 and filed herein for leave to appeal to Her Majesty in Her Majesty's Privy Council from the judgment of this Honourable Court delivered on the twenty-first day of October 1952 UPON READING the said Notice of Motion and the affidavits of Jack Clark sworn on the tenth day of November 1952 and filed herein AND UPON HEARING what was alleged by Mr. Menzies of Queen's Counsel and Mr. Menhennitt of Counsel on behalf of the Respondent (Appellant) and by Mr. Phillips of Queen's Counsel and Mr. C. W. Harris of Counsel for the Applicant (Respondent) IT IS ORDERED that leave be granted to the Respondent (Appellant) to appeal to Her Majesty in Her Majesty's Privy Council under Rule 2 (a) of the Orders in Council on condition that the Respondent (Appellant) do within two months from the date of this order enter into good and sufficient security to the satisfaction of the Prothonotary of this Honourable Court

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In the Full Court of the Supreme Court of Victoria.

No. 8.
Order granting Conditional Leave to Appeal to Her Majesty in Council, 19th December 1952, continued.

in the sum of Five hundred pounds (£500) for the due prosecution of this appeal as provided in Rule 5 (a) of the Orders in Council and payment of all costs as may become payable to the Applicant (Respondent) in the event of the Respondent (Appellant) not obtaining an order granting final leave to appeal or after appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Respondent (Appellant) to pay the Applicant (Respondent) costs of the appeal as the case may be AND IT IS FURTHER ORDERED that the order of this Honourable Court delivered on the twenty-first day of October 1952 in so far as the same relates to costs be stayed until further order of a Judge in Chambers AND IT IS FURTHER ORDERED that the Applicant (Respondent) do pay the Respondent (Appellant's) taxed costs of this motion but that execution of this order as to costs be stayed until further order of a Judge in Chambers.

By this Court.

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No. 9.

ORDER granting Final Leave to Appeal to Her Majesty in Council.
IN THE SUPREME COURT OF VICTORIA.
In the Full Court.

IN THE MATTER of the Workers' Compensation Acts
and

IN THE MATTER of—

DACIE ETHEL SHARPE (Respondent) . . . Applicant
against

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

No. 9.
Order granting Final Leave to Appeal to Her Majesty in Council, 9th April 1953.

Before the Full Court their Honours the **ACTING CHIEF JUSTICE SIR CHARLES LOWE, MR. JUSTICE O'BRYAN and MR. ACTING JUSTICE HUDSON.**

Thursday the Ninth day of April 1953.

UPON MOTION made unto this Honourable Court this day in pursuance of the Notice of Motion dated the thirty-first day of March 1953 and filed herein for final leave to appeal to Her Majesty her heirs and successors in Her or their Privy Council from the judgment of this Honourable Court delivered herein on the twenty-first day of October 1952
40 UPON READING the said Notice of Motion and the said judgment of

In the Full Court of the Supreme Court of Victoria

 No. 9.
 Order granting Final Leave to Appeal to Her Majesty in Council, 9th April 1953,
continued.

this Honourable Court delivered herein on the twenty-first day of October 1952 and the Order of the Full Court of this Honourable Court made on the 19th day of December 1952 granting conditional leave to appeal herein to Her Majesty in Her Majesty's Privy Council and the affidavits of Jack Clark sworn on the thirty-first day of March 1953 and the ninth day of April 1953 and filed herein and the exhibit therein referred to AND UPON HEARING what was alleged by Mr. Menhennitt of Counsel on behalf of the Respondent (Appellant) IT IS ORDERED that final leave be granted to the Respondent (Appellant) to appeal to Her Majesty Her Heirs and successors in Her Majesty's or their Majesty's Privy Council 10 under Rule 2 (a) of the Orders in Council (being the Rules relating to appeals to the Privy Council from the State of Victoria) from the judgment of this Honourable Court delivered herein on the twenty-first day of October 1952 AND IT IS FURTHER ORDERED that the costs of this application be reserved AND liberty is hereby granted to either party to apply as she or they may be advised.

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 Stamp
 Cancelled.
 Seal.

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No. 10.
 Certificate of the Prothonotary of the Supreme Court of Victoria verifying Transcript Record, 26th June 1953.

No. 10.

CERTIFICATE of the Prothonotary of the Supreme Court of Victoria verifying Transcript Record.

I, HAROLD BALDWIN DOWN Prothonotary of the Supreme Court of Victoria DO HEREBY CERTIFY as follows:—

THAT this transcript record contains a true copy of all the proceedings judgments and orders in the Special Case in which James Patrick & Company Proprietary Limited is the Appellant and Dacie Ethel Sharpe is the Respondent so far as the same have relation to the matters of this appeal and a copy of the reasons for the respective judgments pronounced in the 30 course of the proceedings out of which the appeal arises.

THAT the Appellant has complied with the Conditional Order of the Full Court of the State of Victoria dated the 19th day of December 1952 as to security for costs for the due prosecution of this appeal as provided in Rule 5 (a).

THAT the Respondent has received notice of the Order granting Final Leave to Appeal to Her Majesty in Council And has also received notice of the despatch of this transcript record to the Registrar of the Privy Council.

Dated at Melbourne in the State of Victoria this 26th day of June 1953. 40

(Sgd.) H. B. DOWN,
 Prothonotary of the Supreme Court of
 Victoria.

In the Privy Council.

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

BETWEEN

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

AND

DACIE ETHEL SHARPE (Petitioner) *Respondent.*

RECORD OF PROCEEDINGS

NICHOLAS WILLIAMS & CO.,
88/90 CHANCEY LANE,
LONDON, W.C.2,
Solicitors for the Appellant.

WATERHOUSE & CO.,
1 NEW COURT,
CAREY STREET,
LONDON, W.C.2,
Solicitors for the Respondent.