IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Civil Appeal No. 1 of 1983

Between:

CARPENTERS FIJI LIMITED — Appellant

- and -

THE LABOUR OFFICER for and on behalf of KATARINA ESITA (widow), ILIESA NAVUNISINU (son), MARICA VAKATALE, TORIKA NAIROGO VAKATALE and MERESEINI VUALECA VAKATALE (daughters) of the deceased ILIESA NAVUNISINU

Respondent

JUDGMENT

This is an appeal against an award of compensation by the Suva Magistrates Court under the Workmen's Compensation Act to the widow and children of a deceased workman.

In the court below it was common ground that the workman had been continuously employed as a welder by the appellant company, Carpenters Fiji Limited, for some 12 years prior to his death, that he used to work a good deal of overtime and that he had worked on every one of the eight days preceding and including his last day at work, 25th April, 1979.

The workman died in the Colonial War Memorial Hospital of a subarachnoid haemorrhage some time after he reached home after knockning off work on 25th April.

There was conflict in the evidence as to when the workman was admitted to hospital and when he died. According to the widow - see second paragraph, page 26 of the typewritten copy of the record - he was taken to hospital at about 10.00p.m. on the night of 25th April and he died there at about 7.00a.m. the next day, 26th April. But, according to the written report of Dr. Rao, Exhibit 26, which was admitted by consent and which I will later quote in full, he was admitted on the 26th and died on the 27th.

However, there was undisputed evidence :

(i) that on his last work day, the 25th, the workman knocked off at about 4.24p.m., - see Exhibit 14;

(ii) that he arrived home at about 6p.m. and that he later became unconscious, at home - see the widow's evidence, second paragraph, page 26, typewritten copy of record and 4th line, last paragraph, page 25;

(iii) that he was admitted, unconscious, into hospital where he died not later than the 27th - see Dr. Rao's report, Exhibit 26.

It was also common ground that the cause of death was subarachnoid haemorrhage which, as one of the two medical witnesses, Dr. Bokani, explained in his written report (Exhibit A) is a bleeding into the interval between two membranes enclosing the brain, the arachnoid and the pia mater. However, the two doctors who gave evidence, Dr. Rao (called by the widow) and Dr. Bokani (called by the company) failed to agree as to the cause of the haemorrhage. According to Dr. Rao, it was a combination of the disease of high blood

pressure and work. But Dr. Bokani's opinion was that the haemorrhage was due entirely to an aneurism which, he explained, is a balloon-like dilation of a weakened blood vessel, something he described as a "conginital maldevelopment", and work was not a contributing cause.

I think it could reasonably have been understood from their written reports and oral evidence that when they spoke of a "haemorrhage" both doctors meant the escape of blood from a blood vessel due to the rupture of that blood vessel. So, whereas it was clear enough, I think, that both doctors were of the opinion that there had been a rupture of a blood vessel resulting in a fatal subarachnoid haemorrhage, Dr. Rao thought that the rupture had been caused by a combination of the disease of high blood pressure and of work but Dr. Bokani thought that the rupture had been due entirely to the disease of aneurism.

Section 5(1) of the Act says :

> "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter provided, be liable to pay compensation ...."

I think I need quote no authority for saying, as counsel agreed, that the onus was on the widow to prove the following three elements of her claim :

(i) that the workman suffered personal injury, i.e. physiological injury or change, by accident;

(ii) that the injury arose out of the employment and

(iii) that the injury occurred in the course of the employment.

As to that first element it used to be said that two distinctly different things had always to be proved: an accident and personal injury. Accordingly, it was successfully argued in Fenton v. J. Thorley and Company Limited (1903) A.C. 443, in both the County Court and the Court of Appeal, that a workman who had ruptured himself by trying to turn a wheel had not suffered injury by accident since the injury (the rupture) had been caused, not by an accident, but by the workman's deliberate exertions. That interpretation of the statute was rejected when the case reached the House of Lords. As Lord Macnaughten said, referring to Fenton v. Thorley, in the later case of Clover Clayton and Company Limited v. Hughes (1910) A.C. 242, at pages 247 and 248 :

> "There the Court of Appeal had held that if a man meets with a mishap in doing the very thing he means to do the occurrence cannot be called an accident. There must be, it was said, an accident and an injury: you are not to confuse the injury with the accident. Your Lordships' judgment, however, swept away those niceties of subtle disquisition and the endless perplexities of causation. It was held that 'injury by accident' meant nothing more than 'accidental injury' or 'accident', as the word is popularly used."

The House of Lords held in those two cases that a workman had suffered personal injury by accident although the injury, in each case a rupture, had been caused by the workman's deliberate exertions: in the earlier case trying to turn a wheel, in the later case tightening a nut.

What is an accident? That question was asked by Lord Loreburn L.C. in Clover Clayton v. Hughes (supra, at the foot of page 244) His Lordship went on to answer the question by saying :

> "It has been defined in this House as 'an unlooked for mishap or an untoward event, which is not expected or designed' ... I take that as conclusive."

His Lordship was referring to the dictum of Lord Macnaughten in Fenton v. Thorley (supra) at page 448:

> "I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

In Trim School v. Kelly (1914) A.C. 667 it was decided finally that the mishap or event must be unlooked for or untoward from the workman's standpoint and that, however deliberately it may have been caused by others, if it was unlooked for or untoward from the workman's point of view, it was an accident. Referring to Lord Macnaughten's dictum, Lord Loreburn said (at page 681) :

> "When Lord Macnaughten in Fenton v. Thorley spoke of the occurrence being 'undesigned' I think that he meant undesigned by the injured person."

It used also to be said that it had always to be proved that a specific act done by the workman had caused the injury. But in Partridge Jones and John Paton Ltd. v. James (1933) A.C. 501 the House of Lords rejected that contention in the following words of Lord Buckmaster (at page 504) :

> "Now the real case as made against the judgment appealed from is this, that, in order to establish that a man is entitled to the benefit of the Act, it is necessary to show that he has suffered injury as the result of some definite thing that he has done in the course of his work ...
> My Lords, whatever may have been said about this argument some twenty years ago, it appears to me it is impossible to be effectively advanced today ...."

I would conclude my enquiry into the meaning of the term "personal injury by accident" by quoting the following passage (certain words in which I have taken the liberty of underlining for the sake of emphasis) from the speech of Lord Atkin in the House of Lords in Fife Coal Company Limited v. Young (1940) 2 All E.R. 85 at page 91 :

> "It is necessary to emphasize 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. It is now established, however, 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 the 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."

Dr. Rao's opinion, which the learned magistrate preferred to that of Dr. Bokani, was expressed in her written report (Exhibit 26 in the court below) which reads as follows :

> "The above-named was admitted to CWM Hospital on 26.4.79 and died the next morning. While in hospital he remained unconscious. His blood pressure was elevated and he had signs of brain haemorrhage. Investigations confirmed that he had a subarachnoid haemorrhage i.e. bleeding on the surface of the brain.

> It is likely that his employment as a welder and general maintenance man could have added stress and had a detrimental effect on his high blood pressure which in turn would have caused the rupture of a blood vessel resulting in a subarachnoid haemorrhage."

So it seems to me that, if the magistrate thought that the worsening of high blood pressure or the rupture of a blood vessel or the haemorrhage referred to in that opinion was unlooked for or untoward from the workman's point of view, he was entitled to find that the workman had suffered "personal injury by accident".

That was far from the end of the matter. The widow had also to prove the second and third elements of her claim :

> (ii) that the injury arose out of the employment and
>
> (iii) that the injury occurred in the course of the employment.

In Clover Clayton v. Hughes (supra) in which case the House of Lords decided that the rupture of a blood vessel caused by a combination of the strain of tightening a nut and the disease of aneurism was an accident "arising out of the employment", Lord Loreburn said (at page 247) :

> "In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it."

It seems to me to be quite clear from many cases which have been decided by that test that it should be

understood as if the words "when it did" followed the words "came" and "come", that is to say as if the passage read :

> "In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came when it did from the disease alone, so that whatever the man had been doing it would probably have come when it did all the same, or whether the employment contributed to it."

So, it was, I think, open to the magistrate, in the light of Dr. Rao's evidence, to find that any (or all) of three injuries, the worsening of high blood pressure, the rupture of a blood vessel and the subarachnoid haemorrhage, was personal injury by accident arising out of the employment.

In addition, as I have said, the onus was on the widow to prove the third element of her claim: that the injury occurred in the course of the employment.

It is in this regard, I think, that the widow runs into insuperable difficulty in this appeal, the fourth ground of which reads :

> "The learned magistrate erred in fact and in law in finding that the subarachnoid haemorrhage suffered by the deceased was an accident arising in the course of the employment."

As the Fiji Court of Appeal concluded in The Labour Officer on behalf of Louisa Legalevu v. The Ports Authority of Fiji, Civil Appeal No. 6 of 1983 :

> "The evidence must show some physiological change occurring in the course of the workman's employment ...."

What does "in the course of the employment" mean? In paragraph 1161 of Volume 34 of the second edition of Halsbury appears the following statement :

> "The words 'in the course of the employment' mean in the course of the work which the workman is employed to do and what is incidental to it. They do not mean during the currency of the engagement."

In Charles R. Davidson and Company v. M'Robb (1918) A.C. 304 at page 317 Viscount Haldane observed :

> "In order to come within the statute an accident must not only occur 'in the course of', that is to say during, actual employment, but in addition must arise 'out of' it."

I have underlined the words "during actual employment" for the sake of emphasis.

On pages 8 and 9 of the typewritten copy of his judgment, the learned magistrate is recorded as having said :

> "I find as fact that the type of work the deceased did over a considerable period of time for the Respondent and the overtime work which he did from time to time and in the weekend prior to his death, produced considerable strain on the deceased. He even complained about his eye to his wife. He also had high blood pressure at the time of his death.
>
> In this state of things says there was on set of subarachnoid haemorrhage (SH) by the time the deceased knocked off work on 25.4.79."

The underlining in that passage is mine.

I must confess that I do not understand how the magistrate could reasonably have decided on the evidence that there had been an "onset of subarachnoid haemorrhage by the time the deceased knocked off work on 25.4.79" after hearing Dr. Rao answer "yes" to the question "Would it be fair to assume actual haemorrhage occur when he lost consciousness?" see foot of page 30, typewritten copy of record of evidence - and after hearing the widow swear that the workman had lost consciousness after 9.30p.m. on the evening of the 25th - see second paragraph, page 26, typewritten copy of record of evidence.

The learned magistrate went on to say "I find that the SH suffered by the deceased is connected with the deceased's employment and is not remote in point of time". Those words and the general tenor of his judgment seem to show that the injury by accident on which he based the award of compensation was the subarachnoid haemorrhage. I must say that I cannot understand, in the light of the authorities I have quoted in relation to the meaning of the words "in the course of the employment", how he could reasonably have found that that particular injury occurred in the course of the employment.

This was a case in which "accident" and "injury" coincided as they did in Fife Coal Company v. Young (supra). The injury by accident or accident which the magistrate had in mind and on which he based his award was apparently the subarachnoid haemorrhage. In my view, the magistrate erred in fact and law in finding that it occurred in the course of the employment. The evidence did not support such a finding. On the contrary, Dr. Rao's and the widow's evidence was to the net effect that it was "fair to assume" that the haemorrhage occurred, not in the course of the employment, but when the workman lost consciousness after he arrived home on the evening of 25th April.

Paragraph 1180 of Volume 34 of the second edition of Halsbury read as follows :

> "If, from facts proved, a reasonable inference can be drawn that the accident arose out of and in the course of the employment, and that inference is drawn by the arbitrator, his decision cannot be reversed.
>
> If the proved facts give rise to conflicting inferences of equal probability, so that the choice between the two can only be arrived at by what amounts to a guess, then such a guess, though called an inference, arrived at in favour of the applicant will be set aside."

The fourth ground of appeal succeeds and the award of the court below is set aside.

In the penultimate paragraph on page 7 of the typewritten copy of the judgment (at the foot of page 13 of the handwritten original) there is recorded a finding of fact which I can only describe as mysterious. It is the finding that the workman died at home. Having checked the typewritten copy of that particular paragraph against the handwritten original, I am satisfied that it correctly reads as follows :

> "In this case the deceased died at home after he returned from work; at about 9.00p.m. about five hours after he went home from work, he felt unwell; he became unconscious then; some 10 hours after that he died. He died within 15 hours of knocking off from work."

I am completely unable to understand how the magistrate could have decided that the workman died at

home after hearing the widow's evidence that he died on the morning of the 26th after his admission into hospital, and seeing Dr. Rao's report according to which he died in hospital on the morning of the 27th.

That finding that the workman died at home seems to conflict with an earlier finding recorded in these words in the fifth paragraph on page 5 of the typewritten copy of the judgment :

> "It is clear from the evidence and I find as fact that the deceased was a 'workman' defined under the Act employed by the Respondent as welder; his last day at work was 25.4.79; he worked from 7.10a.m. to 4.24p.m. (exhibit 14); he felt unwell at 9.30p.m. the same day and became unconscious; he was taken to CWM hospital the same night at 10.00p.m. and died at 7.00a.m. on 26.4.79."

Nevertheless, there is no doubt that the magistrate did conclude that the workman died at home. His words "In this case the deceased died at home after he returned from work" which appear in the penultimate paragraph on page 7 were virtually repeated in a sentence which is recorded in the third paragraph on page 11 of the typewritten copy of the judgment: "In the instant case the workman died at home in the circumstances I stated hereabove."

The learned magistrate appears not to have considered at all whether the worsening of the workman's high blood pressure or the rupture of a blood vessel (neither of which injuries by accident were, as far as the evidence showed, necessarily simultaneous with the fatal haemorrhage) could have occurred in the course of the employment. His findings of fact that the workman died at home and that there was an

onset of the haemorrhage before the workman knocked off work were contrary to the evidence. Perhaps that is because he delivered judgment on 28th January 1982, nearly eight weeks after the last witness had given evidence on 4th December, 1981. Be that as it may, I am bound to say that I think that this experienced and respected magistrate, for once, failed to apply his mind judicially to the evidence he had heard and that this was an aspect of the trial sufficient to warrant a rehearing. I so order, in the exercise of a power to do so which, according to my understanding, is vested in this court by Rule 18 of Order 37 of the Magistrates' Courts Rules.

(R.A. Kearsley)
JUDGE

Suva,

13th April, 1984.