Privy Council Appeal No. 3 of 1968

Enmore Estates Limited - - - - - - *Appellants*

v.

Ramkhellawan Darsan - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE OF GUYANA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY 1970

Present at the Hearing:
LORD HODSON
VISCOUNT DILHORNE
LORD WILBERFORCE
LORD PEARSON
LORD DIPLOCK

[*Delivered by* LORD PEARSON]

In this appeal, which is concerned with workmen's compensation, the appellants are the employers and the respondent is the workman.

The workman had already before the accident a damaged back. The accident occurred on 18th December 1963, when he was carrying sugar cane in the course of his employment and he slipped and fell and jerked his back and felt pain. He has been off work for a considerable time. He claims under the Workmen's Compensation Act of Guyana compensation for permanent partial incapacity to the extent of 70 per cent.

Before considering the findings of fact and the reasons given in the judgments of the Courts in Guyana, it will be convenient to set out and construe the relevant provisions of the Act.

The Act was at the material time an Ordinance of British Guiana, and it contained in section 3 the following provisions amongst others:

> "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 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. . . ."

The former English Workmen's Compensation Acts, though in many respects similar to the Guyana Act, did not have anything similar to proviso (*c*).

It is obvious that in proviso (*c*) the grammar has gone astray. The introductory word is "should". The words "it be proved that the accident would not have occurred . . ." follow the word "should" with grammatical correctness, but the words "in so far as the incapacity or

death would not have been caused . . ." do not. In spite of the defective grammar, the intended meaning of the proviso, so far at any rate as it relates to the occurrence of the accident and the causation of incapacity, is clear. The proviso deals with three things, namely (i) the occurrence of the accident (ii) the causation of incapacity (iii) the causation of death.

As to (i), the employer is not liable if the accident would not have occurred but for the pre-existing diseased condition.

As to (ii), the employer is not liable *in so far as* the incapacity would not have been caused but for the pre-existing diseased condition. The reason for the change of wording from "that" in the first line of the proviso to "in so far as" in the second line must be that it was envisaged that there would in some cases be a need for apportionment of the incapacity into that part which would have been caused in any case even if there had been no pre-existing diseased condition and that part which would not have been caused but for the pre-existing diseased condition. Broadly stated, the principle is that compensation is payable for the result of the accident and not for the results of the pre-existing diseased condition. That, however, is only a broad statement of the principle, and the proviso must be applied exactly according to its terms. When the incapacity has been ascertained, so much of it as would not have occurred but for the pre-existing diseased condition has to be eliminated, and then compensation is payable only for the residue, if any, of the incapacity.

As to (iii), which is the death case, it is at least difficult to see how the idea of apportionment, which is normally implicit in the words "in so far as", can be applied in a case of death. It may be argued that the question whether death would have been caused but for the pre-existing diseased condition must be answered by a simple Yes or No, and that no intermediate answer involving apportionment is possible, and that therefore the words "in so far as" when applied to a death case can mean no more than "if". Enough has been said to recognise the difficulty of construing the proviso in relation to a death case, but this appeal is not concerned with a death case and the question whether any apportionment is possible in such a case does not arise for decision and has not been dealt with by the Courts in Guyana, and their Lordships do not express any opinion on it.

In the construction of the proviso there are two further questions to be considered.

First, there is the question as to onus. The proviso expressly and without any grammatical aberration places on the employer the burden of proving that the accident would not have occurred but for the pre-existing diseased condition. It is reasonable to infer that, although the grammar has gone astray, the necessary intendment of the proviso is to place on the employer the burden of proving that (wholly or in part) the incapacity or death would not have been caused but for the pre-existing diseased condition.

Secondly there is the question as to the nature of the cause. To bring the proviso into operation, does the pre-existing diseased condition have to be the sole cause or the main cause of the accident or incapacity or death, or is it enough for the pre-existing diseased condition to be only a contributory cause? The language used in the proviso shows that it is enough for the pre-existing diseased condition to be a contributory cause, so long as it makes an essential or necessary contribution. The requirement is that the accident would not have occurred or the incapacity or death would not have been caused *but for* the pre-existing diseased condition. That means, in the Latin terminology sometimes used in forensic discussions of causation, that the proviso operates if the pre-existing diseased condition is a *causa sine qua non,* and it does not have to be *causa causans* or *causa proxima.*

The magistrate, who heard the respondent's claim at first instance, dismissed the claim. In his Memorandum of Reasons for Decision he referred to the conflicting medical testimony and to certain authorities. He said that on a review of the authorities " the rule did not seem to be that any degree of aggravation, be it ever so minute, was sufficient to warrant a conclusion in favour of the injured person. Rather it seemed to be that the aggravation must be material. . . . From the evidence of Mr. Stracey I did not form the impression that the aggravation was material. . . . On a review of the evidence as a whole I accepted and relied on the evidence of Mr. Stracey and Doctor Beadnell and found as a fact that the applicant was not suffering from any permanent disability, the result of the injury in question." It seems to be implied that there was some aggravation of the pre-existing diseased condition of the back. The proviso was not expressly referred to in the Memorandum of Reasons for Decision, but one of the authorities referred to was *Demerara Company Limited v. Burnett* (1959) 1 W.I.R. 547 in which the proviso was considered.

The workman appealed to the Full Court of the Supreme Court of British Guiana. In that appeal one of the contentions of the employers was that the proviso applied to this case and defeated the claim of the workman. The Full Court held, on the authority of the decision in *Jagnarine v. Bookers Sugar Estates Ltd.* (1956) L.R.B.G. 136 and the reasoning of the Federal Supreme Court of the West Indies in the *Demerara Company case*, that the proviso would only apply in the case of " an accident within the extended meaning " and did not apply in the present case, because the slipping and falling constituted " an accident within the restricted meaning ", being an external mishap or untoward event. The distinction between " an accident within the extended meaning " and " an accident within the restricted meaning " was taken from the judgments in the *Demerara Company case*, and will be explained later in relation to that case. The Full Court's conclusion on this point would be right if *Jagnarine's case* was rightly decided and if the reasoning of the Federal Supreme Court in the *Demerara Company case* was correct.

With regard to the facts of the case and the reasons given by the magistrate for dismissing the claim the Full Court said this:

> " We are therefore of the view that in the instant case an untoward event or mishap occurred when the appellant slipped and fell and jerked his back and sustained an injury which had the effect of aggravating the pre-existing condition of the fracture of the back in the region of the twelfth thoracic vertebra and caused a permanent partial incapacity or disability. He was therefore entitled to succeed in a claim for compensation under the Workmen's Compensation Ordinance, Cap. 111, for the aforesaid incapacity and the learned Magistrate was wrong in taking the view that the injury must aggravate the pre-existing condition in a material degree for the appellant to be successful. The question of materiality only arises when an accident in its extended meaning is being considered. In any event the evidence did not disclose that the aggravation was not material."

The Full Court reversed the decision of the magistrate and gave judgment in favour of the workman.

There was an appeal by the employers to the British Caribbean Court of Appeal, and this became an appeal to the Court of Appeal of the Supreme Court of Judicature of Guyana. The Court of Appeal affirmed the decision of the Full Court. In relation to proviso (*c*) they also adopted from the reasoning of the Federal Supreme Court in the *Demerara Company case* the distinction between " an accident in the extended sense " and " an accident in the restricted sense " and held that the proviso did not apply in the present case in which there was

" an accident in the restricted sense ". In so far as there was a difference between the reasoning of Hallinan C. J. and that of Lewis J. in the *Demerara Company case*, the Court of Appeal preferred the reasoning of Lewis J.

The distinction between " an accident in the extended sense " and " an accident in the restricted sense " originated in the *Demerara Company case*. There had been a series of decisions in England and Scotland under the Workmen's Compensation Acts to the effect that there was an " accident " within the meaning of those Acts in a case where there was no external mishap or untoward event (such as slipping and falling) but the doing of his ordinary work by the workman aggravated or brought to a head a pre-existing diseased condition so that he was incapacitated or died (e.g. from development of a hernia or from the rupture of an aneurysm or from heart failure). *Stewart v. Wilson and Clyde Coal Co.* (1902) 5 S.C. (5th series) 120. *Fenton v. Thorley and Co. Ltd.* [1903] A.C. 443, 448, 449. *Clover Clayton and Co. Ltd. v. Hughes* [1910] A.C. 242, 244–5, 255–6. *McFarlane v. Hutton Brothers Stevedores Ltd.* (1927) 96 L. J. K.B. 357. *Partridge Jones and John Paton Ltd. v. James* [1933] A.C. 501. *Oates v. Earl Fitzwilliam's Collieries Co.* [1939] 2 A.E.R. 498. The English and Scottish Courts had reached their decisions in these cases by applying what they considered to be the ordinary and popular meaning of the word " accident ". Hallinan C. J., however, in the *Demerara Company case* considered that they had stretched in favour of workmen the natural meaning of the word " accident ", and so he gave to the internal mishap which constituted the " accident " in a case of that kind the description " accident in the extended sense " and distinguished it from an " accident in the restricted sense ", where there was some external mishap or untoward event. He then considered whether under the proviso it could be said in the case before him that the accident would not have occurred but for a pre-existing diseased condition. He held that the proviso did apply in the case before him, because there was an " accident in the extended sense ", in that the workman was suffering from arteriosclerosis and the doing of his ordinary work caused the bursting of a blood vessel in his brain so that he died.

That was in their Lordships' view a correct decision under the first part of the proviso. The bursting of the blood vessel was the accident and it could not have occurred but for the pre-existing diseased condition.

Hallinan C. J., however, went on to deal (*obiter* but in the course of his reasoning) with the case of an " accident in the restricted sense ".

He said, referring to the proviso:

> " I do not think that an employer can rely on this paragraph to escape liability in a case where the accident is an external mishap or untoward event unrelated to the pre-existing condition as in the case of *Jagnarine v. Booker Sugar Estates Ltd.*, where a workman's foot slipped while engaged in his employer's work, and this mishap aggravated a pre-existing hernia. There the accident, the slipping of the foot, would have occurred even if the workman had not been suffering from hernia. In such circumstances, I do not think that paragraph (*c*) applies. It might be argued that the words ' or in so far as the incapacity or death would not have been caused but for the pre-existing diseased condition . . . ' might help the employer, since the pre-existing hernia materially contributes to the incapacity of the aggravated hernia. But the words ' or in so far as the incapacity or death would not have been caused ' are so ungrammatical as to be meaningless; since the meaning of paragraph (*c*) is plain without them, there is no duty on this court to try and make sense out of nonsense."

For the purpose of the present appeal that is the vital passage in Hallinan C. J.'s judgment. If he was right in rejecting as meaningless the words "or in so far as the incapacity or death would not have been caused", the proviso would not apply to a case such as *Jagnarine's case* nor to the present case, and the decision of the Full Court and the Court of Appeal in the present case would be correct.

In their Lordships' opinion, however, these words are not meaningless and should not be rejected. As has been pointed out above, these words have a clear meaning in relation to a case of incapacity and at any rate some meaning in relation to a death case. As they are not meaningless, effect should be given to them even though they are ungrammatical. *Halsbury's Laws of England* (3rd edition) Vol. 36 (title "Statutes") pp. 389–391 and Vol. 11 (title "Deeds and Other Instruments") pp. 413–5. In *Inland Revenue Commissioners v. Joicey* [1913] 1 K.B. 445, 452 Farwell L. J. said "Obscurity of expression and difficulty of construction are not sufficient grounds for rejecting provisions in Acts of Parliament." In *Murray v. Inland Revenue Commissioners* [1918] A.C. 541, 553 Lord Dunedin said:

> "It is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a judge to declare a statute unworkable."

In *Quebec Railway, Light Heat, and Power Company v. Vandry* [1920] A.C. 662, 676 Lord Sumner said:

> "Secondly, there is no reason why the usual rule should not apply to this as to other statutes—namely, that effect must be given, if possible, to all the words used for the Legislature is deemed not to waste its words or to say anything in vain."

In the *Demerara Company case* Marnan J. agreed with Hallinan C. J., but Lewis J., while agreeing with their conclusion, adopted a different line of reasoning, which has been accepted by the Court of Appeal in the present case and supported by the workman's counsel in his argument in this appeal. Lewis J. said in the course of his judgment:

> "I consider that proviso (*c*) to s. 3 (1) excepts from the ambit of the main clause—which prescribes the liability for compensation—a case which in England had been held to fall within it, namely, the case where the mishap, though brought on by the work, would not have happened if the workman had not the pre-existing diseased condition. In my view, where it is proved that at the time of the accident the workman was suffering from a diseased condition of the body, and there is no evidence of any unusual exertion, or of any untoward event such as a slip, or wrench, or sudden jerk, but the injury occurred or the incapacity or death was caused merely as a result of the effect which the performance of his ordinary work in the ordinary way had upon the diseased condition, then compensation is not payable. I do not think that the proviso applies where the mishap is set in motion by exertion of a degree unusual in the workman's employment, for in my opinion such exertion is similar in character to an untoward event. Applying the foregoing construction to the facts of the case of *Jagnarine v. Bookers Sugar Estates Ltd.*, to which counsel for the respondent referred us, it seems clear that that case was rightly decided, since, though there was a pre-existing hernia, its aggravation was due to the slipping of the workman's foot, an untoward event, and not merely to the ordinary work which he was doing."

The reasoning in that passage involves a proposition that the proviso does not apply unless the pre-existing diseased condition is virtually the sole cause of the incapacity, there being no other cause except the doing by the workman of his ordinary work. In their Lordships' opinion

that proposition is in conflict with the clear intent and meaning of the proviso upon its proper construction giving the natural effect to the language used. In *Jagnarine's case* and in the present case the incapacity or at any rate part of it resulted from an external mishap or untoward event aggravating a pre-existing diseased condition. Manifestly the incapacity or part of it would not have been caused "but for" the pre-existing diseased condition. The condition was a contributory cause, making an essential contribution to the incapacity. As has been pointed out above, the proviso operates if the condition is a contributory cause, a *causa sine qua non*, and it does not have to be the sole or main cause or *causa causans* or *causa proxima*.

For the reasons which have been given their Lordships, while agreeing with the decision of the Federal Supreme Court in the *Demerara Company case*, are unable to accept their reasoning (whether as contained in the judgment of Hallinan C. J. or as contained in the judgment of Lewis J.) whereby the decision in *Jagnarine's case* was approved. The judgment in *Jagnarine's case* itself is of no assistance, because, surprisingly, it does not deal with the proviso at all.

It follows that the decision of the Full Court in the present case and the affirmance of it by the Court of Appeal, being based on the reasoning in the *Demerara Company case* upholding the decision in the *Jagnarine case*, are equally unacceptable and should be set aside.

There is one further point to be mentioned. It has been contended by counsel for the workman in this appeal that a pre-existing *diseased* condition can only be a condition brought about by some kind of illness and cannot include a condition brought about by an injury such as a fracture. In the courts in Guyana this contention was not advanced and it was assumed that the damaged condition of the workman's back constituted a "pre-existing diseased condition". Consequently their Lordships have no assistance on this point from the Courts in Guyana, and therefore will not pronounce upon it except to the extent of saying that *prima facie* the assumption does not seem unreasonable.

The employers by their counsel have explained that their object in bringing this appeal was to obtain a ruling as to the true construction of the proviso, and that they do not ask for any order as to costs. They concede it is possible that on the true construction of the proviso the workman may still be entitled to some compensation. They propose that the case should be remitted to the magistrate for him to consider and decide to what extent, if at all, incapacity would have been caused by the accident without the pre-existing diseased condition, and to give judgment accordingly. Their Lordships consider that this proposal should be adopted.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the existing judgment should be set aside, and the case should be remitted to the magistrate in accordance with the employers' proposal.

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In the Privy Council

ENMORE ESTATES LIMITED

v.

RAMKHELLAWAN DARSAN

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