SAMPAT

v.

COLONIAL SUGAR REFINING CO. LTD.

[COURT OF APPEAL, 1963 (Finlay V.P.; Marsack J.A.; Hammett J.A.), 8th July, 9th October]

Civil Jurisdiction

Tort—negligence—findings of fact of court below—primary facts and inferences—Law Reform (Miscellaneous Provisions) Ordinance (Cap. 17)—Compensation to Relatives Ordinance (Cap. 20).

Workmen's compensation—independent concurrent conditions—arising out of employment—sleeping in dangerous place—Workmen's Compensation Ordinance (Cap. 93).

The appellant sued the respondent company and one Brown for damages under the Law Reform (Miscellaneous Provisions) Ordinance and the Compensation to Relatives Ordinance and alternatively (against the respondent company) for compensation under the Workmen's Compensation Ordinance in respect of the death of her husband. During his lunch break from noon to 1 p.m. the deceased was sleeping on a concrete floor in the respondent's mill when he was struck and killed by a motor car driven by Brown an engineer employed by the respondent company. Brown and his predecessors were in the habit of using the particular area for parking. The trial judge held that there was no negligence on the part of Brown and, on the contrary, the deceased was negligent in being where he was.

Held.—(1) On the facts (Hammett, J.A. dissenting) that there was no reason to interfere with the findings of the trial judge.

Per Hammett, J.A. That while the primary findings could not be disturbed the proper inference to be drawn was that Brown was negligent in failing to keep a proper lookout.

(2) As to the claim under the Workmen's Compensation Ordinance—

(*a*) The law of Fiji requires that an accident can be the subject of compensation only if it satisfies two independent but concurrent conditions; it must arise out of, and in the course of, the employment.

(*b*) The trial judge, who had inspected the site, was in a better position than the Court of Appeal to draw correct inferences and the Court of Appeal was accordingly bound by his findings of fact.

(*c*) That the choice by the deceased of an unreasonable and dangerous place in which to sleep and the consequent accident had no causative relation to his employment and that the accident did not arise out of his employment.

Cases referred to:

Dover Navigation Co. Ltd. v. Craig [1940] A.C. 190: *Henderson v. Commissioner of Railways* (W.A.) 58 C.L.R. 281: *John Stewart & Son v. Longhurst* [1917] A.C. 249: *Plumb v. Cobden Flour Mills* [1914] A.C. 62: *Nunan v. Cockatoo Docks and Engineering Co.* (1942) 58 W.N. (N.S.W.) 140: *Watson v. C. C. Engineering Industries Pty. Ltd.* (1946) 63 W.N. (N.S.W.) 111: *Weaver*

v. Tredegar Iron & Coal Co. Ltd. [1940] A.C. 955: *Lucas v. Postmaster General* [1939] 2 K.B. 808: *Collins v. Commissioner for Railways* (1961) 78 W.N. 788: *Gane v. Norton Hill Colliery Co.* [1909] 2 K.B. 539: *Lancashire and Yorkshire Railway v. Highley* [1917] A.C. 352: *Stephen v. Cooper* [1929] A.C. 570: *Bryce v. Edward Lloyd Ltd.* [1909] 2 K.B. 804: *Challis v. London and South Western Railway Co.* [1905] 2 K.B. 154: *Simpson v. Sinclair* [1917] A.C. 127: *Harris v. Associated Portland Cement Manufacturers Ltd.* [1939] A.C. 71: *Barnes v. Nunnery Colliery Co. Ltd.* [1912] A.C. 44: *Riekmann v. Thierry* (1896) 14 R.P.C. 105: *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370: *Akerhielm v. De Mare* [1959] A.C. 789: *Felix v. General Dental Council* [1960] A.C. 704.

Appeal from judgment of the Supreme Court.

Ramrakha for the appellant.

Sherani for the respondent.

The following judgments were read:

FINLAY V.P. and MARSACK J.A. [9th October, 1963]—

This is an appeal from a judgment given by the late Chief Justice in an action for damages under the Law Reform (Miscellaneous Provisions) Ordinance and for compensation under the Compensation to Relatives Ordinance, and in the alternative for compensation under the Workmen's Compensation Ordinance. The action was brought by the plaintiff as administratrix of her husband's estate on behalf of herself as his widow and on behalf of her five children by the deceased.

Primarily the claim was for damages for negligence in somewhat unusual circumstances. On the 16th May, 1961, during the lunch-hour break between noon and 1 p.m. the deceased was sleeping on a concrete floor in the mill premises of the defendant company near the No. 1 Bagasse. While he so slept an engineer in the employ of the company, one Brown, drove his motor car into the place where the plaintiff's husband was sleeping and struck and killed him. The place where the accident occurred was a place in which the defendant Brown had been in the habit of parking his car daily since his arrival at the mill in January, 1961. He seems to have had predecessors in that practice. The place was in fact an entrance near the conveyor. On the day of the accident Brown drove along the concrete roadway at the right of the mill building and turned to his left into the entrance, intending to park there as usual. Brown did not see the deceased, who was asleep on the concrete floor some 15 feet from the entrance, until after the deceased was struck; apparently Brown was in the course of stopping when his car struck the deceased.

The late Chief Justice heard all the evidence and inspected the premises. For reasons he gave he found as a fact that there was no negligence on the part of Brown. He summed up his conclusions in that respect by saying:

> " I cannot see that he (i.e. Brown) was guilty of negligence in driving into a garage under those conditions."

The word " garage " was there used as a simile in pursuance of a simile previously adopted by the Chief Justice. On the contrary the Chief Justice specifically found that the deceased was negligent " in being where he was, in the position in which he was, at the time he was ", and he found that negligence to be the sole cause of the accident. On the basis of these findings the late Chief Justice found in favour of the defendant Brown and thereby, as he said, found it unnecessary to consider the vicarious liability of the

company. He finally dismissed any claim by the plaintiff against the company in respect of damages by finding that the company was under no duty to take any precautions for the safety of the deceased if he chose to sleep where he did, and that the plaintiff had failed to show (or that there had been) any failure on the part of the company to take adequate precautions for the safety of the deceased in circumstances that could not reasonably have been foreseen.

Against these findings counsel for the appellant urged that the learned Chief Justice had made a material error in that in his recital of the facts he had referred to Brown's car as being a Holden car, whereas in fact it was a Morris. The error seems to us to have been a recitative error only, for although a Holden car was incidentally mentioned in the evidence, it was so mentioned solely in relation to the distance ahead from which a driver's view commences, by a witness not a party and in answer to the Chief Justice. In any case the reference is somewhat equivocal. On the other hand the plan which was before the Chief Justice showed clearly that Brown's car was a Morris. The type of car driven by Brown cannot have been uncertain. We think, therefore, that the error in the recital was probably typographical and, in any event, not sufficiently material to vitiate the specific and convincing reasons which clearly induced the late Chief Justice to acquit Brown of any negligence causative of the death.

Counsel for the appellant also attacked the findings of fact of the late Chief Justice on the ground that there was no evidence, direct or indirect, that the deceased knew or ought to have known that the area in which he was sleeping was used for parking and that there was no evidence of any warning of the danger of sleeping there or that employees were not allowed there. This was a challenge to the finding of the Chief Justice that the company was under no duty to take any precautions for the safety of the deceased if he chose to sleep where he did. It is true that there was no evidence of any warning or prohibition by the company but the judgment would appear to have proceeded upon recognition of that fact. The finding that the deceased should not have been sleeping where he was at the time when he was, (for the accident happened two minutes to 1 p.m. when the warning whistle had gone at ten minutes to 1), was specific. So too were the findings on ample evidence that Brown was not negligent and that the company was not guilty of any breach of duty. We think, therefore, that the findings of fact of the learned Chief Justice must be accepted and maintained in their integrity. Accordingly we are of opinion that the judgment so far as it relates to the claim under the Law Reform (Miscellaneous Provisions) Ordinance and the Compensation to Relatives Ordinance must stand, and the appeal in respect of that aspect must be and is dismissed.

That leaves for consideration those aspects of the judgment which concern the claim under the Workmen's Compensation Ordinance.

Proper consideration of what the law of Fiji makes compensatable requires appreciation of the fact that an accident can be the subject of compensation only if it satisfies two independent but concurrent conditions. It must arise out of, and in the course of, the employment of the person suffering injury. Lord Wright said of them in *Dover Navigation Co. Ltd. v. Craig* [1940] A.C. 190 at p. 199:

> " It is clear that there are two conditions to be fulfilled."

He distinguishes between them by adding:

> " What arises ' in the course of ' the employment is to be distinguished from what arises ' out of ' the employment. The former words relate to time conditioned by reference to the man's service, the latter to causality."

This distinction and the nature of the difference between the meaning and relevance of the two phrases was recognised by Dixon, J. (as he then was) in *Henderson v. Commissioner of Railways* (W.A.) 58 C.L.R. 281 at 294. It detracts nothing for present purposes from the weight of his authority that he was dealing with an enactment which made the conditions alternative and not cumulative as they are in Fiji.

It is necessary too in the consideration of this appeal to appreciate that formulae and tests prescribed in other cases do not constitute exclusive criteria of the causal relationship between injury and employment which may or may not make the injury complained of here compensatable.

Lord Buckmaster adverted to that topic in *John Stewart & Son v. Longhurst* [1917] A.C. 249 at 259. Lord Dunedin did so in *Plumb v. Cobden Flour Mills* [1914] A.C. 62 at 65, whilst Lord Wright lent it the weight of his authority, accompanied by an illuminating reference to another topic, when he said:

> " The fundamental and initial question in every claim under the Act must be whether the accident arose out of and in the course of the employment.
>
> That is a question of fact which can only be decided by the judge by applying his commonsense and his knowledge of industrial conditions to the evidence before him though with due regard to any principles laid down by the Courts."

This is the passage quoted by Jordan, C.J., in *Nunan v. Cockatoo Docks & Engineering Co.* (1942) 58 W.N. (N.S.W.) 140.

It emphasises the factual nature of the issues involved and the objective character of the consideration which the Judge is to bring to bear upon the decision of those issues.

It seems proper to say at this point that the learned Chief Justice did not in his judgment offend against any of these principles or conceptions.

Nor does it offend against the often recorded conception that a " man's work does not consist solely in the task which he is employed to perform; it includes also matters incidental to that task ". See Jordan, C.J., in *Watson v. C. C. Engineering Industries Pty. Ltd.* (1946) 63 W.N. (N.S.W.) where, relying upon *Weaver v. Tredegar Iron & Coal Co.* [1940] A.C. 955 at 990, he adverted critically to *Lucas v. Postmaster General* [1939] 2 K.B. 808.

But it was contended before this Court that on the facts the Chief Justice was in error in declining to hold that the accident arose " out of " *and* " in the course of " the employment, and reliance was placed, at least in the latter respect, upon *Collins v. Commissioner for Railways* (1961) 78 W.N. 788, a judgment of the Chief Justice and two Puisne Judges in New South Wales. Be it said at once that in New South Wales any causal relationship between the employment and an accident has been abandoned by Statute as a separate and independent condition of the recovery of compensation, for the relative enactment now allots to that condition an alternative character and prescribes that compensation is to be recoverable if an accident arises out of *or* in the course of the employment.

Thus causality ceases to be a crucially decisive factor and, as was said in *Henderson v. Commissioner for Railways* (W.A.) (*supra*) at p. 295:

> " The cases of added risk decided under the British Act and similar legislation are of little assistance because the double condition must there be satisfied."

In this state of the law the Court in *Collins v. Commissioner for Railways* (*supra*) concerned itself only with the question whether the death of the deceased " arose in the course of " his employment. That issue in Lord Wright's words related only " to time conditioned by reference to the man's service ".

The obligation of this Court extends further and in consequence into an area where British authorities are relevant and compelling. In discharging that obligation the Court is faced with specific findings of fact by the trial Judge and by an injunction concerning those findings. As to the latter, there is abundant authority; but we content ourselves with referring to what was said by Farwell, L.J., in *Gane v. Norton Hill Colliery Co.* (1909) 2 K.B. at p. 546 where the statement appears:

> " Of course if there are disputed facts the judge below is the sole tribunal. If there is evidence on both sides of those facts, however, we might hesitate ourselves if we had all the conflicting facts before us to come to the same conclusion, we are not at liberty to interfere with his judgment."

It might be said that there was in this case no conflicting evidence and that any finding of fact is an inference from undisputed facts. Even so, however, the learned Chief Justice was in a much better position than we to draw correct inferences. He heard the evidence and inspected the site—no doubt in a proper judicial way—and so could form a more reliable conclusion than any appellate tribunal. We conclude, therefore, that this Court is bound by his findings of fact. That we see no reason to disagree with them is only incidental.

The findings were that the accident did not arise out of the deceased's employment and did not arise in the course of it. This dual finding relieves us of resolving the doubts expressed by Dixon, J., in *Henderson v. Commissioner for Railways* (*supra*) as to whether in superinducing a risk not forming part of the employment a workman has gone outside " the course of or merely encountered a risk arising outside of his employment ". We quote from the judgment in Collins. For with respect we concur in his conclusion that *Lancashire & Yorkshire Railway v. Highley* [1917] A.C. 352 and *Stephen v. Cooper* [1929] A.C. 570 seem to make it clear that the true ground of decision in such cases is that the accident does not arise out of although arising in the course of the employment.

If this is so, as we think, then we are primarily concerned to determine whether there was any evidence from which the Chief Justice should have inferred, as he did not, that the accident arose out of the employment.

This, except for a tentative and expressly inconclusive expression of opinion, is a question wholly apart from anything decided in *Collins v. Commissioner for Railways* (*supra*). We can find no such evidence.

Indeed, judged by any test (with all due respect to the objectivity enjoined upon us) there seems no causal connection between the accident the deceased suffered and his employment. He was, as the Chief Justice found, entitled to sleep during his lunch-hour, but there arises the further question whether he was warranted—to adopt a negative term—in selecting a dangerous place. To suggest that he was seems to conflict with the conception expressed by Lord Simon in *London & Yorkshire Railway v. Highley* (*supra*). That test is expressed in the words:

> " Was it part of the injured person's employment to hazard to suffer or to do that which caused his injury? If yea the accident arose out of the employment. If nay it did not because what it was not part of the employment to hazard to suffer or to do cannot well be the cause of an accident arising out of the employment."

His Lordship then went on to comment, no doubt in relation to the " course of " aspect, that to ask if the cause of the accident was an added peril and outside the sphere of the employment was a way of asking whether it was part of his employment that the workman should have acted as he was acting or should have been in the position in which he was whereby in the course of that employment he sustained injury.

The latter comment is included in the interests of clarity. It is the test first pronounced that is alone apposite at this point of consideration. It is difficult to conceive that it was any part of the employment of this deceased to hazard sleeping in a dangerous place. Confirmation of that view is afforded by *Bryce v. Edward Lloyd Ltd.* [1909] 2 K.B. 804, and *Gane v. Norton Hill Colliery Co.* (*supra*) at p. 545. In the former Cozens Hardy, M.R., in referring to his judgment in a previous case said:

> " It would be entirely to misunderstand that decision if it were held to mean that a workman under those circumstances is at liberty to get his meals on any portion of the employer's premises however dangerous or unsafe it may be."

The gravamen of his judgment is expressed by that portion which reads:

> " The question the Court has to consider is whether the deceased was acting within any authority he had: whether in fact he was not needlessly exposing himself to a risk which could not be fairly said to arise out of the employment."

Farwell, L.J., gave expression to the same view. After stating that employment extends to all things which the workman is entitled by the contract of employment expressly or impliedly to do, he proceeds to exclude from the scope of employment things which are unreasonable or forbidden. Such things he says do not arise out of the employment. Kennedy, L.J., quoting as authority *Challis v. London & South Western Railway* [1905] 2 K.B. 154, said that the test is whether the risk of the accident is one which may reasonably be looked upon as incidental to the employment. His judgment too is concerned with the " arose out of " aspect of the dual conditions.

It is true that that case involved the use of a place access to which was prohibited to the workman, but the judgments as we understand them are declaratory of the law on the topic generally and are not restricted to the use of a prohibited place. The essence of the principle is a reasonable exercise of an actual or assumed authority. The adoption and application of the reasoning in Collins (*supra*) to this aspect of the dual conditions would result in a workman being free to choose any place in his employer's premises however dangerous in which to eat or sleep. Any such theory must, as we see it, conflict with the authorities to which we have referred and many others such as *Thom or Simpson v. Sinclair* [1917] A.C. 127 at 142 where incidentally *Plumb and Barnes* are quoted. Being outside of any authority, no question of the negligent exercise of authority as in Harris [1939] A.C. 71 arises.

We conclude, therefore, that the Chief Justice was right in holding that the choice by the deceased of such an ureasonable and dangerous place in which to sleep and the consequent accident had no causative relation to his employment and that the accident did not arise out of his employment.

That conclusion alone is sufficient to dispose of the appeal.

This eliminates any necessitv to advert to the judgment in Collins in the relation in which it is applicable.

The appeal is dismissed.

In our opinion the circumstances do not warrant the making of any order as to the costs of the appeal, and no such order is made.

HAMMETT, J.A.

I fully concur with the judgment of our distinguished and learned Vice-President in which he has set out so clearly the reasons why the appeal against the decision of the Court below on the claim arising out of the Workmen's Compensation Ordinance must be dismissed.

On the issues of negligence and the vicarious liability of the respondent company for the acts of its servant Brown, however, I find, after the most careful consideration that I am unable to agree with the decision of the Court below. In these circumstances it is with some diffidence and with the greatest respect that I record the reasons for my differing views on these issues since I find that these views also differ from those of my learned brethren in this Court.

I preface my remarks by referring to the words of Lord Halsbury in *Riekmann v. Thierry* (1896) 14 R.P.C. 105 cited in the well-known and often quoted authority *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370:

> " The hearing upon appeal is a rehearing and I do not think there is any presumption that the judgment in the court below is right."

and his later words on the same case:

> " Upon appeal from a judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision.".

Mr. J. M. P. Brown, the second defendant in the original action in the Supreme Court, was an employee of the Colonial Sugar Refining Co. Ltd., the first defendent and the respondent company in this appeal. The Court below held as fact that, in the course of his employment (vide the order for costs) Brown drove his car under a covered portion of the respondent company's Sugar Mill premises at Labasa which he had been accustomed to use as a garage. In doing so he ran into the deceased in broad daylight and killed him as he lay asleep on the floor of the garage.

The Court below held that Brown was not guilty of any negligence in so running into and killing the deceased. It held that the deceased's own negligence in sleeping at such a place at such a time was the sole cause of his death. As a result the claim of the deceased's widow, as the administratrix of his estate, against the respondent company for damages for the negligence of its servant Brown in the course of his employment was dismissed and she was ordered to pay the costs of both the defendant Brown and the respondent company.

Against this decision in favour of the respondent company she has appealed.

The first ground of appeal is as follows:—

> " The learned trial Judge erred in not holding that the death of Ram Balak was caused in all the circumstances either wholly or in part by the negligence of the said J. M. P. Brown, and the finding of the learned Judge in this regard was unsupported by the evidence, was contrary to the facts and was contrary to law."

The Court below held as fact that Brown did not see the deceased lying asleep on the ground in front of his car before he ran into him. The finding is not specifically challenged and I accept it. It then went on to consider whether, in the circumstances, Brown should have seen the deceased, before he killed him, in the following passage in the judgment:—

> " It is then necessary to go back a little further and to consider whether Brown should have seen the deceased in the place where he was lying at an earlier stage, that is to say as he was driving along the concrete way to the right of the mill building or as he made his turn into the entrance. Some distance from where Brown had to start to turn into the entrance Smith says he saw this deceased lying on the concrete floor. He did not call Brown's attention to this fact at any time and he himself admits that in all probability Brown, who was driving, could not see the deceased. With this latter opinion I am inclined to agree. With Brown driving he would have no opportunity to gaze some yards ahead and into comparative darkness. Again as he started to turn into the entrance I cannot see how he could allow his attention to wander to what may have been ahead of him on the concrete."

There is another passage later in the judgment which is relevant to this issue, which reads:

> " . . . it appears to have been nothing out of the usual for workmen during their lunch break to lie down on the floor adjacent to their work to have a sleep . . ."

In *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370, the House of Lords pointed out that in appeals such as this it is necessary to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found or, as has sometimes been said, between the perception and evaluation of facts. On this Lord Reid said at p. 376:

> " in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from the task, though it ought, of course, to give weight to his opinion."

In *Akerhielm v. De Mare* [1959] A.C. 789 and again in *Felix v. General Dental Council* [1960] A.C. 704, *Benmax v. Austin Motor Co. Ltd.* was considered by the Privy Council and its principles were adopted and applied and the decisions of the Privy Council are binding upon this Court.

There is no appeal against, and I am of the opinion that there are no grounds for challenging, the findings of specific fact of the Court below in this case, which are founded on the credibility of the witnesses. On the other hand, I am equally of the opinion that this Court is not only entitled but indeed bound, in view of the specific grounds of appeal before it, to consider whether it was a proper inference to be drawn from those facts that the sole cause of the deceased's death was his own negligence.

It was suggested to and apparently accepted by the Court below that Brown in his car could not have seen the deceased lying on the ground in the garage because Brown was in bright sunlight and looking into comparative darkness. There were no side walls to this garage but only a covered top and from the photographs exhibited in this case the light inside does not appear to be diminished to any appreciable extent by virtue of its roof. Moreover since Smith, who was sitting beside Brown in his car, did in fact see the deceased lying on the ground, I am of the opinion that no weight should be or should have been attached to the suggestion that Brown could not have seen the deceased, had he looked in his direction, owing to any contrast of light and shade.

With the greatest respect, I also do not find it possible to accept the view of the Court below expressed in the following passage, which I have already quoted:

> " Again as he (Brown) started to turn into the entrance I cannot see how he could allow his attention to wander to what may have been ahead of him on the concrete."

It is with the greatest respect that I express the contrary opinion that Brown should not merely " have allowed his attention to wander to what might have been ahead of him on the concrete " but was under an express duty, as the driver of the motor vehicle, specifically to direct his attention to what in fact was ahead of him on the concrete, before driving his car into this open garage space. The body of a man is not an inconsiderable object and should have been seen. There might have been a child or a piece of valuable machinery there on the floor in front of him. I consider he owed a duty to anyone who happened to be in front of him to look where he was going before driving his car forward.

Again there is the following passage in the judgment:—

> " It is also in evidence that the deceased was struck 15 feet from the entrance and that in a Holden, Brown's car, one cannot see the ground closer than 18 feet from the centre of the front of the car. From these facts it is clear that once the car started to enter the entrance way Brown could not have seen that the deceased was lying on the ground."

This passage refers to the testimony of Smith, who was a passenger in Brown's car and who at the conclusion of his evidence was questioned by the Court below. The record shows the gist of his reply to have been:

> " Man was 15 feet from entrance. In Holden you cannot see ground closer than 18 feet from centre of front of car which hit deceased."

In my opinion this evidence is of no probative value whatever as it stands on its own. The distance in front of a car which is obscured from the view of a driver by the car's bonet, etc. depends both upon the size and height of the bonnet and the height of the driver. The size and height of the bonnet may not be variable, but differ in the case of different drivers. A tall person would have his eye level higher than that of a short person driving the same car. The distance in front of a car obscured from the view of the driver must vary according to the height of the driver's eye above ground level. There is no evidence in this case of how close a man of Brown's height could in fact see in front of a Holden car. It is not for any Court to speculate upon this or any other matter. What seems to me to be of much more importance, however, is that it appears from the documentary evidence in this case that the car driven by Brown at the time was not a " Holden " car at all, but a car of an entirely different make, i.e. a " Morris ".

In my view the Court below clearly misdirected itself on the effect of this testimony upon which, from the terms of the judgment, considerable weight was placed. It is quite impossible for us to say now to what extent the findings of the Court below, on the issue of negligence, may have been influenced by what appears to me to have been an entirely erroneous evaluation of this evidence.

One of the inevitable results of the decision of the Court below that this accident was caused solely by the negligence of the deceased, in sleeping where he did and at the time he did, is that his widow is not entitled to any damages in respect of his death. Another inevitable result is that if sued, on behalf of his estate, she must be held to be liable to pay Brown the cost of repairing any damage done to the number plate of his car which apparently struck the deceased and caused his death. This is a proposition to which I am unable to subscribe.

In Benmax's case Viscount Simonds referred with approval to certain unspecified writings of Professor Goodhart. Those " writings " were in fact a lecture entitled *Some problems in the Law of Tort* delivered in the Law Society's Hall in 1954 which was later reproduced in the Law Quarterly Review, Vol. 71 at page 402. Towards the end of that lecture Professor Goodhart said, on the subject of causation in connection with cases of negligence:

> " You no longer ask: ' Was the defendant the effective cause or the dominant cause or the direct cause of the plaintiff's injury? ' The question now is: ' Ought he to have guarded against the risk that someone in the plaintiff's position would be injured in the way he was by his (the defendant's) act ? ' "

Putting that question in the circumstances of this case I feel bound to reply that, in my opinion, Brown ought to have guarded against the risk that someone in the deceased's position would be injured in the way he was by his, Brown's, act.

I accept in their entirety the specific facts held by the Court below which were founded on the credibility of the witnesses. On those findings I am of the opinion that the only proper inference that can be drawn is that Brown was negligent in failing to exercise that degree of care expected of any driver of a motor vehicle to keep a proper look out when he drove his car forward into the body of the deceased lying on the ground directly ahead of him, and thereby killed him as he lay there asleep.

It is for these reasons that I am, with the greatest respect, unable to accept the views of my learned brethren in this case. I would allow the appeal in so far as it concerns the issue of the vicarious liability of the respondent company for damages for the negligence of its servant Brown and order that the case be remitted to the Court below for damages to be assessed and awarded on this issue.

Appeal Dismissed.

Solicitor for the appellant: *K. C. Ramrakha.*

Solicitors for the respondent: *Wm. Scott & Co.*