No. 1 of 1949.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES.

BETWEEN

SLAZENGERS (AUSTRALIA) PTY. LIMITED - - *Appellant*

AND

IVY PHYLLIS EILEEN BURNETT Administratrix of the Estate of MINNIE GERTRUDE MILLIGAN deceased *Respondent.*

Case for the Appellant.

1. This is an Appeal brought by leave of the Supreme Court of New South Wales granted on the 30th July 1948 by Slazengers (Australia) Pty. Limited from a Judgment and Order of the Supreme Court made herein on the 1st June 1948 upon a Case Stated by the Chairman of the Worker's Compensation Commission of New South Wales at the request of the Appellant under the provisions of Section 37 (4) of the N.S.W. Worker's Compensation Act 1926–47 (hereinafter called "the Act") whereby the Supreme Court answered in the negative and unfavourably to the Appellant the first Question submitted by the said Case for the Court's determination in respect of an award of £A800 made by the Worker's Compensation Commission in favour of the widow of John Samuel Milligan a deceased employee of the Appellant.

2. The Appellant was the Respondent to an Application brought under Section 7 (1) (*b*) of the Act by the said widow who died after an Order granting to the Appellant conditional leave to appeal herein had been made by the Supreme Court on the 28th day of June 1948. The Respondent Ivy Phyllis Eileen Burnett is Administratrix of the estate of the said widow and as Administratrix aforesaid was made a party to the proceedings herein and to this Appeal by an Order of Revivor made the 15th day of November 1948 by the said Court.

3. The following are the material provisions of the Act :—

Section 6 (1) so far as is material is in the following terms :—

6. (1) "Injury" means personal injury arising out of or in the course of employment and includes a disease which is contracted by the worker in the course of his employment whether

at or away from his place of employment and to which the employment was a contributing factor but does not save in the case of a worker employed in or about a mine to which the Coal Mines Regulation Act 1912–41 applies include a disease caused by silica dust.

Section 7 (1) (*a*). A worker who has received an injury whether at or away from his place of employment and in the case of the death of the worker his dependants shall receive compensation from his employer in accordance with this Act.

(*b*) Where a worker has received injury without his own default or wilful act on any of the daily or other periodic journeys referred to in paragraph (*c*) of this sub-section, and the injury be not received—

(i) during or after any substantial interruption of, or substantial deviation from, any such journey, made for a reason unconnected with the worker's employment, or unconnected with his attendance at the trade, technical or other school, as the case may be ; or

(ii) during or after any other break in any such journey, which the Commission, having regard to all the circumstances, deems not to have been reasonably incidental to any such journey ; the worker (and in the case of the death of the worker, his dependants), shall receive compensation from the employer in accordance with this Act.

(*c*) The daily or other periodic journeys referred to in paragraph (*b*) of this subsection shall be—

(i) between the worker's place of abode and place of employment, and

(ii) between the worker's place of abode, or place of employment, and any trade, technical, or other training school, which he is required by the terms of his employment, or is expected by his employer, to attend.

(*d*) The provisions of paragraphs (*b*) and (*c*) of this subsection shall not apply to or in respect of an injury received after the expiration of six months after the termination of the war, which commenced on the third day of September, one thousand nine hundred and thirty-nine.

(2) Compensation shall be payable in respect of any injury resulting in the death or serious and permanent disablement of a worker, notwithstanding that the worker was, at the time when the injury was received, in a place not directly concerned with his employment, but forming part of the employer's premises, or acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the worker for the purposes of and in connection with his employer's trade or business.

(3) Provided that—

(*a*) the employer shall not be liable under this Act in respect of any injury which does not disable a worker for a period of at least three days from earning full wages at the work at which he was employed. But if he is disabled for that period, the compensation shall date from his receiving the injury ;

(*b*) if it is proved that the injury to a worker is solely attributable to the serious and wilful misconduct of the worker, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed ;

(*c*) no compensation shall be payable on account of any injury to or death of a worker caused by an intentional self-inflicted injury.

(4) Where the injury is a disease which is of such a nature as to be contracted by a gradual process compensation shall be payable by the employer in whose employment the worker is or who last employed the worker.

(5) For the purposes of subsection four of this section and of sections forty-four and fifty-three of this Act the injury shall be deemed to have happened at the time of the worker's incapacity.

4. Paragraphs (*b*) (*c*) and (*d*) of Section 7 (1) were added by Act No. 13 of 1942 which by paragraph (*d*) expressly limited the compensation payable under the provisions of paragraphs (*b*) and (*c*) to injuries received during the duration of the War which commenced on the 3rd day of September 1939 and during the six months after its termination.

FACTS.

5. The facts were not in dispute and as found by the Worker's Compensation Commission were summarised in paragraph 7 of the Case Stated as follows :—

(1) The deceased was employed by the Appellant and the Respondent Minnie Gertrude Milligan was totally dependent on the deceased's earnings at the time of his death.

(2) On the Twenty-ninth day of May One thousand nine hundred and forty-seven the deceased was journeying by tram on his daily journey between his place of abode at 23 Townes Gardens Pagewood and his place of employment with the Appellant at Alexandria when he suffered a coronary occlusion from which he died at his place of abode on the same day.

(3) The physical effort of the deceased arising out of the journey did not play any part in the happening of the occlusion.

(4) For some months prior to his death the deceased had been receiving medical treatment for hypertension and myocardial degeneration. It was common ground that the hypertension,

myocardial degeneration and coronary occlusion were not contracted by the deceased in the course of his employment with the Appellant nor was the employment a contributing factor thereto ; neither was it an injury which arose out of or in the course of deceased's employment.

(5) The coronary occlusion was solely due to autogenous causes and had no causal connection whatsoever with the journey.

6. On the 27th June 1947 an application under the Act was made by the said widow against the Appellant for the determination of the liability and amount of compensation payable by the Appellant.

7. The application was heard by the Worker's Compensation Commission which upon finding the facts set out in paragraph 5 hereof *held* on the 29th day of May 1947 that the deceased worker received injury within the meaning of section 7 (1) of the Act : *and awarded* the sum of £A800 (eight hundred Australian pounds) as compensation to the applicant widow together with costs.

8. The Commission in paragraph 4 of the Case Stated recites that :—

" The Commission found that the deceased (worker) had " received ' injury ' on his daily journey within the meaning of " Section 7 (1) (*b*) of the Worker's Compensation Act, 1926–47 " and that such injury resulted in his death."

9. At the request of the Appellant and pursuant to the provisions of Section 37 (4) of the Act the Chairman of the Commission Stated for the opinion of the Supreme Court of New South Wales a Case submitting *inter alia* the following question of law, namely :—

" On the Commission's findings of fact did the Commission " err in law in holding that the deceased worker ' received injury ' " within the meaning of Section 7 (1) (*b*) of the Act ? "

10. The contention upheld in the Courts below was that by reason of the happening of the coronary occlusion while the deceased worker was journeying from his home to his place of employment he received injury within the meaning of Section 7 (1) of the Act. The Appellant's contention was that the deceased worker had not " received injury " on a daily or other periodic journey within the meaning of the Act merely because the final stage in a disease was reached during the time occupied on such a journey.

11. On the 1st day of June 1948 the Supreme Court of New South Wales (Jordan, C.J., Davidson and Street, JJs.) answered the said Question in the negative and ordered the Appellant to pay the said widow's costs incidental to the Case Stated.

12. The Chief Justice delivered the Judgment of the Court, and after briefly reciting the facts set out above, said :—

" In my opinion the first Question submitted is completely " covered by the reasons of the Court in *Peart* v. *Hume Steel Ltd.* " 47 S.R. (N.S.W.) 384 where the majority of the Court based

" its decision on a broad ground which covers the present case also. " It would be wrong to regard this Court's decision as a mere " dictum upon a view that it could have arrived at it on a narrower " ground. *N.S.W. Taxation Commissioners* v. *Palmer* (1907) " A.C. 179 at 184/5; cf. *London Dwellers Ltd.* v. *Attenborough* " (1934) 2 K.B. 206 at 222. When *Peart's* case was taken on appeal " to the High Court of Australia (75 C.L.R. 242, 251) three of the " learned Judges (Latham, C.J., and Rich and McTiernan, J.J.) " agreed with the reasons of the majority of this Court."

10 13. The facts in *Peart's* case (supra) as expressed in the judgment of the High Court (75 C.L.R. 242 at p. 244) so far as is material were as follows :—

" The deceased R. J. Peart was journeying by pedal bicycle on " his daily journey between his place of abode and his place of " employment when he suffered a coronary occlusion from which " he died on that day.

" The physical effort of pedalling the bicycle uphill which the " deceased was engaged in within a minute or two of the happening " of the occlusion increased his blood pressure and precipitated the
20 " occlusion.

" The occlusion was due to a small piece of the lining of the " artery having loosened and blocked the artery, and the blocking " of the artery was due to debris in the vessel from the atheromatous " area.

" The occlusion was the inevitable end result of the disease.

" The disease was not due to the nature of the deceased's " employment nor was it contracted in the course of such employ- " ment, and such employment was not a contributing factor " thereto.

30 " The disease had nothing at all to do with the deceased's " employment and the only part the journey played was the " proverbial ' last straw.'

" Because of physical effort occasioned by the journey a " change or new stage in the disease was reached on the journey; " this immediately manifested itself and proved fatal.

" The deceased received personal injury by accident on the " daily journey in question which resulted in his death."

14. The Supreme Court of New South Wales (Jordan, C.J., Davidson and Street, J.J.) held (*ibid.* 47 S.R.—N.S.W.—p. 387) that there was
40 evidence upon which the Worker's Compensation Commission could find (as it did find) that the deceased worker received injury within the meaning of Section 7 (1) (*b*) of the Act.

15. In the High Court of Australia (*ibid.* 75 C.L.R. 242) some of the learned Judges appear to have supported the reasoning of the learned Chief Justice of the Supreme Court in giving to the word " injury " in

the context of Section 7 (1) (*b*) " the non-colloquial sense wide enough to include disease generally " and held that no causal connection between the injury and the journey is necessary. Two of the learned Judges, however (Starke and Dixon, J.J.) held that there was no need to decide whether a causal connection was necessary since the effort of cycling to work had caused a part of the lining of the artery to detach itself and thus caused the death of the worker.

16. The reasoning in *Peart's* case (75 C.L.R. 242) relied on by the Court below in the instant case is given by Latham, C.J. at page 251 of the Report and may be summarised as follows :— 10

(A) The definition of injury in section 6 of the Act does not govern the meaning of the word " injury " as used in every context in the Act. In general for the purposes of the Act " injury " is limited to those injuries which satisfy the requirements set out in the definition ; namely they must be personal and they must arise out of or in the course of employment ; and in the case of disease must be contracted in the course of the employment where the employment is a contributing factor.

(B) So to read " injury " in Section 7 (1) (*b*) would denude it of practical effect. Therefore as the definition must yield to 20 context it is inapplicable to Section 7 (1) (*b*).

(C) Therefore nothing more is required under Section 7 (1) (*b*) than that the injury should be suffered during the journey.

(D) The breaking of an artery or of the lining of an artery although merely a step or stage in a disease is an injury causing death.

17. The learned Chief Justice of the High Court pointed out that the consequences of this view were remarkable, since " for example the " dependants of a man who dies just before he leaves his work must, in " order to obtain compensation under the Act show that he received 30 " an injury which arose out of or in the course of his employment and " caused his death. But if the worker dies while he is on a tram to go home " in his ordinary way, his dependants can recover, though his death had no " relation whatever to his work."

18. The Appellant submits that the decision in *Peart's* case is not decisive of the instant case. But if, contrary to the Appellant's submission, it is decisive the Appellant submits that it was wrongly decided. In any case the Appellant submits that the High Court and the Supreme Court were in error in holding that the stage in the disease that finally brought about the death was an " injury." The Appellant submits that 40 the stage in the disease is of itself no more an injury than the death itself, which is merely the last stage of the disease. Neither the employment nor the circumstances of the journey contributed in any degree to the contraction of the disease from which the deceased worker had been suffering for some considerable time prior to his death. Nor did the

employment or the circumstances of the journey induce accelerate or aggravate the disease or bring about any new stage thereof or contribute in any degree to the happening of the occlusion which finally caused the death of the worker.

19. The Appellant also submits :—

(1) That whether or not the definition of " injury " in section 6 is applicable to section 7 (1) (*b*) the word " injury " in section 7 (1) (*b*) on its true construction does not include death by disease not induced accelerated or contributed to by the journey or the employment.

(2) That the definition of " injury " in section 6 is inapplicable to section 7 (1) (*b*) and that " injury " in that section must be read in its natural sense as not including death by disease.

(3) That alternatively to (2) above the definition in section 6 is so far applicable to section 7 (1) (*b*) as to extend the meaning of the word " injury " to death by disease where the journey or the employment induces accelerates or contributes thereto.

20. The Appellant humbly submits that in answering the said Question in the negative and in making the Rule against which this Appeal is brought the Supreme Court erred in Law and the said Rule should be discharged for the following among other

REASONS

(1) BECAUSE death by disease not induced accelerated or contributed to by the journey or the employment is not an injury within the meaning of section 7 (1) (*b*).

(2) BECAUSE death from autogenous causes is not an injury within the meaning of the said section.

(3) BECAUSE upon its true construction the word " injury " as found in section 7 (1) (*b*) does not include disease.

(4) BECAUSE if upon its true construction " injury " in 7 (1) (*b*) does include disease it only includes such diseases which either the journey or the employment has induced aggravated or accelerated.

(5) BECAUSE the deceased worker had not received " injury " within the meaning of the words in section 7 (1) (*b*).

T. CHAPMAN-MORTIMER.

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