IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 40 of 1985

Between:

THE LABOUR OFFICER for and on behalf of Rajpathi (widow), Bisun Deo (son), Anil Deo (son), Deo Ram (son), Kamal Kala (daughter) and Harish Chand Deo (grandson) of Sukhu s/o Budhu Singh, deceased	Appellant
and	
FIJI SUGAR CORPORATION LIMITED	Defendant

S.P. Sharma & A. Abbas for the Appellant
D.C. Maharaj & K.C. Chaganlal for the Respondent

Date of Hearing: 24th October, 1985
Delivery of Judgment: 8th November, 1985

JUDGMENT OF THE COURT

O'Regan, J.A.

The appellant instituted proceedings pursuant to the Workmen's Compensation Act (Cap. 94), in the Magistrate's Court, on behalf of the dependants of Sukhu s/o Budhu Singh, who died on 22nd August, 1980. On 28th September, 1983 the learned magistrate, in a reserved judgment, found in favour of the defendant. From that determination the appellant appealed to the Supreme Court. On 10th May, 1985 that appeal was dismissed. These proceedings are an appeal from that decision.

The deceased had been employed by the defendant for some thirty years and at the date of his death was a launch captain. On that day he had set out for work at about 4 a.m. and at about 4.30 a.m., with a crew of two, took the launch, with four barges in tow, from Labasa to Malau. The barges were laden with molasses. They arrived at Malau shortly after 7 a.m. and after securing the vessel they took breakfast on board. After the meal the two crewmen set about unloading the vessel. The deceased did not assist in the tying up of the vessel and the barges it had in tow or in the unloading operations. As the crewmen put it he rested. One of them speaking of his general practice said "once the tug is tied he would rest" and added "on this day he also rested".

At about 9 a.m. the deceased complained of stomach pains but after lying down for a short while he told his companions he was "all right". Later still when the crewmen had finished the unloading work, the three of them were sitting on the jetty. The deceased was seated on a pipe when suddenly he collapsed and fell to the ground. He was immediately taken to Labasa Hospital to which he was admitted at about 10 a.m. and shortly afterwards he was pronounced dead by Dr. Rajesh Chandra. On making a post-mortem examination, Dr. Chandra found that the deceased's heart was in an advanced state of disease from which, in his opinion, he had been suffering for some 10 years. The disease was artherosclerosis which gave rise to a coronary occlusion which in turn caused a fatal myocardial infarction.

In due time, the appellant acting on behalf of the deceased's widow, four of his children and a grandchild, brought a claim under the Act against the respondent. At the first hearing it was conceded by the respondent that these persons were all dependants of the deceased. At the hearing of the appeal in the Supreme Court the issues were further narrowed by admissions made from the bar. Before us the extent of such admissions was the subject

of some difference between counsel. There is, unfortunately, some ambiguity in the record as to them. Counsel for the appellant is recorded as having submitted that the first of three matters which the plaintiff had to establish was that the deceased suffered a personal injury by accident and counsel for respondent is recorded as having interposed that the respondent accepted such to be the case. However, in his reasons for judgment the learned Judge has recorded this and other concessions made by the respondent as follows :

> " On appeal the respondent conceded :
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> (i) that the deceased was a workman;
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> (ii) that he suffered personal injury which occurred during the course of his employment.
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> The sole issue for decision therefore is whether the deceased suffered personal injury by an accident which arose out of his employment. "

We are disposed to think that this confusion has arisen from the near coincidence of "accident" and "injury" in this case and indeed, as is the case, in many "heart" cases. Lord Atkin, in Fife Coal Co. v. Young (1940) 2 All E.R. 85, at p.91 referring to such matters said :

> " It is necessary to emphasise the distinction between 'accident' and 'injury' which in some cases tend to become confused ..... 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 the 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. "

Here the accident was the coronary occlusion and the injury the infarct, each intimately related to the other, both temporally and functionally. All in all, we think it best if we leave the matter as put by the Judge in his reasons for judgment and proceed on that footing. We are satisfied that no injustice or disadvantage will accrue to either party from our so doing.

The appellant submitted that the ordinary stress associated with deceased's occupation so affected his diseased heart that it precipitated the coronary occlusion and his death, and that, accordingly, the personal injury - the infarct - which occasioned the accident - the occlusion of the coronary artery - arose out of his employment.

The word "stress" being sufficiently wide to encompass both mental and emotional strain and pressure on the one hand and physical effort on the other, we asked Mr. Sharma whether he was relying on the one or the other or both. He replied - a combination of physical stress and mental stress.. But when he came to elaborate he advanced only the former. He submitted that the deceased being the overall supervisor of the operation, carrying expensive cargo, navigating and manoeuvring the vessel for some two and a half hours in darkness would be acutely conscious of and anxious about his responsibility for the safety of his crew, his vessel and its cargo. And he went on to submit that it was open on the evidence for the magistrate to have found that deceased was under "some stress, albeit ordinary stress, resulting from his duties". The difficulty facing the appellant is that the learned magistrate did not so find. He accepted the evidence of the crewmen to effect that the deceased's job on that morning was not a difficult one; that all he did was steer the boat to Malau Jetty and that thereafter he had done no work at all. And on that basis he found that there was no evidence whatsoever of any physical or mental

stress in the work. We find no warrant whatsoever for any alternative view. Indeed, we agree with the finding.

It is in the light of these findings that the medical evidence fell to be considered. Both the medical experts called, one by each side, agreed that work can precipitate heart attack if it involves extra demand by dint or either physical or mental strain - and especially so where the heart is already diseased. But here it has not been established that there was such extra demand and accordingly the appellant's contentions cannot be sustained.

The appellant placed a deal of reliance upon observations of Clauson L.J. made when delivering judgment of the Court of Appeal in Oates v. Earl Fitzwilliams Collieries Co. (1939) 2 All E.R. 498 which at first sight appear to lend some support for the submissions advanced on its behalf. He said, at p.502H :

> " In our judgment a physiological injury or change occurring in the course of a workman's employment by reason of the work which he is engaged at or about that moment is an injury by accident arising out of his employment; and that is so though the injury or change be occasioned partly, or even mainly, by the progress of development of an existing disease, if the work which he is doing at or about the moment of the occurrence of the physiological injury or change contributes in any material degree to its occurrence; and this is nonetheless true though there may be no evidence of any strain or similar cause other than that arising out of the workman's ordinary work. "

We first observe that these general observations were made subsequent to the determination of the decision in the case and do not touch upon the ratio decidendi. Having so said, we however, make no dissent from them but we think it well to emphasise that their Lordships in this passage and elsewhere in the judgment limit "the physiological injury and change" to such as occurs "by reason

of the work which he is engaged at or about that moment", and that in an earlier passage when they were discussing the medical evidence they said, at p.501H :

> " We may say at once, that, even if we were prepared to accept the first part of the submissions, we should not feel able to hold that the medical evidence as it stands necessarily establishes that the work the man did on the day of his death contributed to a material degree to the occurrence of the physiological injury or change suggested on the widow's behalf. "

The passage we have emphasised makes it manifest that their Lordships subscribed to the necessity of a nexus between the effort of work and such injury. That is all the more abundantly plain when it is noted that their Lordships cited with approval and followed McFarlane v. Hutton Brothers Ltd. (1926) 96 L.J. K.B. 557 which established that a plaintiff has sufficiently made out his case if he proves that strain as a result of routine effort - not necessarily a particular strain - in fact causes or contributes to the death or incapacity.

Before taking leave of the matter we think it pertinent to observe - although it is not in any way essential to the determination of this case - that in our experience in practice or from our knowledge of the texts and reported cases, we know of no cases where the ordinary cares and anxieties incidental to the discharge of duties have held to amount to "stress" or "strain" in the sense those words have been employed in the literature. There are cases, however, where nervous shock or strain due to accident in the course of employment, which has caused personal incapacity to work, has been compensated - see, for instance, Eaves v. Blaenclydach Colliery Ltd. (1909) 2 K.B. 73 and Yates v. South Kirkby Collieries Ltd. (1910) 2 K.B. 538.

The appellant also submitted that the presumption of liability is so strong in the instant case that the onus should shift to the respondent to establish that the personal injury by accident did not arise out of and in the course of the employment. This submission was based upon observations made by Lord Low in Grant v. Glasgow and South Western Rail Co. (1908) S.C. 187; 1 B.W.C.C. 17 :

> " The onus may be shifted, especially when the claim is by a dependant of a workman who has been killed and whose evidence is therefore not available. If in such a case facts are proved, the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment I think that it falls on the employer, if he disputes the claim to prove that the contrary was the case. "

The use of the word "engaged" gives a measure of imprecision to the passage but even if we assume that it encompasses both the elements - "arising out of" and "in the course of the employment" - we do not think that the present case meets the essential prescription as to the matters required to be proved before the onus shifts.

It is interesting to note that, in the same year as Grant's case was decided, Sim J., in New Zealand, laid down a like proposition to that enunciated in that case. The case is Gibbs v. Thompson & Hills (1907) 10 G.L.R. 150. The report is not presently available to us but a short précis of the decision is to be found in Morgan v. Westport Stockton Coal Co. (1944) N.Z.L.R. 859 at pp.866 and 867. The effect of the decision is also given in Charlton v. Makara County (1945) N.Z.L.R. 335 at p.346 where O'Regan J. said :

> " I could find in his favour, however, on another ground in that, as the pain and disablement followed immediately on an effort of abnormal severity, the onus is thrown on the defendant to show that had there been no effort the crisis would have occurred at about the same time '(if there had been no accident)'. "

The words "of abnormal severity" qualifying "effort" in that passage clearly bear relation to the facts of that case. It is manifest from the Morgan case (supra) that all that is required for the rule to operate is proof of exertion or effort - see p.867, lines 19-22, if, of course, the other prerequisites have been met.

Unfortunately for his dependants, the evidence concerning the deceased at and around the time of his death does not meet this yardstick.

The appeal is dismissed and leave is reserved to the respondent to apply for costs.

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