Judgment 1. 1970

IN THE PRIVY COUNCIL No. 3 of 1968

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

B E T W E E N :

ENMORE ESTATES LIMITED Appellants

- and -

RAMKHELLAWAN DARSAN Respondent

CASE FOR THE APPELLANTS

Record

1. This is an appeal from a judgment and order of the Court of Appeal of Guyana (Luckhoo, J.A., Persaud and Cummings, Acting JJ.A.) dated the 31st October, 1966 and entered the 5th November, 1966. An order granting the Appellants conditional leave to appeal was made on the 17th December, 1966 and entered on the 15th February, 1967. An order granting final leave to appeal was made on the 11th July 1967 and entered on the 19th July, 1967, and this order was confirmed on review on the 24th November, 1967, entered on the 30th November, 1967.

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2. On the 20th June, 1964, the Respondent, who was at the material time a workman employed by the Appellants, filed an Application in the Magistrates' Court of the Georgetown Judicial District of Guyana (then, British Guiana) alleging that on the 18th December, 1963, while he was acting in the course of his employment, he suffered an accident, and claiming workmen's compensation from the Appellants under the Workmen's Compensation Ordinance, c.111. On the 20th July, 1964, the Appellants filed an Answer to the Application. After hearing evidence on the 10th and 29th September, and the 15th and 29th October, 1964, the Magistrate, on the 31st May, 1965, dismissed the Application, and on the 26th June, 1965, delivered a memorandum of the reasons for his decision.

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3. The Respondent appealed from the magistrate's decision to the Full Court of the Supreme Court of British Guiana. The Full Court, (Bollers and Van Sertima, JJ.,) by a
p.26/37 judgment and order dated the 15th April, 1966
p.38 and entered on the 11th May, 1966, allowed the Respondent's appeal, set aside the judgment and order of the magistrate, and gave judgment for the Respondent in the sum of $3,864.67. From this judgment and order the Appellants appealed to the British Caribbean Court of Appeal. Before the appeal came on for hearing the jurisdiction of the British Caribbean Court of Appeal to hear appeals from the Full Court of the Supreme Court of British Guiana had become vested in the Court of Appeal of the Supreme Court of Guyana, and it was this Court which gave the judgment and order, referred to in paragraph 1 above, affirming the judgment and order of the Full Court.

4. The relevant statutory provisions are as follows:

The Workmen's Compensation (Consolidation) Ordinance, c.111. Laws of British Guiana, 1953 Edition.

An Ordinance to consolidate and amend the law relating to compensation to workmen for injuries suffered in the course of their employment.

Section 3 (1) "If in any employment a workman suffers personal injury by accident arising out of and in the course of such employment his employer shall be liable to pay compensation in accordance with the provisions of this Ordinance:

Provided that where an accident arises out of employment, it shall be presumed, unless the contrary is shown, to have occurred in the course of the employment and where the accident occurred in the course of the employment, it shall be presumed unless the contrary is shown, to have arisen out of the employment:

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Provided further that the employer shall not be so liable (under this Ordinance) for such compensation should -

. . . . . .

(c) it be proved that the accident would not have occurred, or in so far as the incapacity or death would not have been caused, but for a pre-existing diseased condition of the workman . . . . "

x x x x

Section 8 (1) (as amended by the Workmen's Compensation Ordinance, c.11 of 1960, Section 3(1))

"Subject to the provisions of this Ordinance, the amount of compensation shall be as follows, namely:-

. . . . .

(b) where permanent total incapacity results from the injury -

(i) in the case of an adult, a sum equal to forty-eight months' wages with a minimum of forty-three hundred and twenty dollars and a maximum of eighty-six hundred and forty dollars

. . . . .

(c) where permanent partial incapacity results from the injury -

. . . . .

(ii) in the case of an injury not specified in the First Schedule, such percentage of the compensation payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury;

Provided that such compensation may be increased having regard to the nature of the injury sustained in relation to his type of work and other circumstances.

. . . . .

(d) where temporary incapacity, whether total or partial results from the injury, a periodic payment payable within five

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days, if practicable, but in any case not later than sixteen days from the day of incapacity (and thereafter at regular intervals corresponding to the normal intervals of pay during the period of incapacity, or during a period of five years, whichever is the shorter) based on the following scale:-

(i) . . . . .

(ii) where the workman's wages exceed seventy-five dollars per month but do not exceed one hundred and fifteen dollars per month, seventy-five per centum of the full wages of a month, with a minimum of seventy-five dollars;

(iii) where the workman's wages exceed one hundred and fifteen dollars per month but do not exceed one hundred and fifty dollars per month, sixty-six and two-thirds per centum of the full wages of a month with a minimum of eighty-seven dollars;

(iv) . . . . .

(2) . . . . .

(3) In fixing the amount of any compensation the Court shall have regard to any payment, allowance or benefit, not being a periodic payment or a payment made under section 6 or 38 of this Ordinance, which the workman may have received from the employer after the date of the accident.

x x x x x

Section 34 (1) All claims for compensation under this Ordinance and any matter arising out of the proceedings thereunder shall be determined by the magistrate's court of the district in which there occurred the accident in respect of which the claim for compensation arose whatever may be the amount involved. All such questions shall be determined upon application made to such magistrate in manner provided by this Ordinance

Provided that . . .

(2) . . .

(3) No application for the settlement of any matter by the Court shall be made unless and until some question has arisen between the parties in connection therewith which they have been unable to settle by agreement.

Section 35 (1) A workman or an employer (hereinafter called the applicant) who desires the determination of any question arising out of an accident in which compensation is or might be claimed shall lodge with the clerk of the magistrate's court a written application in the prescribed form accompanied by particulars containing:-

(a) a concise statement of the circumstances under which the application is made and the relief or order which the applicant claims, or the question which he desires to have determined.

(b) the full name and address of the applicant and of his attorney or agent and the name and address of the respondent.

(2) . . . . . .

(3) . . . . . .

Section 36 (1) As soon as an application, together with the accompanying particulars and statement herein prescribed, has been lodged the clerk of the court shall forthwith cause a copy thereof to be served upon the respondent in manner prescribed by regulation, together with a notice requiring the respondent to lodge with the clerk of the court such answer as is prescribed in sub-section (2) within the period therein prescribed and that in default of his complying with that or of his appearing at a time and place fixed in the notice, such order may be made under this Ordinance as the magistrate thinks just and expedient. Except with the written consent of the respondent communicated to the clerk of the court, not less than fourteen clear days shall elapse between the date of the service of the notice upon the respondent and the date fixed for hearing the application.

(2) If the Respondent intends to oppose an application he shall, within seven days after

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service of notice, or within such extended period as the magistrate may upon special request allow, lodge with the clerk of the court a written answer containing a concise statement of the extent and grounds of his opposition.

(3) . . . . . .

5. The principal question for determination on this appeal is as to the true interpretation to be attached to Section 3 (1) of the Workmen's Compensation (Consolidation) Ordinance, c.111 and, in particular, to paragraph (c) of the second proviso thereto.

p.1/3 6. The Respondent, by his Application of the 20th June, 1964, stated that, at the material time, he was a cane-cutter employed by the Appellants. He alleged that on the 18th December, 1963 he had slipped, fallen, and sustained injury to his back and in consequence he had a 70% permanent disability. His monthly earnings during the twelve months previous to the injury were $115.02 and his present earnings were nil. He claimed $6,048.00 compensation plus medical and travelling expenses.

p.4/5 7. The Appellants, by their Answer of the 28th July, 1964, stated that the Respondent had had a pre-existing injury and that this was the cause of his incapacity. They had paid $405.00 compensation for the period 19th December, 1963 to the 28th May, 1964. The amount of compensation claimed was not due, and they were not liable to pay any further sum. The monthly wages of the Respondent, calculated in accordance with the Ordinance, were $95.03.

p.10 l.10 8. The Respondent gave evidence of slipping, falling and feeling pain. He spoke of being seen by Dr. Beadnell on the 20th December, 1963, of being sent to Georgetown Hospital for an X-Ray, and of being treated by Mr. Stracey at the Hospital from the 23rd January, to the 14th May, 1964. He was due to report to Mr. Stracey again on the 4th June, 1964 but did not go because, on the 28th May, he was told not to by a member of the Appellants' Personnel Department. He received compensation from the Appellants from

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the 19th December, 1963 to the 28th May, 1964, totalling in all, $405.00. His average monthly wage was $115.02, so that during the compensation period he was short-paid by $64.80. He said he had never had any injury to his back before the accident and had never before had pain in his back. p.10. 1.33 p.10. 1.40

9. Other evidence was given for the Respondent by Dr. Hugh, who said he examined the Respondent on the 10th June, 1964. Physical examination, he said, showed that there was severe restriction of movement of the middle spine. The witness sent the Respondent for an X-Ray and this revealed a partly healed compression fractures of the 11th and 12th thoracic dorsal vertebrae. This could have been the result of hyperflexion of the spine. It could have been caused by the Respondent having fallen, on the 18th December, 1963, while carrying a bundle of cane on his head. The witness assessed the Respondent at 70 per cent permanent disability and he considered the Respondent would be unfit to follow his usual occupation as cane-cutter. In cross-examination he said that, in his opinion, the X-Ray did not disclose an injury to the back incurred some eighteen months earlier than December, 1963. In re-examination he gave the existence of unabsorbed callus at the site of the fracture as his reason for saying the injury to the back was not old. p.6

10. Evidence was given for the Appellants as follows:

a) Dr. Beadnell said he examined the Respondent on the 20th December, 1963. He found substantially nothing, save that the Respondent complained of pain in the lumbar-sacral region when bending his back. He sent the Respondent to be X-Rayed and he saw the X-Ray before he next saw the Respondent, this being on the 6th January, 1964. The X-Ray revealed an old fracture of the 12th thoracic vertebrae. There were small outgrowths of bone around the vertebral margins which would have taken a minimum of a year to develop. On the 6th January, 1964, he referred the p.6/8 p.7. 1.10. p.7. 1.14

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Respondent to Mr. Stracey of the Georgetown Hospital for an opinion. He saw the Respondent again on the 11th and 18th April and the 9th and 26th May, 1964. The Respondent still complained of pain but the witness thought there was a good reason for this and he discharged him with the recommendation that he should see a

p.14/15 referee. He issued a medical certificate on the 26th May. He did not consider the Respondent had suffered any permanent

p. 8. 1.1 disability as a result of the accident on the 18th December and he thought that the pain of which the Respondent continued to

p.7. 1. 5 complain was of mental rather than physical origin. When he discharged the Respondent he was of the view that the Respondent was fit to discharge his duties as a cane cutter. In cross-examination he said he

p. 8.1.17 had formed the view, from Mr. Stracey's certificate, that the latter had implied that the injury to the Respondent's back was caused by the accident of the 18th December. He did not think the December accident would have aggravated the old injury.

p. 8/9 b) Mr. Stracey said he first saw the Respondent on the 23rd January, 1964. On clinical

p. 9. 1.8. examination the Respondent had some tenderness over the middle region of the spine. All spinal movements were full, save for the extension of the spine, which was slightly limited. An X-ray examination showed evidence of an old compression

p.9.1.13. fracture of the 12th thoracic vertebrae and a diagnosis was made accordingly. On the 5th March, 1964, the Respondent was much improved but still had some pain. Treatment was therefore continued throughout March and April, but on the 14th May, the Respondent had no improvement. The witness advised exercises and asked the Respondent to report again in three weeks, but there was no record that he did so.

p.9.1.24. At the site of the fractured vertebrae there was evidence of osteophytic outgrowths of bone. The witness was of the opinion, from the X-ray and the outgrowths, that the

p.9.1.26. compression fracture outdated the accident

by six months or more. In cross-examination he said he would have expected the Respondent to have suffered pain at the time of the compression fracture, and subsequently, while fetching and cutting cane. The injury of the 18th December could have aggravated the pre-existing condition. Record p.9. l.33

c) Mr. Patrick Narine, the Appellants' Workmen's Compensation Clerk, said he saw the Respondent on the 27th or 28th May, 1964 and on the 6th June, 1964. On the first occasion he gave the Respondent a form terminating compensation. On the 6th June he told the Respondent he would be getting no more work and that he was not to return to Mr. Stracey; if he wished to challenge Dr. Beadnell's certificate he would have to produce a medical certificate from his own doctor. p. 11/12 p. 18/19 p.12.l.13.

11. The learned magistrate, in his reasons for dismissing the claim said the medical evidence was conflicting. He summarised the evidence of the three doctors and, while acknowledging that Mr. Stracey had said, in cross-examination, that the December, 1963 injury could have aggravated the pre-existing injury, he accepted and relied on the evidence of Dr. Beadnell and Mr. Stracey, and found, as a fact, that the Respondent was not suffering from any permanent disability as a result of the December injury. On the authorities it did not seem that any degree of aggravation wassufficient to warrant a finding in favour of the Appellant : the aggravation must be material, and, from the evidence of Mr. Stracey, he did not form the view that the aggravation in this case was material. p.21/23 p.21. l.11. p.22. l.16. p.23. l. l.

12. In the Full Court, Bollars and Van Sertima, JJ., delivered a joint judgment. They reviewed the evidence, commenting that the fact that the Appellant had paid compensation from the 19th December, 1963, to the 28th May, 1964, showed that the Appellants admitted the injury to have been caused by accident arising out of and in the course of employment. They noted p. 26/27 p. 26.l.31.

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that, in Dr. Beadnell's view, the Respondent had not suffered any permanent disability, but they drew attention to the contradiction between his oral testimony to the effect that, on the 26th May, 1964, the Respondent was fit for his normal duties, and the statement in his certificate
p.27.1.40. that the Respondent was temporarily disabled. They therefore regarded Dr. Beadnell's evidence
p.28.1.12. as unsatisfactory. Turning to the evidence of Mr. Stracey, they remarked that, because the Respondent was prevented by Mr. Narine from returning to him, he had had no opportunity of forming a view as to whether the Respondent had
p.28.1.37 suffered a permanent partial disability or a temporary disability. The question as to whether the Respondent was entitled to compensation on the basis of having suffered a permanent partial disability was the question raised by the Respondent in his application for
p.28. 1.46 an award, and this was the sole issue at the trial. The magistrate, had found as fact that
p.29.1.11. the Respondent was not suffering any permanent disability as a result of the December injury, and that the aggravation to the existing injury was not material. Reviewing Jagnarine v. Bookers Sugar Estates Ltd. (1956) L.R.B.G. 136 and Demerara Co. Ltd. v. Burnett 1 W.I.R. 547 he had concluded that aggravation must be material in order to found a claim for compensation.

13. The learned Judges then turned to the two arguments advanced on behalf of the Respondent. The second of these was that, if the Respondent was not entitled to compensation on the basis of permanent partial incapacity, he ought to be
p.29.1.39 awarded periodic payments for temporary disability until such date as it was proved by the Appellants to cease. They rejected this argument. Temporary incapacity was never an
p.30.1.40. issue before the magistrate, for the Respondent had chosen to stand or fall upon his allegation of permanent partial disability. An employer
p.34.1.25. would be severely prejudiced if amendment was allowed at a late stage so as to permit a workman-appellant to re-present his case on a basis never before canvassed.

p.29.1.28. 14. The first argument which had two limbs, was that the Magistrate erred in thinking that

aggravation of an existing condition needed to be material before compensation could be awarded. Further, if materiality was necessary, the proviso to Section 3 (a) of the Ordinance placed the burden of proving its existence upon the employer, and in the present case there was no evidence either way as to whether this was material aggravation. The Magistrate had referred to Jamarine v. Bookers Sugar Estates Ltd. In that case the Full Court had followed Clover Clayton and Co. v. Hughes (1910) A.C.242. Materiality was not discussed, the finding being that a workman, suffering from an existing condition, was entitled to compensation if he sustained an injury, arising out of and in the course of his employment, which aggravated this condition. Bollers and Van Sertima, JJ., rejected the submission that, because the proviso to Section 3 (1) was not discussed in the judgment in Jamarine's case, that decision must be regarded as having been given per incuriam. Consideration of the proviso was, they thought, implicit in the question with which the Court was concerned. In any event, the Federal Supreme Court, in Demerara Co. Ltd. v. Burnett, considered that Jamarine's case had been rightly decided. In the Demerara Case Hallinan, C.J., had held that in one situation local legislation provided a defence to an employer where no defence was available to him under the English legislation. This was where a workman had an existing condition and then suffered mishap by mere exertion. Hallinan, C.J., had referred to this as 'an accident in its extended meaning' and had held that, in such a situation, an employer, by reason of the proviso, could avoid liability if he could show that the pre-existing condition contributed in a material degree to the injury. On the other hand, where there was some external mishap or untoward event unrelated to the existing condition, and the mishap or event aggravated the existing condition, then the proviso would not apply and the employer could not escape liability. The learned Judges pointed out that, in the present case, there was an untoward event or mishap which resulted in injury and which aggravated an existing condition. This

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p.32.1.4.

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p.36.1.40.

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caused, they said, a permanent partial incapacity or disability, and, applying the principle set out in the Demerara Case the Respondent was entitled to succeed. They added that, in any
p.37.1.2. event, the evidence did not disclose that the aggravation was not material. The Respondent
p.37.1.6. was entitled to judgment for $3.864.67. being 70 per centum of his monthly wages of $115.02 multiplied by 48, in accordance with Section 8 (1) (b) (i) of the Ordinance.

p. 42/49 15. The judgment of the Court of Appeal was delivered by Persaud, Ag.J.A., with whom Luckhoo, J.A. and Cummings, Ag.J.A. agreed. The learned Acting Justice of Appeal said that the Appellant had taken two points, accepting, for the purposes of argument, that the Respondent had a fractured
p.43.1.37. thoracic vertebrae which the fall might have aggravated. The points were, first, that in the absence of material aggravation the Respondent was not entitled to compensation and, second, that proviso (c) to Section 3 (1) of the Ordinance protected the employer if the real cause of incapacity was the existing disease. On the first point the learned Judge thought
p.46.1.39. that the correct conclusion in the case before him was that there had been an accident 'in its restricted meaning', occurring in the course of the Respondent's employment, and that this aggravated an existing condition in a material degree. Therefore, in his Lordship's view, the Respondent was entitled to compensation. In his
p.46.1.29. view there must be aggravation in a material degree before a workman with an existing disease could succeed, and this was so whether one was considering an accident in its extended or its restricted meaning. All that 'materiality' meant was that the worsened condition in respect
p.46.1.45. of which a claim is made must be a direct result of the accident.

16. On the second point, Persaud, Ag.J.A., considered the judgment given in the Federal Supreme Court in Demerara v. Burnett where, he said, all three judges expressed the view that proviso (c) to Section 3 (1) applied only to an
p.49.1.16. accident in the extended meaning of the word. He thought that the view of Lewis, J., in Demerara v. Burnett, as to the meaning of the

proviso was the only possible view. This was that where a workman with an existing condition of disease suffered harm, the payment of compensation could only be avoided if the harm flowed from usual as opposed to unusual exertion. As the present case did not come within that class, the proviso had no application. He would therefore affirm the decision of the Full Court and dismiss the appeal.

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p.49.1.23.

p.49.1.31.

17. It is respectfully submitted that the interpretation put upon proviso (c) in Demerara v. Burnett and adopted in this case, is incorrect; that Jagnarine v. Bookers Sugar Estates was decided per incuriam; and, that the correct interpretation of proviso (c) (which is a matter of substantial importance to workmen and employers in Guyana) is that it comprehends accidents in every relevant meaning of the word, and is not limited to accidents within the 'restricted meaning' of the word. In any event, the decision of the Court of Appeal leaves uncertain what is meant by the 'restricted meaning' of the word accident. It is respectfully submitted that, where a workman suffers injury by accident arising out of and in the course of his employment, then the effects of the proviso are that:

a) the employer escapes liability if, but for an existing diseased condition of the workman, either the accident would not have happened or, if it had happened, the workman would not have suffered any incapacity; and

b) if an accident results in incapacity, which incapacity is greater than would have resulted had there been no existing diseased condition, then the employer is liable to pay compensation only in respect of the incapacity which would have been suffered had there been no existing diseased condition.

18. Further, it is respectfully submitted that the Full Court erred, on the facts and in view of the finding of the learned Magistrate, in

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finding that the Respondent had suffered permanent partial incapacity, that the Court of Appeal erred in failing to consider this finding; and that there were therefore no grounds for disturbing the decision of the learned Magistrate in favour of the Appellants, which decision, it is respectfully submitted, was correct.

19. The Appellants respectfully submit that this appeal should be allowed, the decision of the Court of Appeal set aside, and the decision of the Magistrate restored for the following, among other,

REASONS

1. BECAUSE the evidence shewed, and the learned Magistrate found, that the Respondent was not suffering from any permanent disability:

2. BECAUSE the Respondent suffered from a pre-existing diseased condition:

3. BECAUSE the evidence shewed, and the learned Magistrate found, that there was no material aggravation of the said pre-existing condition:

4. BECAUSE the evidence accepted by the learned Magistrate shewed that there would have been no incapacity but for the said pre-existing condition:

5. BECAUSE paragraph (c) of the second proviso to s. 3 (1) of the Workmen's Compensation (Consolidation) Ordinance applies to every 'accident' within the meaning of that Ordinance:

6. BECAUSE the Supreme Court and the Court of Appeal misinterpreted the said paragraph (c):

J. G. LE QUESNE

GERALD DAVIES

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