Privy Council Appeal No. 31 1979

T. H. Bushby and Another – – – – – *Appellants*

v.

Sydney Blair Morris and Others – – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MARCH 1980

Present at the Hearing:

LORD DIPLOCK

LORD SIMON OF GLAISDALE

LORD SALMON

LORD RUSSELL OF KILLOWEN

LORD KEITH OF KINKEL

[*Delivered by* LORD KEITH OF KINKEL]

This appeal comes before the Board from a decision of the Court of Appeal of New South Wales. The decision was given on an appeal by way of stated case from the Workers' Compensation Commission (Williams J.). Seven questions of law were referred by the stated case for the decision of the Court of Appeal, but before this Board only one of these was treated as a live question. It stems from the provisions of section 9(1) of the Workers' Compensation Act, 1926, and raises the issue whether, in a case where it is found that a particular incapacity suffered by a worker has resulted from two or more injuries sustained by him on separate occasions in his employment with different employers, an award of compensation under the Act in respect of the incapacity may validly be made against each of the employers concerned.

By section 7(1)(a) of the Act it is enacted:—

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

Section 9(1) provides:—

> "Subject to the provisions of this section and of sections 11 and 13, where total or partial incapacity for work results from the injury

the compensation payable by the employer under this Act shall include:—"

and detailed provisions follow prescribing rules for assessing the amount of compensation payable.

The stated case contains the following findings relevant to the question at issue:—

> "That the Applicant had received injury arising out of and in the course of his employment firstly with the . . . Respondents R. D. George and F. W. McKern, on 16th November 1964, namely a lumbar disc strain: secondly, with the . . . Respondent T. H. Bushby, on 17th June 1966, namely an aggravation and exacerbation of a pre-existing condition of the lumbar spine:. . .
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> That on and prior to 21st December 1972 and continuing, and from 5th January 1973 to the date of the Award and continuing, the Applicant was partially incapacitated for work (excepting during periods of total incapacity for work falling within that period as hereinafter mentioned) and that such partial incapacity resulted respectively from the injuries of 16th November 1964 and 17th June 1966.
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> . . . .
>
> That the Applicant was totally incapacitated for work from 16th January 1973 to 21st February 1973 and from about 18th August 1974 to 30th November 1975, as a result of the effects of, and necessary treatment for the effects of, each of the injuries of 16th November 1964 and 17th June 1966."

The stated case contains a further finding that certain specified operative and other medical and rehabilitative treatment undergone by the Applicant "was reasonably necessary as a result of each of the abovementioned injuries of 1964 and 1966."

In the result, Williams J. on 7th July 1976 made an award against R. D. George and F. W. McKern for payment to the Applicant of weekly compensation at the rates and for the periods there specified. On the same day he also made an award against T. H. Bushby for payment to the Applicant of weekly compensation at the same rates and for the same periods. It should be mentioned that at the same time a similar award was made against a company called Glenmore Pty. Limited, which in relation to the Applicant's employment with R. D. George and F. W. McKern in November 1964 was a "principal" within the meaning of section 6(3)(a) of the Act of 1926. A separate point was at an earlier stage taken about the validity of this award, but it was not argued before this Board and does not now require to be considered.

It appears that the award against T. H. Bushby was made after the awards against R. D. George and F. W. McKern and also after that against Glenmore Pty. Limited, notwithstanding that all three awards bear the same date. That situation led to the following question of law being included in the stated case:—

> "6. Whether the Applicant was disentitled to the award of compensation specified in the Award in his favour against the Respondent T. H. Bushby once the Commission had made validly any one of the two instant Awards against the Respondents R. D. George and F. W. McKern and the Respondent Glenmore Pty. Limited for the payment of the same compensation as he was awarded under the Award made against the Respondent T. H. Bushby?"

Before the Court of Appeal it was argued for T. H. Bushby, with the support of Glenmore Pty. Limited, that this question should be answered

in the affirmative. On 28th November 1977 the Court (Moffitt P., Hope and Glass JJ.A.) unanimously decided that the question should be answered in the negative. From that decision T. H. Bushby and Glenmore Pty. Limited now appeal, with leave of the Court of Appeal, to this Board. The appeal is resisted by the injured worker Sydney Blair Morris and also by the Registrar of the Workers' Compensation Commission, who has an interest in respect that R. D. George and F. W. McKern were not insured against liability for workers' compensation.

It is to be observed at the outset that the appellants did not argue, either before the Court of Appeal or before this Board, that there was no evidence upon which the Commission could properly find that the incapacity suffered by the respondent Morris, in respect of which the relevant awards of compensation were made, resulted both from the injury of 16th November 1964 and from that of 17th June 1966. The appellants' proposition, in effect, was that as a matter of law the Commission was not entitled to make, in respect of one and the same incapacity, awards of compensation based on more than one injury.

The starting point of the argument in support of this proposition was the decision of the Court of Appeal in England in *Noden v. Galloways Limited* [1912] 1 K.B. 46. In that case the plaintiff, in the course of his employment with the defendants in 1902, was injured in an accident which resulted in the loss of the index finger of his right hand. In 1910, while still in the defendant's employment, the plaintiff developed inflammation in his right hand, leading to incapacity, as a result of using a pneumatic hammer. According to the medical evidence this was due to the presence of a piece of diseased bone which had nothing to do with the accident of 1902. The plaintiff claimed compensation for the 1910 incapacity, founding on the accident of 1902—no doubt because what happened in 1910 could not be said to be an " accident ", such as under the Workmen's Compensation legislation then in force in the United Kingdom was an essential prerequisite of a valid claim. In the County Court it was held that the 1902 accident was one of the contributing causes of the incapacity and an award of compensation was made. The Court of Appeal disallowed the award. Cozens-Hardy M.R. said at p. 49:

> " The learned deputy county court judge has directed himself, as a question of law, in these words: ' The accident is laid as arising in 1902. The question is whether that accident is a contributing cause to the incapacity which has come on at different times.' Now the learned deputy county court judge lays that down as the proposition of law with which he has to deal. It seems to me to be a proposition most dangerous, and, I think, inaccurate. Suppose there had been not the same employer in 1910 as there was in 1902, and suppose there was an admitted accident occurring in 1910 in circumstances which rendered that accident much more probable because the new employer of 1910 knew that the man was, to some extent, disabled by the accident of 1902, can it reasonably be suggested that the workman would have been entitled to say that the 1902 accident was contributory to the incapacity resulting from the 1910 accident, and that he could proceed against the 1902 employer and leave the 1910 employer untouched? Or could he proceed against both? In my opinion, when once it is shown that the man having the disability occasioned by the 1902 accident met with another accident in 1910, it is the second employer who is liable and who alone is liable, and it is not relevant to say that the 1902 accident was a contributing cause ".

Fletcher Moulton L.J. at p. 51 said

> " The learned deputy county court judge has directed himself that it is quite sufficient if the original accident of 1902 was a contributing

cause to the incapacity that now exists. That, I think, is incorrect in law".

He then figured a case where the effect of a first accident made the consequences of a second accident more serious than they would otherwise have been, and continued:

> " But if there is no doubt that there has been a second accident and the injury is directly brought on by that second accident, the employers at the time of the second accident are, in my opinion, liable:. . . when you are taking the incapacity which follows when a second cause has intervened, it is, in my opinion, the employers at the time of the intervention of that second cause who are liable for the whole incapacity. Their liability is not less because the man has brought to his work something that makes an accident more serious than it otherwise would be.
>
> I have taken a clear case of two contributing causes, and if the law as laid down to himself by the learned deputy county court judge is right, the workman in such a case could go against the first employer or the second employer, and, for aught I see, against both employers. That is not the law. When a second cause intervenes and produces the incapacity and that second cause is in the nature of an accident, it is the second employer who is liable."

Both Cozens-Hardy M.R. and Fletcher Moulton L.J. (with both of whom Farwell L.J. concurred) went on to hold that there was no evidence to support the view that the accident of 1902 had any connection whatever with the incapacity arising in 1910. Thus the opinions which they expressed on the law, though no doubt embodying a concurrent *ratio decidendi*, were not strictly necessary for the determination of the appeal.

Noden v. Galloways Limited (supra) was considered in a number of subsequent cases in the Court of Appeal. There are *Roberts v. Broughton & Plas Power Colliery Co. Ltd.* (1921) 14 B.W.C.C. 186, *Hutchinson v. Kiveton Park Colliery Co.* [1926] 1 K.B. 279 and *Hutchings v. Devon County Council* (1931) 24 B.W.C.C. 320. These were all two-accident cases. Each of them was decided on the basis that there was evidence to support the finding made by the trial judge, viz., in the first and second cases that the incapacity relied on had not resulted from the first accident, and in the third case that it had so resulted. In none of them was it necessary either to approve or disapprove of the statements of law contained in *Noden's* case (supra), but it does not appear to their Lordships that in any of them were these statements treated with particular enthusiasm.

Their Lordships now turn to consider two decisions of the High Court of Australia, *The Commonwealth v. Butler* (1958) 102 C.L.R. 465, and *Conkey & Sons Ltd. v. Miller* (1977) 51 A.L.J.R. 583, both upon very similar facts. In each case an employee had suffered a coronary occlusion or myocardial infarction at work, which he survived, and a later attack of similar nature at home, from which he died. In the first case it was held that the dependants of the deceased were not entitled to compensation, and in the second it was held that they were. The question whether death resulted from the earlier incident at work was in each case held to be one of fact to be determined upon the evidence, and in neither of them was there any detailed examination of authorities. In *The Commonwealth v. Butler* (supra) Fullagar J. made passing reference, at p. 473, to *Noden v. Galloways Ltd.* (supra) but only as leading up to his conclusion that

> " In the present case the evidence could not be said to establish that any prior occlusion ' contributed to ' the death in the sense that the death ' resulted from ' it—which is the only relevant sense".

Taylor J. said at p. 476:

> "In order to prove that death has resulted from an injury it is necessary to establish a causal connexion between the particular injury and the death in question. So much is, of course, beyond doubt. So also is the fact that a particular death may result from more than one cause . . . The legal concept [of causation] looks to so-called 'immediate' or 'direct' or 'proximate' causes rather than to antecedent and predisposing circumstances. But at the same time an 'effect' may be caused, in the legal sense, by circumstances apparently remote for the chain of causation may be shown to have continued unbroken by any other intervening cause to the effect in question. It requires but little reflection to appreciate that the relationship of cause to effect must be a matter for particular consideration in every case and that it is impossible to substitute for the word 'cause' any other expression or formula capable of providing a simple solution in all cases where difficulties arise. It should, however, be said that the cause of an event is not established in the legal sense by showing, without more, that in the absence of a proved set of circumstances the event would or may not have happened, or, that a proved set of circumstances, in the widest sense, contributed to the happening of the event."

Their Lordships see no reason to doubt the correctness of either of these decisions, but they stress that each of them turned upon an analysis of the medical evidence. No support for the present appellants' contention is afforded by these decisions, and they may reasonably be regarded as incompatible with it.

Their Lordships are of opinion that *Noden v. Galloways Ltd.* (supra) is not properly to be understood as laying down any rule of law such as is contended for by the appellants. They consider that by their use of the expression "contributing cause" in that case Cozens-Hardy M.R. and Fletcher Moulton L.J. were referring to the concept which is commonly described as "*causa sine qua non*", such as is referred to in the concluding sentence of the judgment of Taylor J. quoted above. It is only upon this view that these two able and experienced judges can reasonably be regarded as having been able to perceive any question of law at all arising upon the facts of the case. The deputy county court judge was seen as having directed himself that a mere predisposing cause of the incapacity was sufficient in law to found a claim to compensation. The Court of Appeal were concerned to make clear that this was erroneous, but they went on to observe that the 1902 accident could not, on the evidence, properly be held to have any causal connection whatever with the incapacity. If, contrary to their Lordships' understanding of the judgments in the case, the Court of Appeal intended to lay down any wider rule, they fell into error, and the judgments should not be followed.

It is well established in common law contexts that an injury or incapacity may be attributable to more than one cause, in the legal sense, operating concurrently. If any authority be required for that proposition, it is sufficient to refer to *Baker v. Willoughby* [1970] A.C. 467, particularly the speech of Lord Reid at p. 492, where it is to be observed also that he equiparated the legal view of causation in tort to that in the field of workmen's compensation. Their Lordships are of the clear opinion that there is indeed no difference between the two, subject to the qualification that in a claim for workers' compensation it is unnecessary to prove that the incapacity was the natural and probable consequence of the injury. The question of foreseeability does not arise. It is sufficient that the incapacity results from the injury by a chain of legal causation unbroken by any *novus actus interveniens*.

In truth, the finding by the Commission in this case that the worker's incapacity resulted both from the accident of 1964 and from that of 1966, which is not now attacked as being unsupported by sufficient evidence, really concludes the matter. There is no room for an artificial rule of law that in such a situation one or other accident must necessarily be selected as the cause of the incapacity, apparently on an entirely arbitrary or capricious basis. Their Lordships conclude that the existence of such a rule of law is unsupported by principle or authority. None of the numerous decisions in the Workers' Compensation Commission and the Court of Appeal of New South Wales relied on by the appellants as affording such support, which their Lordships have carefully examined and which it is unnecessary to cite at length, are properly to be understood in that sense.

Counsel for the appellants sought to derive support for his contention from the absence in the Act of 1926 of any provision regulating contribution among two or more employers against each of whom a worker has obtained an award of compensation in respect of a single incapacity. If section 9(1) of the Act were properly to be regarded as containing an ambiguity, the absence of such a provision might be taken to favour the view that the ambiguity should be resolved to the effect of holding that only one award was permissible. But their Lordships can perceive no ambiguity in section 9(1). There is no doubt about the ordinary and natural meaning of the words " results from ". The issue in the appeal does not turn upon any problem in the construction of section 9(1) but upon the application of ordinary legal concepts of causation. The absence of any provision for contribution may amount to a lacuna in the Act, but a similar lacuna existed at common law as regards contribution among joint tort-feasors. It is clear enough that a worker who obtains awards against two or more employers in respect of a single incapacity cannot legally enforce both or all of them to the effect of obtaining multiple payment of compensation. Satisfaction of one award will *pro tanto* release the employers against whom the other awards have been obtained; *D'Angola v. Rio Pioneer Gravel Co. Pty. Ltd.* [1979] 1 N.S.W.L.R. 495. Thus in the present case the Commission was quite correct in noting (it did no more than " note ") on each award that compensation paid thereunder would *pro tanto* discharge the liability of the respondents against whom the other awards had been made.

For these reasons their Lordships are of opinion that the decision of the Court of Appeal was correct, and will humbly advise Her Majesty that the appeal should be dismissed with costs.

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In the Privy Council

T. H. BUSHBY and ANOTHER

v.

SYDNEY BLAIR MORRIS
and OTHERS

DELIVERED BY

LORD KEITH KINKEL

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