Privy Council Appeal No. 27 *of* 1933.

Margaret Brooker - - - - - - - - *Appellant*

v.

Thomas Borthwick and Sons (Australasia), Limited - - *Respondents*

John Ryan - - - - - - - - *Appellant*

v.

Thomas Borthwick and Sons (Australasia), Limited - - - *Respondents*

John Prendergast - - - - - - - - *Appellant*

v.

Nelsons (N.Z.), Limited - - - - - *Respondents*

Philomena Mary Ashwell - - - - - - *Appellant*

v.

Thomas James Brennan and another - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1933.

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
LORD MACMILLAN.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[*Delivered by* LORD ATKIN.]

This is an appeal from judgments of the Court of Appeal in New Zealand in four proceedings which were brought to determine the liability of employers in respect of injuries to their workmen that occurred on the occasion of the serious earthquake in the Hawkes Bay District of New Zealand on the 3rd February, 1931. By the provisions of the Workmen's Compensation Act exclusive jurisdiction is given to the Court of

Arbitration to decide without appeal claims under the Act. But by a convenient procedure it is possible in New Zealand on agreed facts to obtain the decision of the Supreme Court on a question of law, the judgment being subject to the ordinary rights of appeal. In the present case proceedings having been commenced by originating summons were moved directly by order of the Supreme Court to the Court of Appeal, from whose decision appeal is now brought to this Board.

The provisions of the New Zealand Act, so far as liability is concerned, are identical with those of the English Act. The question is whether the workmen concerned suffered "injury by accident arising out of and in the course of their employment." The parties agreed upon a statement of general facts and also of the particular facts applicable to each case. It is only necessary here to state that the earthquake was exceptionally severe, of intensity 10 on the Rossi Forel scale. In the last 90 years there had only been 10 recorded earthquakes of this class in New Zealand. The district was a recognized earthquake zone. Its area was 3,567 acres and its population 57,000. It included the borough of Napier with a population of 19,000 and the borough of Hastings with a population of 15,500. Approximately 250 people were killed and at least five times that number injured. The great majority were killed by the collapse of brick buildings or brick chimneys. In each borough there is an area, generally the business area, usually described as the brick area, in which the law requires the buildings to be constructed of brick or other, more or less, indestructible material. Whether the buildings with which these cases are concerned were within such area is not stated; but it does not seem to matter. In any case they were of brick. Numerous earthquakes have occurred in New Zealand, but only five have been attended by loss of life.

Turning to the particular facts, in two cases the workman was killed and the claims are by dependants; in the other two cases the workmen were injured and make the claims themselves.

In Brooker's case Brooker was employed as a "gut runner" in his employer's freezing works, Paki Paki, near Hastings. He was employed in the gut house, and at the time of the accident was employed on a staging about 4 ft. above a table and 7 to 7 ft. 6 inches from the ground. The access to the staging was from the table. When the shock came Brooker's mate escaped from the staging, but Brooker while stepping on to the table was pinned down by falling debris and killed.

Ryan was not killed. He was engaged at the same works as a slaughterman. He was working on the second floor. The floor began to collapse; he tried to get out but was thrown down at the spot where he was working, was covered with debris from the collapsing building and suffered severe injuries whereby he has been totally disabled.

Prendergast was employed by another firm of employers as a shepherd at their works at Tomoana. The sheep are slaughtered on the fourth floor of the works, being driven up a sheep race with a gradient of 1 in 2·9. Prendergast's duty was to drive the sheep up the sheep race and pen them. While standing on the fourth floor alongside the sheep race by reason of the motion he lost his balance and fell down the sheep race, a distance of 119 ft. He was injured and totally disabled for 14 weeks.

Ashwell was employed as a porter at an hotel in Napier. He had left the hotel in performance of his duty to post letters, get the mail and do some shopping for his employers in the course of his employment. He had just left a brick shop when he was killed by the falling of the building, the collapse of which was caused by the earthquake.

It was agreed before the Court of Appeal that the deaths and injuries were caused by "accident" and were in the course of employment. The question remains whether the accident arose "out of" the employment. On this topic there is a superfluity of authority. That some of the decisions conflict is undoubted, though the extent of variance is likely to appear greater than it is, if one ignores the essential feature of our procedure that appeals in such cases are on law only, and that a decision for a workman or an employer is often only a decision that there was evidence upon which the arbitrator could decide as he did. But amid the range of decisions firm land does emerge, and it appears to their Lordships of the highest importance to accept decisions of the ultimate tribunals which select definite principles. They gather that the learned members of the Court of Appeal allow themselves to be guided by the decisions of the House of Lords, and their Lordships would desire to follow the same course. Where statutory enactments have assumed the same language in so many parts of the Empire it is desirable that there should be uniformity of interpretation.

In their Lordships' opinion the question raised in this appeal has been finally decided in the United Kingdom by the decision of the House of Lords in the case which ought to be cited as *Simpson* v. *Sinclair*, but is too well-known under the title *Thom* v. *Sinclair* to be renamed. It is reported in [1917] A.C. p. 127. There a woman employed by a fishcurer was engaged in packing kippered herrings into boxes in a shed belonging to her employers, which had brick walls and a roof of corrugated iron. While she was so engaged a brick wall which was being constructed upon a neighbouring property not belonging to her employer, fell by reason of its instability on the shed, bringing the roof and part of the wall down and burying the applicant under the wreckage whereby she was totally disabled. The arbitrator had found that the accident arose out of the employment; the Second Division of the Court of Session had reversed

this finding. The House of Lords affirmed the arbitrator. It is to be noted that the force which brought down the shed was quite unconnected with the employment. The walls and roof of the shed were good enough. But the workwoman was injured by the collapse of her workshop, and in the opinion of the House of Lords it was immaterial to consider why the workshop walls collapsed.

Lord Haldane presided in a House where four Lords sat, and with his judgment Lord Kinnear agreed. In the course of his opinion he dealt with the suggestion that the accident must arise out of the nature of the employment, and says :—

> " My Lords, there are no doubt many kinds of accident which do not in any sense arise out of the employment. There may be no reason why such accidents should happen to a man in one situation rather than to a man in another, and it may therefore be impossible to pronounce truly that they are so connected with the employment as to have arisen out of it. But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment. The question really turns on the character of the causation through the employment which is required by the words ' arising out of.' Now it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If, therefore, the statute when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one. Has the accident arisen because the claimant was employed in the particular spot on which the roof fell ? If so, the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged."

He then proceeds in a valuable passage to deal with causation in reference to this topic, and says at p. 136 :—

> " If therefore the language in question were to be construed upon principle and apart from authorities I should be prepared to hold that it was satisfied where as here it has been established as a fact that it was as arising out of her employment that the appellant was under the roof by the falling of which she was injured. Behind the fact that the roof fell we cannot go."

And on the same page :—

> " Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the appellant

> had to work in this particular shed, and was in consequence, injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment, none the less, if ultimately caused by the fall of some one else's wall than if it had been caused by inherent weakness of the employer's roof."

He then proceeds to indicate that existing authorities are not inconsistent with this view. The judgments of Lord Shaw and Lord Parmoor appear to their Lordships to affirm the principle expressed by Lord Haldane.

The passages cited appear to their Lordships to negative conclusively the argument which was pressed upon them with great power by the respondents' counsel. The destructive force in their case it was said was a natural force quite unconnected with the employment. It exposed every one within the area to a similar risk of danger from falling walls.

In the case of such a " community risk " as it was labelled, a workman cannot say that an injury caused by such a happening arises out of his employment unless he can show that the nature of his employment exposed him more than other members of the public to the danger in question. To define the so-called " community risk " did not prove easy. Eventually it would appear that Mr. Greene threw over the view which seemed to find favour with some of the learned Judges in the Court of Appeal that it depends upon the intensity and range of the destructive force. He would not have the distinction between the big earthquake and the little earthquake which seems to be found in the judgment of the Chief Justice. In his view a thunderstorm involved a community risk, and if a workshop chimney was struck by lightning and fell upon the workshop and injured a workman, he could not recover compensation unless he could show that by reason of the height or otherwise of the chimney he was especially exposed to the risk of that chimney falling as compared with other persons in the vicinity of chimneys. On this argument counsel found himself confronted with the passage quoted where Lord Haldane expressly refers to the remoter cause of the wall falling being a stroke of lightning. This passage was said to be *obiter dictum* and to be wrong.

Their Lordships, however, cannot agree to this. The illustration appears to be of the essence of the argument. In the course of the discussion the House of Lords had been referred to four cases of injury by natural forces, the two cases of lightning *Andrew* v. *Failsworth* [1904], 2 K. B. 32, and *Kelly* v. *Kerry County Council* (1908), 1 B. 194, and the two cases of frostbite, *Karemaker* v. *S. S. Corsican*, (1911), 4 B. 295, and *Warner* v. *Couchman* [1912], A.C. 35, where the principle had been adopted that where the injury was directly caused by such a natural force it has to be shown that the workman was especially exposed by reason of his employment to the incidence of such a force. Lord Haldane's exposition was obviously intended to comprise these decisions. The principle which emerges seems to be clear

The accident must be connected with the employment: must arise " out of " it. If a workman is injured by some natural force such as lightning, the heat of the sun, or extreme cold, which in itself has no kind of connection with employment, he cannot recover unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to suffering such an injury. But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered. So that if the roof or walls fall upon him, or he slips upon the premises there is no need to make further inquiry as to why the accident happened.

This principle appears to be the foundation of the street risk decision *Dennis* v. *White* [1917], A.C. 479, which finally decided that a workman employed to go into the streets on his master's business who is injured by a risk of the streets establishes an accident arising " out of " the employment, though the risk was shared by all members of the public using the streets in like circumstances. The same principle is adopted in *Upton* v. *G.C. Railway Company* [1924], A.C. 302, where the workman slipped on a railway platform and was held entitled to compensation. Lord Haldane reaffirms his conception of the kind of causation necessary to establish that an accident arises " out of " employment. The only other case to which it is desirable to refer is the more recent case of *Lawrence* v. *Matthews* [1929], 1 K.B. 1. In that case the present Lord Chancellor, whose special experience in these cases both at the Bar and in the Court of Appeal gives exceptional weight to his opinion, declared the law to be in terms as their Lordships have stated it. The concurring judgment of Lord Russell of Killowen is on exactly the same lines, for his statement of what he calls " a locality risk " appears to conform with precision to Lord Haldane's exposition in *Thom* v. *Sinclair*. The phrase " dangerous spot " used in Lord Russell's judgment for this purpose appears to mean a spot which, in fact, turns out to be dangerous. In this connection it seems important to note that an expression of Lord Wrenbury's in *Allcock* v. *Rogers* (1918), 11 B., at p. 154, defining a dangerous place as a place which has some quality which results in danger, as for instance, that an insecure wall which may fall exists there, must be taken to be limited by its context, which was that of a workman employed in a street who was injured by what the Courts held not to be a street risk, viz., the explosion of an enemy bomb in war time. If it were sought to be applied to the premises on which the workman was employed the definition would be too narrow and inconsistent with the decisions of the House of Lords already cited.

Their Lordships' attention was drawn to the various decisions in cases in which workmen were injured by bombs and shells from bombardment during the war. They do not refer

to them in detail for they appear to confirm the conclusions which their Lordships have reached. Neither bombs nor shells have ordinarily anything to do with a workman's employment. It is therefore necessary to show special exposure to injury by them. They represent exactly for this purpose the operation of such forces as lightning, heat and cold. It is said how capricious is the working of the law. If the bomb injures a workman directly he must show special exposure; if it injures him indirectly by bringing the roof down on him he can recover unconditionally. It is almost impossible to give statutory protection in any case in which the line of distinction may not appear narrow; but the dividing principle adopted is authoritative and appears to their Lordships to be logical, and they feel bound to adopt it.

The substance of the matter is that in every case the words of the section alone are to be considered: "arising out of and in the course of the employment." It is with respect misleading to apply other terms whether derived from insurance law or other sources. It is not satisfactory, if a slight criticism on Lord Haldane's words may be permitted, to speak even of the proximate cause as determining the matter. In the case of death by lightning few could doubt that from an insurance point of view lightning would be the proximate cause whether the assured were or were not specially exposed to lightning yet the problem—"arising out of"—is solved by considering the special exposure. The association therefore of the employment with the accident may be even closer than that of proximate cause. Whether "connected with" or as by Lord Loreburn in *Dennis* v. *White supra* "incidental to" is the better term need not be decided. It is sufficient for their Lordships to say that it appears to them to have been authoritatively decided that where a workman is injured by the falling upon him of the premises where he is employed the accident necessarily arises out of the employment. This conclusion decides the two cases of Brooker and Ryan; Prendergast's case speaks for itself and in their Lordships' view the case of Ashwell is within the decisions as to street risks and gives rise to a claim for compensation. Their Lordships therefore will humbly advise His Majesty that these appeals be allowed and that the judgment in each case be varied by substituting yes for the answer to the second question. The respondents should pay the appellants' costs of these appeals.

In the Privy Council.

MARGARET BROOKER

v

THOMAS BORTHWICK AND SONS (AUSTRALASIA), LIMITED

JOHN RYAN

v.

THOMAS BORTHWICK AND SONS (AUSTRALASIA), LIMITED

JOHN PRENDERGAST

v.

NELSONS (N.Z.), LIMITED

PHILOMENA MARY ASHWELL

v.

THOMAS JAMES BRENNAN AND ANOTHER.

(*Consolidated Appeals.*)

DELIVERED BY LORD ATKIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

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