[HIGH COURT OF AUSTRALIA.]

CLARK . . . . . APPELLANT;
APPLICANT,

AND

FLANAGAN . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 14; *Nov.* 13.

Gavan Duffy C.J., Rich, Starke, Dixon and McTiernan JJ.

Workers' Compensation—Injury—"Arising out of and in the course of the employment"—Loss of finger—Worker's evidence disbelieved—No other evidence of accident—Allegation that injury intentionally self-inflicted—Onus of proof—Worker's Compensation Act 1926-1929 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1929), *secs.* 6 (1), 7.

A worker, who was employed for some months stripping wattle bark, met with an injury and claimed compensation. According to the worker he attempted, whilst engaged stripping bark, to strike a tomahawk into the trunk of a tree, but the tomahawk was deflected by a bough, glanced off the trunk of the tree, struck his hand, which was resting on another bough of the tree, and severed his left forefinger. No other person was nearer than fifty yards at the time. It was shown that accounts concerning the matter given by the worker from time to time differed as to details. The Workers' Compensation Commission of New South Wales found that the evidence did not establish that the injury was intentionally self-inflicted or that the injury arose out of and in the course of the worker's employment, and made an award in favour of the respondent. The Supreme Court held that in so finding the Commission had not erred in law. Upon the hearing of an appeal therefrom, the High Court directed certain questions to the Commission. The replies thereto showed that the Commission did not accept material parts of the worker's evidence, and that on the evidence it was unable to say whether the worker injured himself unintentionally or not.

Held that the worker had not established that his injury arose out of and in the course of his employment, and therefore the appeal must be dismissed.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

CASE STATED.

A case stated by the Workers' Compensation Commission of New South Wales for the determination of certain questions by the Supreme Court of New South Wales was substantially as follows :—

1. This case is stated at the request of the applicant, Horace Edward Clark, under the provisions of sec. 37 (4) of the *Workers' Compensation Act* 1926-1929 (N.S.W.), and refers for the decision of the Supreme Court questions of law which arose in proceedings brought by him before the Workers' Compensation Commission of New South Wales on 9th June 1933, in which Austin Flanagan was the respondent.

2. The applicant claimed £120 compensation from the respondent in terms of sec. 16 for the loss of portion (terminal and mid phalanges) of the left forefinger, together with £9 medical and hospital expenses in respect of an injury which he alleged arose out of and in the course of his employment by the respondent while engaged stripping wattle bark.

3. The respondent denied liability to pay compensation on various grounds, those relied on at the hearing being :—(*a*) That the alleged injury to the applicant was not an injury arising out of and in the course of his employment. (*b*) That the alleged injury to the applicant was an intentional self-inflicted injury.

4. The following facts were proved :—The applicant, a married man, aged twenty-two years, with a dependent wife and child, was employed by the respondent for some months stripping wattle bark at Lett's Mountain, near Bombala, his remuneration being 25s. per week and keep. On 9th February 1933, at 7.50 a.m., he was working with certain other employees, the nearest being the foreman named Spackman, who was between 50 and 100 yards away. Applicant had felled a small wattle tree and stripped the bark from the trunk up to the point where the limbs branched from it. The trunk, which was 6 inches or 7 inches in diameter at the butt, was lying in a horizontal position supported at the butt by the stump from which it had been cut and at the other end by the branches of the tree. Having prized some bark up with a tomahawk, applicant stated that with his left hand he caught hold of a branch about 2 inches thick at a point 12 inches or 18 inches from the trunk, and with his right

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hand attempted to strike the tomahawk into the trunk of the tree, which was on his right side, in order that he could use both hands to pull off the before-mentioned bark. In doing so, applicant stated in evidence that the tomahawk on the upstroke struck a limb above his head which deflected the tomahawk and, after hitting the trunk, it glanced off on to his left index finger—almost severing it—which was resting on the small branch already mentioned. He walked to the foreman, the finger was bandaged, and applicant was taken to a doctor and then to Bombala Hospital, where he received treatment. Before the Commission applicant was emphatic that the tomahawk struck the limb on the upstroke. In the particulars filed with his application the account is: "As he struck a blow another limb deflected the axe which struck the tree at an angle and glancing off came into hard contact with applicant's left index finger." The respondent in evidence stated that on the Sunday following the accident at the hospital applicant gave him the following account, which he wrote down in applicant's presence :—" Whilst endeavouring to cut small limb off wattle tree, hatchet came in contact with bramble and so altered course of blow, causing same to come in contact with finger." In a statement made to one of the solicitors for respondent, applicant, in describing the occurrence, said :—" I lifted the tomahawk with my right hand about a foot, in doing so I struck another limb of the same tree and it turned the tomahawk towards my left hand which was lying on the bough." Later in the same statement he says :—" The bough deflected my aim when I was on the down blow. I did not strike anything as I was lifting the tomahawk." In another statement to an insurance inspector applicant said :—" In making the blow to stick the tomahawk into the tree the tomahawk came in contact with a branch of the tree which caused the tomahawk to glance off and it hit the index finger." Applicant demonstrated in Court the manner in which he then alleged the occurrence happened. When it was suggested to applicant in cross-examination that he would not have had to hit very hard to strike the tomahawk into the trunk of the wattle tree he said: " Yes, you have, because the tree being green and sappy the tomahawk would come out." Applicant was the only witness of the happening of

the injury. The foreman was not called, although respondent admitted he had spoken to him at Brogo the day before the hearing. Respondent stated in cross-examination that he did not believe applicant had chopped off his finger intentionally.

5. In arriving at the conclusion that the applicant had not discharged the onus of proving that the injury arose out of and in the course of his employment, the Commission was unable to reconcile the statements made by the applicant in the witness-box, and during the demonstration in Court, as to the happening, with those statements proved in evidence which he made elsewhere, particularly to respondent and to the solicitor. Applicant's demonstration was not convincing, and his demeanour not such as favourably to impress the Commission as to his veracity. When being closely observed in his demonstration he intentionally altered the position of his left thumb from a horizontal to an oblique position away from the forefinger which was injured. No injury was caused to any other portion of the left hand by the alleged occurrence. His explanation that it required a hard blow to strike the tomahawk into the sap wood of the green wattle tree trunk was regarded by the Commission as being not free from doubt. After making every allowance for strange happenings at accidents, the Commission found it difficult to believe that the striking of a branch above applicant's head on the upstroke of the tomahawk caused the deflection of the blade on the downstroke in the crooked course necessary to reach applicant's left forefinger, and further that it glanced from the trunk and then struck applicant's forefinger about 12 inches or 18 inches distant with sufficient force to almost completely sever that member. At the conclusion of the hearing the Commission was left in doubt as to how the injury arose, and was of opinion that it could not reasonably find on the evidence tendered that the injury arose out of and in the course of applicant's employment.

6. The Commission made an award in the following terms:— "Having duly considered the matters submitted the Commission finds that the evidence does not establish that applicant's injury to his left forefinger was intentionally self-inflicted as alleged, nor does it establish that applicant's injury arose out of and in the course of

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his employment with the respondent. Thereupon the Commission orders and awards as follows:—(*a*) That the award of the Commission herein be made in favour of the respondent. (*b*) By consent the applicant do pay the respondent his costs of and incident to this determination."

The Commission submitted the following question of law for the decision of the Supreme Court:—

(1) Did the Commission err in law in holding that the evidence did not establish that applicant's injury arose out of and in the course of his employment with the respondent?

At the express request of counsel for the applicant three further questions in the following terms were also submitted for determination by the Court:—

(2) The Commission having found that the evidence did not establish that the injury was intentionally self-inflicted, did the Commission err in law in making its award in favour of the respondent?

(3) The Commission having found that the evidence did not establish that the injury was intentionally self-inflicted, should the Commission have held that the applicant was entitled to receive compensation under the Act?

(4) In the absence of any express finding as to how the admitted injury was sustained, did the Commission err in law in holding that the injury received did not arise out of and in the course of applicant's employment?

In a "report of injury" completed and forwarded by him to an insurance company the respondent answered the question: Was the injury sustained in the course of the worker's employment with you? "Yes"; and the question: State the operation at which the worker was engaged at the time of the accident? "Stripping bark"; and in "supplementary remarks as to anything affecting the cause or probable consequences of the injury" he stated that "whilst endeavouring to cut small limb off wattle tree hatchet came in contact with bramble and so altered course of blow causing same to come in contact with finger." The report was tendered in evidence by counsel for the applicant.

The Full Court of the Supreme Court answered Questions 1, 2 and 3 in the negative, and, as neither party pressed for an answer to Question 4, did not answer that question.

From that decision the applicant now, by special leave, appealed to the High Court.

Ingham (with him *Dwyer*), for the appellant. The only question which arises is: Was the injury sustained by the worker caused accidentally, or was it self-inflicted? The Commission did not find that the injury was intentionally self-inflicted. In the absence of such a finding it must be taken that the injury was the result of an accident, or alternatively, the case should be sent back to the Commission for a definite finding upon this point: otherwise the Court will be unable to determine whether the injury arose out of and in the course of the employment. The evidence before the Court, including the admitted facts, is sufficient to justify a finding in favour of the appellant. In the circumstances the onus is upon the respondent to show that the injury was intentionally self-inflicted (*A. G. Moore & Co.* v. *Barkey* (1); *Lochgelly Iron and Coal Co. Ltd.* v. *Lindores* (2)). The Commission should have made a definite finding in the matter (*Herbert* v. *Samuel Fox & Co.* (3)). If the findings of the Commission are insufficient for the purpose of arriving at a determination the matter should be referred back to the Commission (*Maydew* v. *Chatterley-Whitfield Collieries Ltd.* (4)). Before arriving at the ultimate decision the Commission should find whether the worker had merely acted negligently within his employment, or had done something which took him outside his employment (*Taylor* v. *Lock* [*No.* 1] (5); *Partridge Jones and John Paton Ltd.* v. *James* (6); *Rogers* v. *Garside* (7)). [Counsel was stopped until after argument had been addressed to the Court on behalf of the respondent].

E. M. Mitchell K.C. (with him *Bradley*), for the respondent. It would seem that to an extent, and especially so as to material features, the Commission doubted the veracity of the appellant.

(1) (1923) A.C. 790.
(2) (1929) 22 B.W.C.C. 376.
(3) (1916) 1 A.C. 405; at p. 413.
(4) (1918) 119 L.T. 262.
(5) (1930) 23 B.W.C.C. 55.
(6) (1933) A.C. 501; (1932) 25 B.W.C.C. 92.
(7) (1915) 9 B.W.C.C. 91.

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The cases cited on behalf of the appellant are not cases where the tribunal rejected the evidence of the only witness, as here. In the circumstances the appellant has not discharged the onus of proving his case. His evidence as to how the injury was caused having been rejected, there was not any evidence on this point before the Commission (*Beaumont* v. *Underground Electric Railways Co. of London* (1)). An injury intentionally self-inflicted does not arise out of the employment. The onus of proving that an injury which he has sustained arose out of his employment is upon the worker. That onus is not discharged in cases where, as here, at the conclusion of the evidence, the Commission is left in doubt upon the matter.

Ingham, in continuation of argument and in reply. The evidence of the appellant is corroborated in material aspects by the evidence of his employer. Practically the whole of the facts were admitted; therefore the Commission was not entitled to disbelieve the appellant. All that the Commission found was that it was not satisfied as to the precise way the injury occurred. It is suggested that the appellant is seeking by fraud to obtain an award of compensation. Fraud must be proved strictly. In cases of this nature there is a presumption of innocence, and here there is not any evidence that the injury was intentionally self-inflicted. Under the decision in *A. G. Moore & Co.* v. *Barkey* (2) the appellant is entitled to an award. If not, the matter should be sent back to the Commission for a specific finding, for a decision as a matter of law, whether the injury arose out of and in the course of the appellant's employment.

GAVAN DUFFY C.J. The Court proposes to ask for further information. In the meantime the case will stand adjourned.

[The answers made by the Workers' Compensation Commission to questions directed to it by the High Court are shown in the judgment of *Starke* J. hereunder.]

Ingham. It is difficult to understand what the answers furnished by the Commission mean. On the facts admitted by the respondent in a report made by him and tendered in evi-

(1) (1912) 5 B.W.C.C. 247. (2) (1923) A.C. 790.

dence the Commission ought to have made a finding in favour of the appellant (*Upton* v. *Great Central Railway Co.* (1)). Those facts show that he was injured in the course of his employment by a risk he was bound to encounter (*Dennis* v. *A. J. White & Co.* (2)), and thus establish a prima facie case sufficient to bring the matter within the scope of the decision in *A. G. Moore & Co.* v. *Barkey* (3). There is not any evidence to show that the injury was intentionally self-inflicted, or that it was the result of something not within the scope of the appellant's employment (*Evans* v. *Raglan Collieries Ltd.* (4)). In *Pomfret* v. *Lancashire and Yorkshire Railway Co.* (5) the test applied was in respect to negligence, not workers' compensation; therefore that case is distinguishable. The Commission was wrong in applying that test to this case (*Simpson* v. *London, Midland and Scottish Railway Co.* (6)); *Thom* or *Simpson* v. *Sinclair* (7)). It is the duty of the Commission to make a definite finding (*Maydew* v. *Chatterley-Whitfield Collieries Ltd.* (8); *Dennis* v. *A. J. White & Co.* (9). The presumption of innocence remains unless and until rebutted by the respondent. The burden of proof is upon those who allege the doing of a wrongful act (*Hire Purchase Furnishing Co. Ltd.* v. *Richens* (10)).

E. M. Mitchell K.C., *Bradley* K.C., and *J. E. Pilcher*, for the respondent, were not further called upon.

The following judgments were delivered :—

Nov. 13.

GAVAN DUFFY C.J. The appeal should be dismissed with costs. I agree with the reasons about to be given by my brother *Dixon*.

RICH J. I agree. The appeal should be dismissed. The answers given by the Commission to the questions put to it have left the appellant without a case, in spite of the very able argument put forward by Mr. *Ingham*.

(1) (1924) A.C. 302.
(2) (1917) A.C. 479, at p. 491.
(3) (1923) A.C. 790.
(4) (1933) 26 B.W.C.C. 609, at p. 615.
(5) (1903) 2 K.B. 718.
(6) (1931) A.C. 351, at pp. 361, 378.
(7) (1917) A.C. 127, at p. 142.
(8) (1918) 119 L.T. 262.
(9) (1917) A.C., at p. 490.
(10) (1887) 20 Q.B.D. 387, at p. 389.

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STARKE J. This was a claim for compensation under the *Workers' Compensation Act* 1926-1929 of New South Wales. It appeared that the applicant was employed by the respondent for some months stripping wattle bark. According to the applicant, he attempted, whilst he was so engaged, to strike a tomahawk into the trunk of a tree, but the tomahawk was deflected by a bough, glanced off the trunk of the tree, struck his hand, which was resting on another bough of the tree, and severed his left forefinger. The Workers' Compensation Commission heard the claim, and at the conclusion of the evidence the Commission made an award in the following terms: "Having duly considered the matters submitted the Commission finds that the evidence does not establish that applicant's injury to his left forefinger was intentionally self-inflicted as alleged, nor does it establish that applicant's injury arose out of and in the course of his employment with the respondent."

Thereupon the Commission ordered and awarded, so far as material, as follows: "That the award of the Commission herein be made in favour of the respondent." The Commission then, pursuant to sec. 37 of the Act, stated certain questions of law for the Supreme Court of New South Wales. The questions were:—1. Did the Commission err in law in holding that the evidence did not establish that applicant's injury arose out of and in the course of his employment with the respondent? 2. The Commission having found that the evidence did not establish that the injury was intentionally self-inflicted, did the Commission err in law in making its award in favour of the respondent? 3. The Commission having found that the evidence did not establish that the injury was intentionally self-inflicted, should the Commission have held that the applicant was entitled to receive compensation under the Act? 4. In the absence of any express finding as to how the admitted injury was sustained, did the Commission err in law in holding that the injury did not arise out of and in the course of applicant's employment?

The Supreme Court decided questions 1, 2 and 3 in the negative, and, as neither party pressed for an answer to question 4, that question was not answered.

The decision of the Supreme Court was plainly right. The onus of proving that the injury arose out of and in the course of his employment was upon the applicant, and he failed to satisfy the Commission that it arose during the work he was employed to do. But this Court nevertheless gave leave to appeal. And it was seriously argued on the appeal that the Commission's finding meant that the applicant was injured in the performance of his work, but that the Commission was unable to say whether the injury was intentionally self-inflicted by the applicant. The facts stated by the Commission are, to my mind, incapable of any such interpretation. But for greater certainty this Court, following a precedent in the House of Lords (*Penrikyber Navigation Colliery Co.* v. *Edwards* (1)), inquired from the Commission what the facts stated by it meant. The inquiries and answers are as follows :—

Questions.	Answers.
Do the facts stated by the Commission mean :—	
(1) That the worker injured himself by a blow from a tomahawk	Yes.
and that before	Yes. Before he injured himself he was working at the tree.
and up to his doing so	No. The Commission did not accept his evidence that he was working at the tree when he injured himself.
he was working at the tree, but that the Commission on the evidence is unable to say whether he injured himself intentionally or not ?	Yes.
Or	
(2) That the Commission is unable on the evidence adduced before	

(1) (1933) A.C. 28.

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Questions.	Answers.
it to say whether the worker injured himself	
(*a*) at the tree	Yes.
or	
(*b*) by a blow from the tomahawk?	No. The worker injured himself by a blow from the tomahawk.

It is clear, on these facts, that the applicant has not established that his injury arose out of and in the course of his employment. It is unnecessary to consider whether the applicant should have succeeded if the first question had been answered in the affirmative.

The appeal ought to be dismissed.

DIXON J. The appellant claimed worker's compensation for loss of two joints of his left forefinger. He was employed by the respondent, near Bombala, stripping wattle bark. Before he reported his injury, he had been stripping bark from a wattle tree that he had felled. His case was that, having prized some bark up with his tomahawk, he was about to use both hands to pull it off the tree. To leave his right hand free he attempted to strike the tomahawk into the tree. But it caught a branch by which it was deflected, with the result that it cut off the end of his finger. No person was nearer to him than fifty yards at the time.

The Workers' Compensation Commission felt some dissatisfaction with his evidence, particularly with his account of how the blow of the hatchet was deflected. The Commission entertained some suspicion that his injury was self-inflicted. In the end it made the following award:—"Having duly considered the matters submitted the Commission finds that the evidence does not establish that the applicant's injury to his left forefinger was intentionally self-inflicted as alleged, nor does it establish that the applicant's injury arose out of and in the course of his employment with the respondent."

The appellant required a special case under sec. 37 (4), which the Commission accordingly stated for the decision of the Supreme

Court. The statement of facts contained in the special case was open to the interpretation that until the delivery of the blow which amputated his finger joints, the appellant was working at the tree, but that the Commission was unable to determine affirmatively whether the appellant had struck his forefinger unintentionally in the process of work or intentionally.

The Supreme Court decided the questions submitted by the special case against the appellant upon the ground that it meant that the Commission had been unable to accept the appellant's evidence as reliable and had been left with nothing to show that his story was substantially or at all accurate. Special leave to appeal from this decision was obtained from this Court, because, as I infer, the case was considered to raise the question of law whether, when it appeared that an injury occurred while the worker was at work, the onus of proving that it was intentionally self-inflicted fell upon the employer.

Upon the hearing of the appeal, I was inclined to think that from the statement of facts in the special case we should understand that the appellant injured himself by a blow from his tomahawk, and that before and up to his doing so he was working at the tree, but that the Commission on the evidence was unable to say whether he injured himself intentionally or not. A majority of the Court, however, considered that it was desirable to consult the Commission as to the meaning intended to be conveyed by the special case. The Commission has now informed us that it was unable on the evidence to say that, when the worker injured himself with a tomahawk, he was at the tree, and that it did not accept his evidence that he was working at the tree when he injured himself. This, in substance, confirms the interpretation of the special case adopted by the Supreme Court. It leaves no room for the specific question of law which appeared to arise, because there is no finding to the effect that the appellant's injury was sustained when at work. Mr. *Ingham* contends, however, that the Commission was bound in point of law to find that at the time of injury the workman was at the tree ostensibly working. It must be conceded that the material before the Commission strongly supports such a conclusion

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of fact, but the initial burden of proof is upon the applicant and the question whether he has so completely discharged it as to make a finding to the contrary unreasonable is not a question of law (see *Shepherd* v. *Felt and Textiles of Australia Ltd.* (1); *Driver* v. *War Service Homes Commissioner* [*No.* 1] (2)). We are not exercising a jurisdiction to control findings of a tribunal of fact, as a Court does upon an application to set aside a verdict of a jury. We are limited to questions of law. Mr. *Ingham* also contended that, once the explanation was suggested that the injury was self-inflicted, the burden of supporting it by evidence fell upon the employer and unless the Commission were satisfied affirmatively that the injury was self-inflicted, it was bound to hold that the injury arose out of the employment and could not take into account the possibility of self-infliction as an explanation of the unsatisfactory proofs offered by the worker. I do not agree with this view. As I understand the law, there is no rule requiring affirmative proof that an unlawful act or misconduct has actually taken place when the possibility of its occurring is relied on as a reasonable explanation of facts otherwise tending to prove an issue against the party suggesting it. The general rule is laid down in *Doe d. Devine* v. *Wilson* (3). That was a case where the authenticity of a document was in question and it was sought to throw the burden of proving it to be a forgery on the party impugning it. Speaking for the Privy Council, Sir *John Patteson* said: "In a civil case the onus of proving the genuineness of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities" (4). Self-inflicted injury or other misconduct as an explanation of what might otherwise be due to accident appears to me to be in the same category.

(1) (1931) 45 C.L.R. 359, at p. 379.
(2) (1924) V.L.R. 515, particularly at pp. 533-534.
(3) (1855) 10 Moo. P.C.C. 502, at p. 531; 14 E.R. 581, at p. 592.
(4) (1855) 10 Moo. P.C.C., at p. 531; 14 E.R., at p. 592.

The existence in the Act of an express proviso that no compensation shall be payable for self-inflicted injury (sec. 7 (3) (*c*)) does not make it less necessary that the applicant should affirmatively establish the conditions of liability, one of which is that the injury arose out of the employment. It may be that, if he proves that while actually at his work he received such an injury as that now in question, this onus must as a matter of law be treated as sufficiently discharged, unless and until the employer shows that the injury was intentionally inflicted. But when the place and occasion of injury remain unproved, the so-called presumption of innocence cannot be used to shift the burden of proof. It is only one of the arguments of probability to be taken into account by the tribunal of fact.

I think the appeal should be dismissed with costs.

McTIERNAN J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, *Abram Landa.*

Solicitors for the respondent, *Dawson, Waldron, Edwards & Nicholls.*

J. B.