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was kept. I am of opinion that he was a person actually appointed to the staff of a State school before and not after December 1st, 1881. The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Frank G. Menzies*, Crown Solicitor for Victoria.

Solicitor for the respondent, *H. S. W. Lawson & Co.*

Cons *A N I Corporation Ltd* v *Hatzimanolis* (1991) 23 NSWLR 125 | Cons *Hatzimanolis* v *A N I Corporation Ltd* (1992) 173 CLR 473 | Expl *Commonwealth* v *Oliver* (1962) 107 CLR 353 | Cons *Buckfield & Repatriation Commission, Re* (1993) 29 ALD 884 | Refd to *Peet* v *Workers Rehabilitation & Comp Corp (York Civil Pty Ltd)* (1996) 66 SASR 474

H. D. W.

[HIGH COURT OF AUSTRALIA.]

WHITTINGHAM . . . . . APPELLANT; CLAIMANT,

AND

THE COMMISSIONER OF RAILWAYS (W.A.) RESPONDENT. RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *Oct.* 14.

SYDNEY, *Dec.* 10.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Injury sustained during lunch hour—Accident to eye by cricket ball hit by other employee—Whether accident arose "out of or in the course of" the employment—Workers' Compensation Act 1912-1924 (*W.A.*) (*No.* 69 *of* 1912—*No.* 40 *of* 1924), *sec.* 6.*

During the luncheon interval the appellant was strolling on a recreation ground attached to the workshops at which he was employed, and owned by the respondent, when he was struck in the eye with a cricket ball, hit probably by one of his fellow-workers who were playing cricket there. As a result of the accident the appellant lost his right eye.

Held, by *Rich*, *Starke* and *Dixon* JJ. (*Evatt* and *McTiernan* JJ. dissenting), that the appellant was not entitled to compensation under sec. 6 of the *Workers'*

* The *Workers' Compensation Act* 1912-1924 (W.A.), by sec. 6 (1), provides that "If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions, is caused to a worker, his employer shall . . . be liable to pay compensation" &c.

Compensation Act 1912-1924 (W.A.), as the accident arose neither "out of" nor "in the course of" his employment.

Per Evatt J.: The accident arose "out of" the employment.

Per McTiernan J.: The accident arose "in the course of" the employment.

Decision of the Supreme Court of Western Australia (Full Court) affirmed.

APPEAL from the Supreme Court of Western Australia.

This was an appeal by Robert Whittingham from the judgment of the Full Court of the Supreme Court of Western Australia, which set aside an award of the Local Court of Perth in favour of the appellant granting him compensation under the *Workers' Compensation Act* 1912-1924 of Western Australia in respect of an accident which occurred while he was an employee of the Commissioner of Railways for Western Australia and which was alleged to have arisen out of or in the course of his employment.

The following statement of facts is taken from the judgment of *Northmore* A.C.J. in the Supreme Court:—"There is no dispute on the facts. The appellant is the Commissioner of Railways and the respondent was employed by him as a machinist at the Midland Junction Workshops. His hours of work were from 7.30 to 11.54 a.m. and from 12.36 to 5 o'clock p.m. During the luncheon interval, that is, between 11.54 and 12.36, work in the shops ceases and it is optional for the men either to have their lunch on the premises or to go elsewhere for it. Attached to the workshops and owned by the appellant is a recreation ground upon which it is customary for some of the workers to play games, including cricket, during the luncheon interval. Upon the day of the accident the respondent, having eaten his lunch, was strolling on the recreation ground when he was struck in the eye with a cricket ball, hit, no doubt, by one of his fellow-workers who were playing cricket there. As the result of the accident the respondent lost his right eye, and the Magistrate made an award in his favour for the sum of £375 and hospital and medical expenses. The respondent was employed as a machinist, and it would seem that by no straining of the language can it be said that the accident arose 'out of' that employment; and the only question therefore is whether the accident occurred 'in the course of' his employment."

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The Full Court of Western Australia (*Northmore* A.C.J. and *Dwyer* J.) were of opinion that the accident did not arise " in the course of " Whittingham's employment, and allowed the appeal of the Commissioner of Railways from the award of the Local Court.

From this decision Whittingham now appealed to the High Court.

Clyne, for the appellant. Under the provisions of sec. 6 of the *Workers' Compensation Act* 1912-1924 of Western Australia it is sufficient to entitle the claimant to compensation if the accident arises either " out of " or " in the course of " his employment. Too narrow a view was taken by the Full Court of Western Australia. " In the course of the employment " does not mean that the claimant is actually engaged in the work for which he is employed. It includes not only the actual work but also the reasonable adjuncts of that employment, such as going to and leaving the premises and waiting about during lunch time, and includes all the reasonable incidents of the work a man is called upon to do (*Charles R. Davidson & Co.* v. *M'Robb* (1); *St. Helens Colliery Co.* v. *Hewitson* (2); *Pearson* v. *Fremantle Harbour Trust* (3)). An employee is entitled to compensation if he is on the spot by virtue of his contract of employment, and the appellant falls within this description (*Blovelt* v. *Sawyer* (4); *Rowland* v. *Wright* (5); *Gilbert* v. *Owners of Steam Trawler Nyzam* (6); *Morris* v. *Lambeth Corporation* (7); *Martin* v. *J. Lovibond & Sons Ltd.* (8); *Armstrong, Whitworth & Co.* v. *Redford* (9)). The acts causing injury need not be referable to the conduct of his employment (*Radcliffe* v. *Pacific Steam Navigation Co.* (10)).

Wolff, for the respondent. The accident happened during the currency of and not in the course of the employment. The appellant was not on the premises by virtue of his employment. He could have gone off the premises and had his meals elsewhere. The appellant was not performing any duty or doing anything incidental to his duties when he sustained this injury (*Elliott*

(1) (1918) A.C. 304, at pp. 314-315, 321.
(2) (1924) A.C. 59, at pp. 70-71.
(3) (1929) 42 C.L.R. 320, at pp. 326-327.
(4) (1904) 1 K.B. 271
(5) (1909) 1 K.B. 963.
(6) (1910) 2 K.B. 555, at p. 558.
(7) (1905) 22 T.L.R. 22.
(8) (1914) 2 K.B. 227, at p. 229
(9) (1920) A.C. 757.
(10) (1910) 1 K.B. 685, at p. 689.

on *Workers' Compensation* (1925), 8th ed., p. 49). The appellant was not standing by ready to receive an order from his employer, which is the condition contemplated by Lord *Atkinson* in *St. Helens Colliery Co.* v. *Hewitson* (1). *M'Robb's Case* (2) lays down the principle which was adopted in *Pearson* v. *Fremantle Harbour Trust* (3). There is nothing from which it can be gathered that the employer had a right to call on these men to work during the lunch time (*Philbin* v. *Hayes* (4)). In the present case the appellant sustained the injury in his own time.

Clyne, in reply, referred to *Armstrong, Whitworth & Co.* v. *Redford* (5); *Standen* v. *Smith* (6); *Local Courts Act* 1904 (W.A.), secs. 107 *et seqq.*

Cur. adv. vult.

Dec. 10.

The following written judgments were delivered :—

RICH J. This is an appeal from the judgment of the Supreme Court of Western Australia which set aside an award of the Local Court of Perth in favour of the appellant granting him compensation under the *Workers' Compensation Act* 1912-1924 of Western Australia in respect of an accident alleged to have arisen "out of or in the course of his employment." The material facts are stated in the judgment of *Northmore* A.C.J. as follows :—"The appellant is the Commissioner of Railways and the respondent was employed by him as a machinist at the Midland Junction Workshops. His hours of work were from 7.30 to 11.54 a.m. and from 12.36 to 5 o'clock p.m. During the luncheon interval, that is, between 11.54 and 12.36, work in the shops ceases and it is optional for the men either to have their lunch on the premises or to go elsewhere for it. Attached to the workshops and owned by the appellant is a recreation ground upon which it is customary for some of the workers to play games, including cricket, during the luncheon interval. Upon the day of the accident the respondent, having eaten his lunch, was strolling on the recreation ground when he was struck in the eye

(1) (1924) A.C., at p. 75.
(2) (1918) A.C. 304.
(3) (1929) 42 C.L.R. 320.
(4) (1918) 87 L.J. K.B. 779.
(5) (1920) A.C., at p. 778.
(6) (1927) 20 B.W.C.C. 305.

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with a cricket ball, hit, no doubt, by one of his fellow-workers who were playing cricket there. As the result of the accident the respondent lost his right eye, and the Magistrate made an award in his favour for the sum of £375 and hospital and medical expenses." The first alternative condition of the appellant's right to compensation was not argued before us. The question then is whether the accident arose in the course of the employment. As the expressions "admit of inexhaustible varieties of application according to the nature of the employment and the character of the facts proved" (*Kitchenham* v. *Owners of s.s. Johannesburg* (1)), it is not surprising that the hope expressed that a decision had been given which is final has not been fulfilled. "The facts in different cases are infinitely different; and if we were upon each argument to discuss them and to differentiate one from another, judgments in Courts of law would be interminable and would lead rather to confusion than to enlightenment." The recent decision of this Court in *Pearson* v. *Fremantle Harbour Trust* (2) relieves me from any such discussion. The determining facts in the present case are that "lunch time" was not included as time worked: it was an interval in the employment of the appellant when he was at liberty to go off or remain on the respondent's premises for his luncheon. For his own convenience the appellant remained on the premises, and, having finished his meal, he went for a walk for his own purposes and met with the accident in respect of which he claims compensation. The appellant was not on the premises preliminary or pursuant to a duty imposed by his contract of service. The accident did not happen in the course of his service or while he was doing something which was an adjunct to or an incident of his service.

For these reasons I think that the Supreme Court arrived at the right conclusion and that the appeal should be dismissed.

STARKE J. If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under his employer's instructions, is caused to a worker, his employer is liable to pay compensation (*Workers' Compensation Acts* 1912-1924 (W.A.)—1912 No. 69, sec. 6, and

(1) (1911) A.C. 417 (2) (1929) 42 C.L.R. 320.

1924 No. 40, sec. 4). The appellant was employed by the respondent as a machinist in the railway workshops at the Midland Junction. The hours of work were from 7.30 a.m. to 11.50 a.m., and from 12.36 p.m to 5 p.m. The luncheon interval was from 11.54 a.m. to 12.36 p.m., and work in the shops ceased during that interval. The workmen could bring their lunches with them, and they could either eat the same on the premises or go off the premises and eat their lunches elsewhere. The appellant brought his lunch on to the premises, and ate it in his workroom. He then went out of the workroom for a stroll in the fresh air; he walked into the yard of the workshops, where some boys, employed at the workshops, were playing cricket, and other employees were looking on. He had walked some fifty or sixty paces, and was distant about thirty yards from the players, when he heard a cry: "Look out!" He turned his head, and was struck in the right eye with a cricket ball. In consequence he lost the sight of that eye. The question is whether the appellant can recover compensation against the respondent under the provisions of the *Workers' Compensation Acts* already mentioned. Despite the variation in terms between those Acts and the English *Workmen's Compensation Acts*, the principle upon which such a case as the present must be decided is the same, whether occurring under the local or under the English Acts: the inquiry is whether the accident took place in the course of the work, or what was incident to it. "The condition is that the employment is to give rise to the circumstances of injury by accident. . . . Has the accident arisen because the claimant was employed in the particular spot on which the roof fell"—here, the place where he was struck with the cricket ball? "If so, the accident has arisen out of the employment," otherwise not (*Thom* v. *Sinclair* (1): *Dennis* v. *A. J. White & Co.* (2)). Again, "the currency of the engagement is not the test. There cannot be employment where one party no longer employs and the other is no longer employed, but there may be a break 'in the course of the employment' in the sense of the statute, though the currency of the contract is unbroken and the legal nexus is subsisting." "Anything which is incident to the work is covered by the course of employment, but to say that taking meals or taking

(1) (1917) A.C. 127, at p. 135. (2) (1920) A.C. 479.

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sleep is incident to the work is surely a most unjustifiable extension of the scope of 'incident.' In the case of a night watchman who has to be on the premises all night, both meals and sleep are in the course of his employment. . . . But a job of that sort differs for the present purpose absolutely from the case of a workman who takes his food and sleep when off work. The night watchman is at work while he is taking his food or sleeping; the workman who takes his food during the dinner hour is off work." "Dining is 'ancillary' and 'incidental' to his continued utility no doubt, but that in itself does not make him dine in the course of his service, nor is dining for that reason part of his service" (*Armstrong, Whitworth & Co.* v. *Redford* (1); *Charles R. Davidson & Co.* v. *M'Robb* (2)).

In the case now before us, the appellant was not employed in the place where he was struck with the cricket ball. Further, he was "off work" in the sense in which that phrase is used in the above judgments: he had ceased work to take his lunch, and, having finished his lunch, was strolling about the premises, not as part of his service, but merely for his own pleasure and "a walk in the fresh air." The accident to the appellant cannot, consistently with these authorities, and the facts of the case, be said to have arisen out of or in the course of the employment. And no one suggested that it happened whilst the appellant was acting under his employer's instructions.

The appeal should be dismissed.

DIXON J. After eating his lunch in the workroom at the Midland Junction Workshops, where he was employed, the appellant went for a stroll in the yard near by where it was customary for some of his fellow employees to occupy part of the luncheon interval in playing cricket. He was struck in the face by a cricket ball and lost the sight of his eye. He claimed workers' compensation from the respondent, who was his employer; and the Local Court at Perth determined that in his employment personal injury by accident arising in the course of his employment was caused to him and that the respondent was liable to pay compensation. On appeal to the Supreme Court, *Northmore* A.C.J. and *Dwyer* J. reversed the judgment

(1) (1920) A.C., at pp. 769, 774. (2) (1918) A.C. 304.

of the Local Court, and from their decision the appellant now appeals to this Court. Sec. 6 (1) of the *Workers' Compensation Act* 1912-1924 of Western Australia makes the familiar conditions of the employee's right to workers' compensation alternative, and not cumulative as in the British statute. It is not necessary that the accident shall arise both out of and in the course of the employment. It is enough if it arises either out of or in the course of the employment. Accordingly, in this case the appellant must succeed if the accident arose in the course of the employment. In the circumstances in which it occurred, the accident could not be considered to arise out of the employment, at any rate unless it also arose in the course of the employment. It has been said that in *Charles R. Davidson* v. *M'Robb* (1) a decision was given upon the words "in the course of the employment" which is final and that it only remains to apply it in other cases. Its application, however, has not proved simple. There can no longer be any doubt that the accident must happen while the employee is doing something which is part of or is incidental to his service. It is another matter to be sure what is included within this conception. In *Pearson* v. *Fremantle Harbour Trust* (2) some passages are collected from judgments in the House of Lords in which illustrations are given of acts done by workmen which are preparatory or incidental to or consequential upon the performance of their actual work. As the test is not, and could not be, whether the employee was obliged to act as he was doing when the accident occurred, the inclusion of things arising out of the actual performance of his duty was, no doubt, inevitable, but, as a result, the sufficiency of the connection between the employment and the thing done by the employee cannot but remain a matter of degree, in which time, place and circumstance, as well as practice, must be considered together with the conditions of the employment. In this case the question appears to be whether the presence of the appellant at the place where he was struck by the cricket ball was connected with the actual performance of his duty in a sufficient degree. His work was that of an iron machinist. The award which regulated his employment provided for a week's work of forty-four hours, extending over five or six days at the choice of the employer, and

(1) (1918) A.C. 304.

(2) (1929) 42 C.L.R., at pp. 327-330.

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a day's work of not more than eight hours forty-eight minutes. Five days a week were worked, and the maximum daily hours were divided into two periods of four hours twenty-four minutes each. The interval between the first period, which ended at six minutes before noon, and the second period was forty-two minutes, during which the employees were free to leave or remain at the premises where they worked. Usually they remained and ate their lunch and some of them played cricket. The evidence contains no clear description of the place where cricket was played, but, although it is called a yard, it is said that concrete slabs had been put down and were used as cricket pitches. As for size, all that appears is that when the accident happened the players were thirty yards away from the appellant, who had walked fifty or sixty paces. An employee arriving at work lifted a metal check bearing his number from a board on entering the premises and deposited it at the proper place inside the workshop. On leaving he replaced it on the board. The checks were not so replaced during the midday interval. But the interval was not time of duty, and, notwithstanding some general provisions of a railway by-law, the workmen were not liable during the interval to be recalled to duty. Neither by-law, award nor practice required the employees to eat their meal upon the premises. On the other hand, forty-two minutes is not a sufficiently long time to make it likely that men would leave the vicinity, and the general practice of eating lunch at work is to some extent recognized because the by-law contains a provision prohibiting employees from eating their meals in any of the coaching stock. The accident seems to have occurred about a quarter of an hour before work resumed.

In these circumstances the connection between the appellant's presence at the spot where he was hit and his duty consists of no more than the fact that he was on his employer's premises because in fifteen minutes or less his work would commence, and he was in that particular part of them because he had leisure to stroll in the open air. Whether the things which the employee does in the course of his employment although not obliged by the terms of his service to do them, are described by the words "belonging to," "ancillary to," "incidental to," "adjuncts of" or "arising out of" his employment, the connection is too remote. He was not engaged

at the moment in doing something directed towards the performance of his duty as is the workman going to his place at the employer's works, or immediately consequential upon it as is the man who is leaving his place of work. His presence somewhere at or near the premises at that time may be said to be a consequence of or at least to arise out of his employment. But all that can be said of his presence in the yard at the place where he was struck is that, if he had not been an employee, he would have probably been elsewhere. So much could be said if he had been struck in passing a cricket field half a mile away on his way to work. In fact his presence there contributed nothing towards and was in no way involved in the performance of his duties.

For these reasons the appeal should be dismissed.

EVATT J. The question on this appeal is whether the *Workers' Compensation Act* of Western Australia entitles the appellant to be paid compensation in respect of an injury sustained by him which resulted in the loss of an eye.

The facts are not in dispute. Whittingham was employed at the railway workshops as a machinist. On the day in question he commenced work at 7.30 a.m. The whistle blew for lunch shortly before 12 noon. The interval was to last for forty-two minutes only, work being resumed at 12.36 p.m. It was optional for the men to have their lunch on the premises, but the interval was so short that many of the employees exercised this option. The appellant had his lunch in the work-room near his machine. He finished it about 20 past 12 o'clock. This left a period of about a quarter of an hour before the whistle to resume work would be given. He went out of the work-room from his machine into the yard. Here some of the employees were playing cricket. The practice of playing cricket during the luncheon interval was well known to the Department, and concrete slabs had been put down in the yard for the purpose of being used as pitches. Whittingham and another employee walked a short distance. Someone cried "Look out!" Whittingham turned his head and was struck in the right eye with the cricket ball. Whittingham was neither playing cricket nor watching it. Although employees were permitted to take their meals outside the

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premises, in order to do so they were required to take their metal disc off the board in the machine shop and put it on the board in the time office. It was also shown that persons remaining at the works for lunch might have to obey an order. But such an occasion seldom arose.

The appellant claimed in the Local Court of Perth that the personal injury he sustained was by accident arising both out of and in the course of the employment. The Local Court affirmed that Whittingham was injured in the course of his employment and gave judgment in his favour. This decision was reversed in the Supreme Court of Western Australia.

The statutory condition governing the payment of compensation is satisfied if a worker sustains "in any employment injury by accident arising out of *or* in the course of the employment, *or* whilst the worker is acting under the employer's instructions" (sec. 6 (1), *Workers' Compensation Act* 1912-1924).

There is a vital distinction between this Act and the English *Workmen's Compensation Act*, where it is necessary for the worker to prove the concurrence of two conditions and the injury must arise "out of" *and* "in the course of" the employment. All that need be shown to recover compensation under the Act of Western Australia is the existence of one of the three conditions mentioned in sec. 6 (1).

In *Davidson* v. *M'Robb* (1) Lord *Dunedin* said:—"It is in one sense difficult to imagine that there could be any injury held as arising out of the employment which would not also be in the course of the employment. But it may well be that the determination of the question whether at the moment of the injury the workman was in the course of his employment may go to solve the question of whether the injury arose out of the employment."

One method of approach to the English problem of the double condition is provided by the case of *Armstrong, Whitworth & Co.* v. *Redford* (2). A girl employed as a machinist went, during the luncheon hour, to have her lunch at a canteen provided by the employer for women workers in premises close to the factory. Whilst hurrying down the stairs after her lunch on her way back

(1) (1918) A.C., at p. 321. (2) (1920) A.C. 757.

to work, she slipped and broke her ankle. Lord *Dunedin* held, contrary to the view of the majority of the House, that the girl was not injured "in the course of" the employment. But he also said:—"If the respondent here was in the course of her employment then I do not think it could be said that there was no evidence on which the County Court Judge as arbitrator could find that the accident arose out of her employment. The slippery steps were a danger of the employment. The more difficult question is, was she in the course of her employment?" (1).

Now the obvious purpose of the Western Australian Act is to extend the class of occasions in which compensation is to be available to an injured worker. The disjunctive form of expression used in sec. 6 (1) necessarily postulates that there are cases in which the injury is sustained "out of" the employment although not "in the course of" it. It follows that English cases where the definitions of the words "out of" and "in the course of" have been attempted in the light reflected from the existence of the double condition must be used with nice discrimination.

Assistance may, however, be gained from the observations of Lord *Shaw of Dunfermline* in *Thom* v. *Sinclair* (2). That well-known case was concerned with the claim of a woman engaged at work in her employer's shed. She was injured by the roof of the shed collapsing owing to the fall of a wall on the property of an adjoining proprietor. The House of Lords held that the accident arose "out of" the employment. Lord *Shaw* said (3):—"In short, my view of the statute is that the expression 'arising out of the employment' is not confined to the mere 'nature of the employment.' The expression, in my opinion, applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply."

Previously Lord *Shaw* had emphasized an important point which is sometimes overlooked, namely, "There may be causes of danger arising to all employees, which causes are not confined to the

(1) (1920) A.C., at p. 772. (2) (1917) A.C. 127.
(3) (1917) A.C., at p. 142.

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individual situation, but are general and applicable to the employment as a whole " (1). It is apparent that these dangers may exist at the place of employment although actual work has been interrupted. An explosion may occur at a factory during a luncheon interval when all the employees have stopped work for 30 or 40 minutes. They have been authorized by the employer to remain at the place of employment because they are his employees. They are, at the very least, invitees of a special class and character. Assuming that they are not performing duties under their contract of service and are not " in the course of " the employment, why does not an injury to an employee caused by such an explosion arise " out of " the employment ? Unless the Western Australian Act covers such a case, it is almost impossible to give any force or effect to the statutory assumption that an accident *may* arise out of but not in the course of the employment.

In *Blovelt* v. *Sawyer* (2) the Court of Appeal was inclined to the view that a lunch interval injury occurring at the place of employment by reason of the risks incidental to building operations arose both " out of " and " in the course of " the employment although all work had been completely suspended. Later decisions of the House of Lords have, no doubt, seriously weakened the force of this decision. On the other hand it is not conclusive even against a claim under the English Act that " the works stopped and were cleared for an hour." (Per Lord *Sumner* in *Armstrong, Whitworth & Co.* v. *Redford* (3).)

Whatever may be the position under the English Act, I think that the Western Australian Act is intended to include in its scope all factory, establishment, or premises risks occurring during the luncheon interval, and resulting in injury to employees authorized to remain upon the premises. These injuries arise " out of " the employment. " The employment " is a contributing factor to the injury sustained although the injured worker is not actually working and all work had ceased for the prescribed interval. A sufficiently close relation exists between the employment, the risks incidental to it, and the time and place of the accident which causes the worker's injury.

(1) (1917) A.C., at p. 142. (2) (1904) 1 K.B. 271.
(3) (1920) A.C., at p. 774.

The application of the principle of liability may be difficult in particular cases, but I do not think there is any difficulty here. I will assume that Whittingham was merely exercising a right and not performing a duty to his employer when he went for a stroll around the yard of the factory before returning to his machine. Although employees were at liberty to go away from the premises for their lunch, their liberty was restricted if they remained on the premises. Workshop Regulation No. 26 provided that "An employee must not eat his meal in any of the coaching stock." The employer was therefore able to control the premises and the employees who did not "check out" during the interval. The employer could have forbidden the practice of playing cricket during the interval. But, very properly no doubt, he allowed and encouraged it.

To Whittingham, however, who was neither a player nor a spectator, the risk of injury by a cricket ball was merely an additional factory, establishment, or employment risk. It is true that the actual chance of serious injury from the practice of playing cricket was not considerable. But the risk of some injury to employees not playing or watching the game was distinct and measurable. Whittingham was only a short distance across the yard when he was struck by the ball. The premises had "turned out to be a place of special danger." (Per Lord *Shaw* in *Thom* v. *Sinclair* (1).) It is just as though the building in which he had been allowed to eat his midday meal had collapsed and injured him. In such a case his injury would arise from the employment although at the moment he was not in the course of it.

Whittingham can truly say that but for his employment he would not have lost the sight of his eye, that his employer allowed the place of his employment to become a source of danger to him and that, as a consequence, the employment contributed directly to his injury. The accident to him arose "out of" the employment, though not "out of" any work he was then performing for his employer.

The appeal should be allowed.

(1) (1917) A.C., at p. 143.

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McTiernan J.

McTIERNAN J. Sec. 6 (1) of the *Workers' Compensation Act* 1912-1924 of Western Australia provides that "If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions, is caused to a worker, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule." The question that was argued is whether the employer is liable to pay compensation on the ground that the injury suffered by the appellant was caused to him "by an accident arising in the course of the employment." The principle according to which the answer to that question should be determined is enunciated in the decisions which are collected in the judgment of this Court in *Pearson* v. *Freemantle Harbour Trust* (1). Upon a consideration of them the Court said in that case: "We think that the result of these authorities is to show that the words 'arising in the course of the employment' describe a condition which is satisfied if the accident happens while the workman is doing something in the exercise of his functions although it is no more than an adjunct to or an incident of his service." A list—though of course, not exclusive—of such adjuncts or incidents appears in a passage from the speech of Lord *Wrenbury* in *St. Helens Colliery Co.* v. *Hewitson* (2), which is quoted in the judgment of this Court in *Pearson's Case* (3). It is as follows:—"The employment may be to do some defined manual work, say, hewing coal, but the accident need not arise when the man is actually using his pick. He may be going down in the cage. He may be resting between shifts. He may be taking a meal. He may be merely standing by, waiting for the next job. All these, and such as these, are not 'the employment' but are incidental to the employment. The man is in the course of his employment—is engaged in his employment in all such cases. 'They also serve who only stand and wait.' In every case the facts have to be ascertained and discrimination made between the time during which or the place at which the employment is and those during or at which it is not being carried on." In the present case the employment of the appellant was regulated by an

(1) (1929) 42 C.L.R., at pp. 329-330. (2) (1924) A.C., at p. 91.
(3) (1929) 42 C.L.R., at pp. 327-328.

award of the Court of Arbitration of the State of Western Australia, which was delivered on 4th July 1928. He was also subject to the provisions of by-law No. 84, made by the Governor in Council on the 30th November 1927. This prescribed certain rules and regulations to be observed by all persons employed in the workshops of the Department. The appellant was employed by the respondent as a machinist in the Midland Junction Workshops. The award provided that forty-four hours, exclusive of Sunday work, should constitute a week's work and that no day's work should exceed eight hours forty-eight minutes. The day's work began at 7.30 a.m. The whistle blew at 11.54 a.m. to indicate that the employees should stop working in order to take lunch. It blew again at 12.36 p.m. to indicate that work should be resumed. Work ceased at 5 p.m. The by-law provided that the time of starting and finishing work was to be fixed by the head of the Branch and that a signal should be given to indicate the time for commencing and ceasing work. The interval between 11.54 and 12.36, which according to the evidence of the assistant works manager was known as the "lunch hour" or "lunch time," was not computed as part of the time worked on any day or in any week. This interval was of forty-two minutes' duration only. On the day of the accident the appellant partook of his lunch in the workshop, as he was permitted to do. He finished lunch at about 12.20, and then went outside, with another employee, into the yard, which was part of the respondent's premises, to take a stroll. The appellant said in evidence: "I was a bit stiff from standing and also a bit hot, and I thought a walk in the fresh air would cool me down and take the stiffness away." He walked 50 or 60 paces when he was struck by a cricket ball which was hit by an employee playing cricket in the yard. The blow resulted in the loss of the appellant's right eye. Such criteria as the rules and regulations contained in the by-law afford, do not suggest that when the appellant walked out of the workshop into the yard he vacated his duty for the time being as completely as if he had gone outside the respondent's premises into the public street. Clause 3 of the by-law is as follows:—"3. Each employee will be given a number and supplied with a metal check bearing such number. This check must be lifted from the board on entering the workshops and

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deposited at the place appointed for its reception within the workshops. Should the time check of an employee not be on the board, such employee must not proceed to work without the permission of the workshops manager or his representative. On termination of work, or when leaving the workshops at any time, check must be lifted and placed on the board at the timekeeper's lodge. Any irregularity in respect to time checks will render employee liable to be fined. Employees must not under any circumstances lift or deposit a check belonging to another employee." In the circumstances in which the appellant went out of the workshop into the yard on the day he met with the accident, he was not required to lift his check and place it on the board at the timekeeper's lodge. The appellant further said in evidence :—" If I wished I could have taken my meals outside. If I did this I would have to take my disc off the board in the machine shop and put it on the board in the time office. This acts as a check on my time." The evidence of the assistant works manager was as follows : " I control the foremen and he controls the men under him of whom applicant is one. During the lunch hour the men were not asked to work unless previously notified. Applicant would not be bound to comply with any particular order during the lunch time on the 12th December." Cross-examined.—" I have, under similar circumstances, asked men to work and it has been done, and I have extended their lunch hour. I would not expect a man to refuse." Re-examined.—" I don't know what is the effect of my request so far as the award is concerned. If he was on the works he would have to do the work under liability to dismissal for refusal. His lunch time was absolutely his own." I think it is clear, therefore, that when the whistle blew at 11.54 the appellant was not discharged until the whistle blew at 12.46, in the same manner as he would have been discharged at 5 p.m. until 7.30 a.m. on the next day. The mere fact that the lunch hour was not counted as time worked does not in the circumstances militate against this conclusion. Had the appellant spent more of the interval known as " lunch hour " or " lunch time " in eating his lunch and been struck by the ball coming through an open window or door of the workshop, it would have been very difficult to resist

the conclusion that the accident arose in the course of his employment. The appellant would have been doing a thing, which, in the passage which has been quoted from the speech of Lord *Wrenbury* in *Hewitson's Case* (1), is mentioned as a matter incidental to the employment. Had he been struck by the ball whilst returning to his station in the workshop in obedience to the signal to resume work at 12.46, I do not see how the position of the appellant could have been distinguished from that of the miner descending in a cage. This is also described as incidental to the miner's employment by Lord *Wrenbury* in the speech which has been quoted. When the appellant was injured, sixteen minutes, perhaps less time, remained before the whistle would blow as an instruction to him to go to his place in the workshop. He did not, it is true, "serve" by standing about waiting for the whistle, but in lieu of doing that he proceeded to take a walk in the immediate vicinity of the workshop on the employer's premises where he was permitted to go, and there can be no doubt that he was waiting and holding himself in readiness to resume his station in the workshop when the signal was given.

In amplification of the illustrations given by Lord *Wrenbury* of things incidental to the employment, the following extract from the speech of Lord *Atkinson* in *Hewitson's Case* (2) may be given. This also is cited in *Pearson's Case* (3). It is as follows:—"The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word 'employment' as here used covers and includes things belonging to or arising out of it. For instance, haymakers in a meadow on a very hot day are, I think, doing a thing in the course of their employment if they go for a short time to get some cool water to drink to enable them to continue the work they are bound to do, and without which they could not do that work, and workmen are doing something in the course of their employment when they cease working for the moment and sit down on their employer's premises to eat food to enable them to continue their labours."

In the circumstances of this case I find it impossible to mark any point of time in the appellant's "lunch time" when the course

(1) (1924) A.C. 59. (2) (1924) A.C., at p. 71.
(3) (1929) 42 C.L.R., at p. 328.

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of the employment terminated. The alternative conclusion would appear to be that when the appellant finished his lunch in the workshop and began his walk, a gap occurred in the course of the employment which was due to subsist for about sixteen minutes, but when the whistle sounded at 12.54, the course of the employment would have been restored. When the appellant was spending the residue of the lunch time taking his disastrous walk on the respondent's premises in the circumstances related in the evidence, he was, in my opinion, in the same position as if he were still at lunch or partaking of his lunch while walking. It is true that during the "lunch hour," time did not run for the purpose of calculating the hours to be worked by the appellant, presumably as a set-off in favour of the respondent against the limitation of hours by the award; but I think that, in the light of the authorities which have been cited, the circumstances of this case require the conclusion that the course of the employment had not been broken and the accident arose when the appellant was doing something adjunctive or incidental to his employment. Having come to this conclusion, it is not necessary for me to decide whether, upon the true construction of sec. 6 (1) of the above-mentioned statute, the accident was one arising out of the employment.

I am of opinion that the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *Dwyer, Durack & Dunphy.*

Solicitor for the respondent, *J. L. Walker*, Crown Solicitor for Western Australia.

H. D. W.