CASE NOTES

THE COMMONWEALTH v. OCKENDEN[1]

Workers' Compensation—Commonwealth Employees' Compensation Act 1930-1956, section 11—Inevitable deterioration of heart condition—Personal injury by accident—In course of employment

The respondent, in his childhood, had contracted rheumatic fever, from which a heart disease had resulted. The condition of his heart progressively deteriorated thereafter, until a leakage in the aortic valve commenced, and later still an audible murmur developed. Only then was the condition of his heart discovered, and soon afterwards he was discharged from his service in the Royal Australian Navy. He then successfully applied to the County Court for an order for medical expenses under section 11 of the Commonwealth Employees' Compensation Act 1930-1956. The Commonwealth's appeal to the High Court was allowed, and the order of the County Court judge set aside.

Section 9 (1) of the Commonwealth Employees' Compensation Act required an employee to show 'personal injury by accident arising out of or in the course of his employment' by the Commonwealth. The High Court, in a joint judgment, considered that he had not satisfied this requirement. It was clear that his condition was in no way attributable to or aggravated by his service in the Navy, and so could not have been said to have arisen 'out of' his employment.

But the court also held that his condition had not arisen 'in the course of his employment', and the interesting feature of the case lies in the meaning attributed to this latter phrase. It was not enough merely to show that an injury occurred while the employee was present at his place of employment, and still less was this so where the physiological change was produced by the inevitable course of a progressive disease. 'A physiological change, sudden or otherwise, is not an injury by accident arising in the course of the employment unless it is associated with some incident of the employment.'[2] For if a physiological change is not associated with some incident of the employment, 'such changes, even if they can be called accidents, occur not in the course of the employment, but, it may perhaps be said, in the course of the disease'.[3]

It was necessary for the court to explain the decision in *James Patrick & Co. Pty Ltd v. Sharpe*,[4] a Privy Council decision on a case arising under the Victorian Workers' Compensation Act 1928-1946 at a time when section 5 (1) of that Act was substantially the same as section 9 (1) of the Commonwealth Employees' Compensation Act 1930-1956. The worker in question in that case had suffered an auricular fibrillation while travelling to work, as a direct result of which he died. His condition had not been

[1] [1958] Argus L.R. 772. High Court of Australia; Dixon C.J., Fullagar and Taylor JJ.
[2] [1958] Argus L.R. 772, 774. [3] *Ibid.*, 774.
[4] [1955] A.C. 1. For a similar case, see *Willis v. Moulded Products (Australia) Ltd* [1951] V.L.R. 58.

contributed to by his employment but his dependants successfully recovered compensation. The main reasons given by the Privy Council were, first, that the substitution of the word 'or' for the word 'and' in section 5 (1) had rendered the showing of a causal connection between the employment and the injury unnecessary, and, secondly, that an injury by accident was deemed to arise out of or in the course of the employment if it occurred while the worker was present at, or travelling between his residence and, his place of employment.[5] The Commonwealth Employees' Compensation Act 1930-1956 differed in this respect: while section 9 (1) provided that the Commonwealth would be liable to pay compensation where personal injury by accident was caused to an employee while travelling to or from his employment by the Commonwealth as if the accident were an accident arising out of or in the course of his employment, there was no express provision relating to the time when he was present at his place of employment. This difference was the ground on which the High Court distinguished *James Patrick & Co. Pty Ltd v. Sharpe,*[6] claiming that the provision deeming the injury to arise out of or in the course of the employment if it occurred while the worker was travelling from his home to his place of employment was the decisive factor in that case. It seems a strong argument, however, that the basis of the decision in *James Patrick & Co. Pty Ltd v. Sharpe*[7] was that the change from 'out of *and* in the course of' to 'out of *or* in the course of' had made is sufficient to show *either* a causal connection *or* a temporal one. Certainly to read a causal requirement into the words 'in the course of' removes most of the effect of this legislative change.

The comprehensive nature of section 8 (2) of the Victorian legislation means that the High Court's decision in this case cannot restrict the generous interpretation of the State Act which has prevailed in recent years. The case is of interest, however, because it represents one of the rare occasions when a restrictive interpretation of Workers' Compensation legislation has been adopted by our courts.

Recently in Victoria there has been a campaign by organized employers to restrict compensation to injuries connected with the inevitable risks of industrial activity, and to stop the payment of compensation for injuries totally unconnected with a worker's employment, such as many heart conditions. The subject has also received some press publicity.[8] We have seen the transition of Workers' Compensation from a means of spreading the loss caused by industrial accidents over employers in the whole field of industry to a form of social service to be borne by employers. Whether it would be a retrogressive step to reverse this development is a matter on which employers and trade unions differ.

There were two other grounds on which the High Court would have been prepared to find against the respondent. First, they considered that there was no sudden and distinct physiological change in this case

[5] Victorian Workers' Compensation Act 1951, s. 8 (2) (as it stood before the repeal of the words 'by accident'), which was identical with s. 5 (5) of the Victorian Workers' Compensation Act 1928-1946. [6] *Supra*, n. 4. [7] *Supra*, n. 4.
[8] '*The Herald*' *(Melbourne)*, 13 November 1958, and 14 November 1958.

sufficient to constitute an 'injury by accident'. There had been nothing in the nature of a ruptured artery, as there was in *Hetherington v. Amalgamated Collieries of W.A. Ltd.*[9] Here there was merely a valve commencing to leak slightly. And secondly, the respondent had not discharged the onus on him to establish that the leakage or the murmur had commenced at a time when he was present at his place of employment. The court could well have decided the case on these grounds alone, without venturing into a controversial treatment of the phrase 'in the course of his employment'. However, it did not, and the *ratio decidendi* of the case stands as the reading of a causal requirement into the phrase 'in the course of his employment'. One must wonder whether it heralds a new judicial, or perhaps even legislative, trend in this important field.

J. S. COX

KING v. SMAIL[1]

Transfer of Land—Gift—Bankruptcy Agreement—Prior Equities—Transfer of Land Act 1954, sections 42, 43

K and his wife, the applicant, were the proprietors as joint tenants of certain property under the Transfer of Land Act 1954. On 24 July 1956, K purported to transfer to his wife, by way of gift, his half-interest in the land. Then, on 17 August, he and his business partner executed a deed of arrangement under the Bankruptcy Act 1924-1955 (Cth.), in favour of one S, the respondent to the application, as trustee for their creditors. The property so assigned included 'all other property of which the debtor . . . is possessed or to which he . . . is entitled legally or equitably in possession . . .'. A search on behalf of S disclosed that the land in question was registered in the joint names of the husband and wife. However, on 28 September the transfer to Mrs K was lodged for registration, and it was not until two weeks later that the respondent lodged a caveat claiming an equitable estate in fee simple. The caveat was therefore ineffective to prevent registration of the transfer to Mrs K, but was later amended to apply to the land standing in the Register Book in her name alone. The instant proceedings arose by way of an application by Mrs K under section 90 (3) of the Transfer of Land Act 1954 seeking an order that the caveat be removed. It was held that a volunteer who becomes registered as proprietor under the Transfer of Land Act 1954 takes subject to prior equities, and the application was therefore refused.

The issue to be decided was whether the respondent had acquired an estate or interest in the land which took priority over the wife's registered title. Two subsidiary questions then arose—did the respondent acquire any beneficial interest or estate under the deed of arrangement and, if so, did that estate prevail against the registered title subsequently acquired by the applicant?

To answer the first of these questions, His Honour had to decide

[9] (1939) 62 C.L.R. 317. [1] [1958] Argus L.R. 677. Supreme Court of Victoria; Adam J.