[HIGH COURT OF AUSTRALIA.]

DEEBLE . . . . . APPELLANT;
PLAINTIFF,

AND

NOTT . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 7, 8, 21.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Railways—Gratuity—Retirement from service—Incapacity—"Bodily injury"—Paralysis agitans or similar disease—Aggravation or acceleration—Government Railways Act 1912-1934 (*N.S.W.*) (*No.* 30 *of* 1912—*No.* 28 *of* 1934), *sec.* 116.

Sec. 116 of the *Government Railways Act* 1912-1934 (N.S.W.) provides that "a gratuity . . . shall be payable to any officer who is incapacitated from the further discharge of his duties by reason of bodily injuries received in the course of his duty, and who retires from the service."

The plaintiff in an action for a gratuity under sec. 116 of the *Government Railways Act* was incapacitated from the further discharge of his duties by reason of a nervous disease which involved some organic deterioration of the brain cells, and retired from the service. For some years he had worked as a turner at a lathe which was defective, and in 1933 was injured while working thereat. On his return to work he was again put on to the lathe, which was still defective, but he became increasingly nervous, owing to fear of another injury, and ultimately refused to work on it any longer. He was put on another machine at heavier work. His nervous condition became steadily worse, until he became incapacitated for further work. According to the medical evidence, the plaintiff's disease was not caused by his work, but a medical witness called for the plaintiff said that the plaintiff's condition as a whole could be, and in his opinion was, greatly aggravated by working at the defective lathe in constant fear of danger and subsequently at the heavier machine.

Held that there was evidence on which a jury could reasonably find that the physical change in the structure of the plaintiff's brain was accelerated by his work; on this finding the plaintiff had suffered a "bodily injury" within the meaning of sec. 116, and was entitled to a gratuity.

Decision of the Supreme Court of New South Wales (Full Court): *Deeble* v. *Nott*, (1940) 58 W.N. (N.S.W.) 32, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales, Daniel Percy Deeble sued Melville Charles Nott, a nominal defendant on behalf of the Government of New South Wales, for the sum of £300, the amount of a gratuity to which he claimed to be entitled by virtue of the provisions of sec. 116 of the *Government Railways Act* 1912-1934 (N.S.W.).

Sec. 116 provides that "a gratuity . . . shall be payable to any officer who is incapacitated from the further discharge of his duties by reason of bodily injuries received in the course of his duty, and who retires from the service."

Deeble entered the service of the Railway Commissioners of New South Wales as a turner in 1911. In 1930 he suffered from neurasthenia, which caused his absence from work for about fourteen weeks. For a long time prior to 18th July 1933 he had been working at a high-speed lathe which was defective in that it would sometimes start and sometimes stop for no apparent cause. On that date, whilst working at the lathe, the defective condition of the machine caused one of his fingers to be injured and it had to be amputated. As a result he was absent from work for about three months. He resumed work at the lathe on 16th October 1933. It was still defective, and he became increasingly nervous whilst working at it. Ultimately, in June 1935, he refused to work at the lathe any longer, and he was then put on to different work at another machine and of a heavier character. After he had taken up this work his mouth and face began to twitch uncontrollably. His condition became steadily worse, and on 20th April 1936 he had to cease work in order to receive medical treatment, and was not afterwards able to resume work until his retirement from the railway service on 19th May 1937.

According to the evidence, Deeble had some organic disease of the nervous system, some physical degeneration of the brain itself and a destruction of nerve cells which had produced a peculiar spasmodic contraction of the face muscles inducing a continuous yawning movement of the mouth and twitching of the face. The medical evidence was to the effect that he had paralysis agitans or Parkinson's disease or some condition similar or allied to that disease, and also some functional disturbance. That evidence showed that his work did not cause the condition mentioned, which developed gradually and slowly. Two medical witnesses called for the defendant said that the plaintiff's employment would not have had any effect on the origin or progress of the disease. A specialist in nervous and mental disorders called for Deeble deposed, however, that his

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condition as a whole could have been and was, in his opinion, greatly aggravated by working at the defective lathe in constant fear of danger and also by the heavier work he was called upon to perform at the other machine. He added that it was impossible to be dogmatic, for there was in addition to probable organic trouble some disturbance of functions.

The trial judge held that there was not any evidence upon which the jury could find that Deeble was incapacitated from the further discharge of his duties by reason of bodily injury received in the course of his duty, and, by his direction, the jury returned a verdict for the defendant.

In order, however, to avoid the necessity of a new trial in the event of it being held that Deeble had made a case fit to be submitted to the jury, the trial judge asked the jury to answer the following question: Was the progress of the disease of the brain from which the plaintiff suffers accelerated by mental disturbance caused by his work? The jury's answer was: Yes.

It was not disputed that if Deeble established the existence of the conditions prescribed by sec. 116, the amount of gratuity to which he would be entitled was £300.

An appeal by Deeble was dismissed by the Full Court of the Supreme Court: *Deeble* v. *Nott* (1).

From that decision he appealed to the High Court.

Further facts appear in the judgments hereunder.

Miller K.C. (with him *Dwyer*), for the appellant. The appellant is entitled to a gratuity under sec. 116 of the *Government Railways Act* 1912-1934, and, in addition, or alternatively, under sec. 100E of that Act. He retired from the service of the Railway Commissioners as the result of bodily injuries received in the course of his duty, the bodily injuries being anxiety neurosis operating upon and aggravating a brain deterioration from which he suffered. This is shown by affirmative evidence; therefore *Commissioner for Railways* v. *Corben* (2) is not applicable. That neurosis or fear complex, which was caused by the nature of the work performed by him, materially contributed to his ultimate breakdown whereby he became incapacitated from work. "Bodily injuries" are not, and should not be, confined to physical damage to the structure of the body. The expression "bodily injuries" in sec. 116 means "injuries" as in sec. 100E, and should be construed as personal injuries as under sec. 7 of the *Workers Compensation Act* 1926-1939 (N.S.W.). Nervous

(1) (1940) 58 W.N. (N.S.W.) 32.
(2) (1938) 39 S.R. (N.S.W.) 55; 56 W.N. 7.

shock was held to be personal injury arising out of the course of employment in *Yates* v. *South Kirkby &c. Collieries Ltd.* (1) and *Pugh* v. *London, Brighton and South Coast Railway Co.* (2). Any material contribution from the work which has the result of converting a mind-controlled mass of tissues into a mass of tissues no longer mind-controlled is bodily injury. *Ex parte Rae*; *Re Hartigan* (3) was not correctly decided. The expression "bodily injuries" in sec. 116 is not a technical term. It is satisfied by any interference with or impairment of the normal functioning of the human body as a capable body. Provided such interference or impairment is associated with the work it is bodily injury within the meaning of the section, and it is so even if such interference or impairment has resulted from an aggregation of factors one only of which is associated with the work. The work upon which the appellant was engaged contributed to the ultimate result by accelerating or aggravating the disease from which he was suffering (*Hetherington* v. *Amalgamated Collieries of W.A. Ltd.* (4); *Oates* v. *Earl Fitzwilliam Collieries Co.* (5); *Partridge Jones and John Paton Ltd.* v. *James* (6); *Clover, Clayton & Co. Ltd.* v. *Hughes* (7); *Small* v. *Metters Ltd.* (8))—See also *Smith* v. *Australian Woollen Mills Ltd.* (9).

Loxton, for the respondent. The main question does not turn on the meaning of "bodily injuries": it depends upon whether the appellant has proved that his retirement was due to incapacity which he had received in the course of his employment and, therefore, that he comes within sec. 116. The only evidence is that the appellant was retired, that at the time of retirement he was incapacitated, and that that incapacity was caused by disease. There is not any evidence of the extent to which his disease was aggravated by his work, or that it was so aggravated at all. Decisions in respect of workers' compensation legislation as cited on behalf of the appellant are not applicable. Those are cases in which the workers respectively concerned underwent some physiological change. There is not any evidence of any physiological change on the part of the appellant attributable to his work. Assuming, but not admitting, that there is evidence that his work caused an aggravation or acceleration of his disease, there is not any evidence from which a jury could infer that such aggravation or acceleration caused the appellant's retirement any earlier than would have been the case in

(1) (1910) 2 K.B. 538, at p. 541.
(2) (1896) 2 Q.B. 248, at p. 251.
(3) (1940) 40 S.R. (N.S.W.) 438; 57 W.N. 164.
(4) (1939) 62 C.L.R. 317.
(5) (1939) 2 All E.R. 498, at p. 502.
(6) (1933) A.C. 501.
(7) (1910) A.C. 242; 3 B.W.C.C. 275.
(8) (1941) 41 S.R. (N.S.W.) 97; 58 W.N. 101.
(9) (1933) 50 C.L.R. 504.

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the normal course of his disease. The trial judge was right in directing a verdict for the respondent (*Commissioner for Railways* v. *Corben* (1), and cases there cited). The expression "bodily injuries" in sec. 116 means traumatic injuries; it does not mean "personal" injuries, therefore *Yates* v. *South Kirkby &c. Collieries Ltd.* (2) and *Pugh* v. *London, Brighton and South Coast Railway Co.* (3) do not apply. There is a distinction between nervous shock and bodily injuries: See *Pollock* on *Torts*, 13th ed. (1929), pp. 50, 51. Sec. 100E refers to far wider matters than are contemplated by sec. 116.

Miller K.C., in reply. It was necessary for the appellant to adduce evidence for the purpose of accurately measuring the extent of the aggravation caused by his work upon his disease. The test to be applied is: Was the appellant incapacitated by the disease alone, or did his work contribute thereto in a material degree? (*Old* v. *Furness Withy & Co. Ltd.* (4); *McFarlane* v. *Hutton Brothers (Stevedores) Ltd.* (5); *Hore* v. *General Steam Navigation Co.* (6); *Smith* v. *Railway Commissioners for New South Wales* (7); *Leabeater* v. *Mashman Brothers* (8)).

Cur. adv. vult.

April 21. The following written judgments were delivered:—

RICH A.C.J. I have had the advantage of reading the judgment of my brother *Williams* and agree with it.

The appeal should be allowed and the order of the Supreme Court set aside and in lieu thereof verdict for £300 and judgment entered for the appellant. Costs in this court and of the trial and motion to the Supreme Court to be paid by the respondent.

STARKE J. The *Government Railways Act* 1912-1934 (N.S.W.), sec. 116, provides that "a gratuity . . . shall be payable to any officer who is incapacitated from the further discharge of his duties by reason of bodily injuries received in the course of his duty, and who retires from the service." The plaintiff appellant entered the railway service as a turner in 1911: he was injured in July 1933 whilst working at a defective lathe, and a finger was amputated. He returned to work in October 1933 and resumed work at the lathe, which was still defective. But he became so nervous, owing to fear that he might be injured, that he was, at

(1) (1938) 39 S.R. (N.S.W.), at pp. 58, 59.
(2) (1910) 2 K.B. 538.
(3) (1896) 2 Q.B. 248.
(4) (1934) 27 B.W.C.C. 266.
(5) (1926) 20 B.W.C.C. 222.
(6) (1929) 22 B.W.C.C. 100.
(7) (1929) 3 W.C.R. (N.S.W.) 51.
(8) (1931) 5 W.C.R. (N.S.W.) 177.

his own request, about July 1935, put on another machine and at heavier work. His condition became steadily worse and by April 1936 he was incapacitated from further discharge of his duties and retired in May 1937.

According to the evidence, he has some organic disease of the nervous system: some physical degeneration of the brain itself and a destruction of nerve cells which has produced a peculiar spasmodic contraction of the face muscles inducing a continuous yawning movement of the mouth and twitching of the face. The medical evidence is to the effect that he has paralysis agitans or Parkinson's disease or some condition similar or allied to that disease and also some functional disturbance.

But it is clear on the medical evidence that his work as a turner in the railway workshop did not cause the condition mentioned, which developed gradually and slowly. A specialist in nervous and mental disorders called for the appellant deposed, however, that the appellant's condition as a whole could have been and was in his opinion greatly aggravated by working at the defective lathe in constant fear of danger, and also by the heavier work that he was called upon to perform at the other machine. He added that it was impossible to be dogmatic, for there was in addition to probable organic trouble some disturbance of functions.

The action was tried with a jury, and the learned trial judge held that there was no evidence upon which the jury could find that the appellant was incapacitated from the further discharge of his duties by reason of bodily injuries received in the course of his duty, and this decision was supported upon appeal. But, in order to avoid the necessity of a new trial in case it were held that the appellant had made a case fit to be submitted to the jury, the following question was submitted to them: "Was the progress of the disease of the brain from which the plaintiff suffers accelerated by mental disturbance caused by his work?" The charge to the jury thus explained the question: "You will please consider this question and state whether, in your opinion, you think the emotional and mental disturbance which the plaintiff" (appellant) "admittedly suffered accelerated or aggravated the progress of this disease of the brain which the doctors unanimously say does and did exist." The jury anwered the question submitted to them in the affirmative.

The words "bodily injuries" in sec. 116 of the Act cannot be confined to external bodily or traumatic injuries, but extend to any injuries to the material body of man and its properties, or, in short, to any physical injuries. The evidence is clear that the appellant was incapacitated from the further discharge of his duties and that

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he had retired from the service. And there is ample evidence that the appellant suffered from some organic disease, some physical degeneration of the brain involving destruction of nerve cells. Fear just as well as sudden terror or nervous shock may, it is now recognized, affect the physical state of the body as well as mental, nervous, or other functions.

The critical question is whether there is any evidence upon which a jury might reasonably conclude that the physical change in the structure of the appellant's brain was accelerated or aggravated by working at the defective lathe in constant fear of danger. If the appellant's work and his disease together contributed to that physical change in structure then it follows, in my opinion, that the appellant was incapacitated by reason of bodily injuries received in the course of his duty: See *Hetherington* v. *Amalgamated Collieries of W.A. Ltd.* (1) and the cases there collected. As already stated, the evidence is clear that his work was not the origin of the physical change in the structure of his brain. But there is no doubt that after the amputation of his finger he worked at the defective lathe in constant fear of injury, that he developed severe nervous symptoms, which became progressively worse, and that after working eighteen months at the defective lathe he refused to do so any longer and was put on to another machine which involved heavier work, that he lost considerable weight and generally deteriorated in physical condition. All this, it is argued, is as consistent with the progress of his disease as with any physical injury received in or contributed to or aggravated by the performance of his duties. The question is one of fact, dependent in large measure upon the opinions and conclusions of several competent medical men. But if their opinions and conclusions conflict, then the right conclusion must necessarily be left to the consideration of the jury. It is true that the medical expert who gave evidence for the appellant said that it was impossible to be dogmatic, but his clear opinion was that the physical change in the structure of the appellant's brain was contributed to and accelerated or aggravated by the constant fear induced by working the defective lathe. The fear complex, which developed after the amputation of the appellant's finger, and the rapid deterioration of his physical condition in these circumstances, suggests that the deterioration of his physical condition was contributed to or aggravated by his work, for otherwise the development of his disease would normally be slow and gradual. And the jury had the opinion of a competent and expert medical man to the effect that the physical deterioration of

(1) (1939) 62 C.L.R., at pp. 330, 331.

the appellant was accelerated or aggravated by his work. In my opinion, the jury viewing the evidence reasonably might so conclude.

The result is that the appeal should be allowed, the verdict for the defendant set aside, and a verdict entered for the appellant for the agreed sum of £300.

McTIERNAN J. The appellant sued the defendant for the amount of a gratuity to which he claimed to be entitled by virtue of the *Government Railways Act* 1912 (N.S.W.) as amended. It was admitted that he was an officer, that he was incapacitated from the further discharge of his duties and retired from the service. The contested issue was whether he was incapacitated by reason of bodily injury received in the course of his duty. The case now turns on the question whether there was any evidence on which the jury could properly decide this issue in the appellant's favour.

The learned trial judge, whose decision was upheld by the Full Court, thought that there was not any such evidence, and directed a verdict to be entered for the respondent. But in order to avoid a new trial if that should otherwise have been necessary, his Honour asked the jury to answer this question: "Was the progress of the disease of the brain from which the plaintiff suffers accelerated by mental disturbances caused by his work?" The jury's answer was: Yes. It was common ground that if the disease had caused some physical deterioration of the appellant's brain tissue, such deterioration was plainly a bodily injury.

If an external cause brought about a more rapid deterioration than that which would occur because of natural causes, it would, in my opinion, be correct to say that he received a bodily injury. It follows that the question put to the jury contained a correct criterion of liability. There was evidence from which the jury could properly find that the incapacity for work was the result of the progress of the disease. The question that remains is whether there was any evidence upon which the jury could properly—that is, acting reasonably in the eye of the law—find that the mental disturbances produced by the appellant's work accelerated the deterioration of his brain tissue. The Full Court thought that there was no such evidence. The Chief Justice considered that Dr. Arnott's evidence, upon which the appellant depends, amounts to no more than speculation whether there was a connection between the fear which admittedly the appellant experienced while working at the lathe and the deterioration of his brain tissue. I have carefully read Dr. Arnott's evidence, and the view which I have taken of it is that it contains the doctor's scientific opinion that there is a causal

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connection between the mental disturbances produced by the appellant's fear of the lathe and the deterioration of his brain tissue. It was, therefore, evidence which could legitimately assist the jury in forming a judgment on the question put to them.

It was entirely within their province to act on Dr. Arnott's opinion rather than on other expert evidence which was not in agreement with it. "*Cuilibet in sua arte perito est credendum*" (*Co. Litt.* 125 (*a*)).

In my opinion the appeal should be allowed, the verdict for the respondent set aside, a verdict for £300 entered for the appellant and he should have his costs of the appeal to this court and the Full Court and of the trial.

WILLIAMS J. The appellant was in the employ of the Railway Commissioners from September 1911 until 19th May 1937. At the date of his retirement he was forty-nine years of age. He had an attack of neurasthenia in 1930, from which he returned to work after fourteen weeks, and appeared to have recovered. On 18th September 1933 he suffered an accident which resulted in the loss of a finger. When the accident occurred he was engaged in working a high-speed lathe. He had been doing the same work for the past twenty years. This lathe was in a defective condition, because it had no proper stop, and was in the habit of starting suddenly and without warning. One of these starts caused the accident.

When the appellant returned to work after the accident, he had a dread of the lathe for this reason, and it affected his nervous system. He became shaky, lost weight, and was obliged to seek medical advice. About June 1935 he had to refuse to continue his work on the lathe. He was then put on to another machine, where he had to turn heavy train buffers. He found the work very hard, his general nervous condition became worse, his mouth and face began to twitch and move uncontrollably, and he had a nervous tremor in his fingers. He had to seek continuous medical treatment.

On 20th April 1936 he was forced to cease work. The twitching of his jaw and the tremor of his fingers continued, his speech became slurred and indistinct, and he lost further weight. He was given leave, and received medical and hospital treatment, but did not recover, and was finally retired from the service on 19th May 1937. He had been a contributor to the superannuation fund.

Apart from the attack of neurasthenia already mentioned, he appears to have enjoyed good health prior to the date of the accident to his finger.

Sec. 116 of the *Government Railways Act* 1912-1934 (N.S.W.) provides that "a gratuity shall be payable to any officer who is incapacitated from the further discharge of his duties by reason of bodily injury received in the course of his duty, and who retires from the service." If the appellant could bring himself within the section his gratuity would be £300. The evidence shows he retired from the service because he was incapacitated from the further discharge of his duty.

The questions that arise are whether (*a*) the incapacity arose by reason of bodily injury, and, if so, (*b*) the bodily injury was received in the course of his duty.

Three specialists in mental and nervous disorders, Dr. Arnott, called on behalf of the appellant, and Dr. S. A. Smith and Dr. McGeorge, called on behalf of the respondent, gave evidence at the trial. They all agreed that the appellant was suffering from a nervous disease which involved some organic deterioration of the brain cells. Dr. Smith and Dr. McGeorge considered he had paralysis agitans, which is an organic disease of the nervous system, sometimes known as Parkinson's disease. Dr. Arnott thought the disease to be some rare condition akin thereto. The disease usually develops over a long period of from ten to twenty years, and eventually results in total incapacity due to inability to use the muscles properly. They also agreed that the origin of the disease is obscure, but that it was not caused by the accident to his finger.

There have been many decisions upon clauses in insurance policies and provisions in workmen's compensation Acts which have contained expressions such as "bodily injury," "personal injury," and "injury." They show the three expressions have been used indiscriminately to mean the same thing and to cover all cases where a person suffers a physiological injury or change as a result of the happening of the event insured against. They have been held to include many diseases, including bodily disability resulting from the nervous consequences of an accident. In *In re an Arbitration between Etherington and The Lancashire and Yorkshire Accident Insurance Co.* (1) death caused by an attack of pneumonia supervening upon a fall in a wet hunting field was held to be a bodily injury: See also *Isitt* v. *Railway Passengers Assurance Co.* (2); *In re United London and Scottish Insurance Co. Ltd.*; *Brown's Claim* (3). In many cases under the workmen's compensation Acts the contraction of a disease has been held to be an accident arising

(1) (1909) 1 K.B. 591.
(2) (1889) 22 Q.B.D. 504.
(3) (1915) 2 Ch. 167.

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out of the employment :—For instance, *Brinton's Ltd.* v. *Turvey* (1) (anthrax) ; *Glasgow Coal Co. Ltd.* v. *Welsh* (2) (rheumatism) ; *Innes or Grant* v. *G. and G. Kynoch* (3) (blood poisoning) ; *Walker* v. *Bairds and Dalmellington Ltd.* (4) (pneumonia).

Diseases caused by nervous affections arising from accidents have been held to be "personal injuries" within the meaning of the Acts : *Eaves* v. *Blaenclydach Colliery Co. Ltd.* (5) (anaesthesia of the leg) ; *Southampton Gas Light and Coke Co.* v. *Stride* (6) (functional paraplegia) ; *Fife Coal Co. Ltd.* v. *Young* (7) (dropped foot) ; *Yates* v. *South Kirkby &c. Collieries Ltd.* (8) (nervous shock).

Many injurious diseases contracted in the course of the employment have been held to be outside the Acts because of the difficulty of establishing that their slow and continuous onset, in the course of which no event occurs of which time and place can be specified, is an accident (*Young's Case* (9)). This difficulty would not arise in the present case because, as it is only necessary to show that the bodily injury arose in the course of the duty, the incapacity causing the retirement could be sudden or of slow growth.

The learned Chief Justice of the Supreme Court considered that secs. 113 (*b*) and 117 showed that the legislature intended the words "bodily injury" in sec. 116 to be confined to incapacity arising from physical damage to the structure of the body as contrasted with loss of control occasioned by psychic disturbances. I do not take this to mean, as suggested in the argument, that the injuries referred to in *Eaves'* (10), *Stride's* (11), *Yates'* (8) and *Young's Cases* (7) would be outside the section. If it does, then, in my opinion, it is too narrow a construction. Very little light appears to be thrown onto its meaning by secs. 113 (*b*) and 117. They make use of the expression "infirmity of body or mind," but the legislature was dealing with the retirement of an officer brought about by some infirmity not referable to the course of his duty. Sec. 100E on the contrary shows that the legislature intended bodily injury in sec. 116 to mean the same thing as personal injury in the *Worker's Compensation Act*, and "received in the course of duty" to be equivalent to "arising out of and in the course of the employment."

Employment in the railway must expose many officers to the risk of incapacity from diseases due to exposure, such as tuberculosis and rheumatism ; and to nervous diseases due to shock, such as those described by *Farwell* L.J. in *Eaves' Case* (12) and by *Cozens-Hardy*

(1) (1905) A.C. 230.
(2) (1916) 2 A.C. 1.
(3) (1919) A.C. 765.
(4) (1935) 153 L.T. 322.
(5) (1909) 2 K.B. 73.
(6) (1916) 115 L.T. 498.
(7) (1940) A.C. 479.
(8) (1910) 2 K.B. 538.
(9) (1940) A.C., at p. 488.
(10) (1909) 2 K.B. 73.
(11) (1916) 115 L.T. 498.
(12) (1909) 2 K.B., at p. 76.

M.R. and *Kennedy* L.J. in *Yates' Case* (1) respectively. Incapacity arising from such diseases would be "bodily injury" within the meaning of the section. Neurasthenia, not due to shock, and not involving any physical or functional change in the condition of the body, may not be a bodily injury (*Charles Wall Ltd.* v. *Steel* (2); *Ex parte Rae*; *Re Hartigan* (3)); but it is unnecessary to express any final opinion on this point, because it is immaterial to decide whether the cause of the involuntary movements of the appellant's jaw is physical or mental (per *Cozens-Hardy* M.R. in *Stride's Case* (4)). Whatever the cause it is a bodily injury. Even if it is not, the medical evidence shows that the appellant is suffering from an organic disease of the nerves, resulting in a degeneration in the condition of the cells and tissues of the brain, and this is just as much a bodily injury as the aneurism referred to in *Clover, Clayton & Co. Ltd.* v. *Hughes* (5), which Lord *Macnaghten* described as "an unnatural or abnormal dilation of an artery; but still it is a part of the artery, and so a part of the man's body" (6).

The remaining question is whether there was sufficient evidence that this bodily injury was received in the course of the appellant's duty.

At the trial the learned judge left the following question to the jury: "Whether, in your opinion, you think the emotional and mental disturbances which the plaintiff admittedly suffered accelerated or aggravated the progress of this disease of the brain which the doctors unanimously say does and did exist."

The jury answered the question in the affirmative.

In cases decided under the workmen's compensation Acts in England and Australia it has been held that a worker is entitled to compensation where the employment contributed in a material degree to the personal injury caused by the accident, even though it would not have occurred if the worker's condition had not predisposed him to such an injury (*Hetherington* v. *Amalgamated Collieries of W.A. Ltd.* (7)). The words "by accident" do not occur in the *Workers' Compensation Act* 1926-1929 (N.S.W.). The expression used is "personal injury arising out of and in the course of the employment." But the Act has been construed to mean the same thing (*Smith* v. *Australian Woollen Mills Ltd.* (8); *Small* v. *Metters Ltd.* (9)).

It was evidently the view of the learned trial judge, with which I agree, that sec. 116 would be satisfied if the evidence established

(1) (1910) 2 K.B., at pp. 541, 543.
(2) (1915) 112 L.T. 846, at p. 848.
(3) (1940) 40 S.R. (N.S.W.) 438; 57 W.N. 164.
(4) (1916) 115 L.T., at p. 499.
(5) (1910) A.C. 242.
(6) (1910) A.C., at p. 249.
(7) (1939) 62 C.L.R. 317.
(8) (1933) 50 C.L.R. 504.
(9) (1941) 41 S.R. (N.S.W.) 97; 58 W.N. 101.

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that the duties of the appellant contributed in a material degree to the physiological injury or change which occurred in his brain structure and incapacitated him from further duty, even though the change was occasioned partly or even mainly by the progress or development of an existing disease.

According to Drs. Smith and McGeorge his employment could have had no effect on the origin or progress of the disease. The jury were entitled, however, to reject their opinion, especially in view of the admission, which they made so fairly, that the origin of the disease was obscure. Dr. Arnott on the other hand said that the appellant's condition as a whole could have been greatly aggravated by his having to work at the dangerous lathe and subsequently at the heavier machine. He pointed out that the organic changes in the brain could have been precipitated by fear. He said that as a result of an attack of neurasthenia in 1930, the appellant could have suffered from an unhealthy brain in the sense that the nervous tissues were not up to the mark or the arteries were below normal; and that, in such a case, fear or any emotion may so disturb the circulation of the brain as to cause degeneration by the destruction of nerve cells. He said that, so far as he was concerned, the disease started when the jaw movements commenced, and that it might be a particularly sudden thing.

It is true that Dr. Arnott could not swear positively that the duty the appellant was performing did in fact precipitate or materially contribute to the progress of the disease. He was quite definite, however, that it could do so, and no honest witness could be expected to say more in view of the existing imperfect state of the medical knowledge on the subject.

The facts are, however, that for some time prior to June 1935 the appellant's duties had been causing him severe mental strain; and that about then he commenced to exhibit the distressing outward and visible symptoms, due to loss of control over muscle tone, which are admittedly attributable to the organic brain degeneration which Dr. Arnott said this mental strain could have caused. Whether this was due to the disease then originating or to an aggravation of an already existing disease is immaterial. No other explanation was proffered to explain this onset.

Something must have caused it, and the question is whether it is proper legal inference or pure conjecture to attribute it to an injury received in the course of the appellant's duty. In *Minifie* v. *Railway Passengers Assurance Co.* (1) *Pollock* B. referred to the "legal or surgical evidence which tends to prove or disprove the connection of cause and effect between the accident and the death of the deceased."

(1) (1881) 44 L.T. 552, at p. 554.

In *Brintons Ltd.* v. *Turvey* (1), where it was inferred that the bacillus passed from the wool to the eye of the workman and infected him with anthrax from which he died, Lord *Macnaghten* pointed out the judge had found that there was no abrasion about the eye " while the medical evidence seems to be that without some abrasion infection is hardly possible " (2). In truth, the judges of fact, in the present instance the jury, are allowed considerable latitude in drawing inferences to establish that the injury arose out of the accident: See, for instance, *Martin* v. *Travellers' Insurance Co.* (3); *Trew* v. *Railway Passengers' Assurance Co.* (4); *Isitt's Case* (5); *Etherington's Case* (6); and *Owners of Ship Swansea Vale* v. *Rice* (7). In the last-mentioned case Lord *Loreburn* L.C. said: " What you want is to weigh probabilities, *if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities* at their respective value, the one against the other " (8). In *Innes or Grant* v. *G. and G. Kynoch* (9) Lord *Buckmaster* referred to a statement by the same Lord Chancellor in *Lyons* v. *Woodilee Coal and Coke Co.* (10) " ' that as there are many causes of most events, it ' (i.e. the connection between the work and the disease) ' must be a connection which is not, as a matter of common sense, too remote.' "

At least it can be said that " the facts in the present case speak, in a whisper it is true, but still audibly " (*Craig* v. *Glasgow Corporation* (11); *Jones* v. *Great Western Railway Co.* (12)), and provide a foothold or ground to enable the jury to hold, as a matter of common sense, that the question they were asked should be answered in the affirmative.

For these reasons I am of opinion that the appeal should be allowed.

Appeal allowed. Order of the Supreme Court set aside, verdict for defendant (respondent) set aside. Direct verdict be entered for plaintiff (appellant) for £300 and judgment accordingly. Respondent to pay the costs of this appeal and of the trial and motion to the Supreme Court.

Solicitors for the appellant, *C. Jollie Smith & Co.*

Solicitor for the respondent, *A. H. O'Connor*, Crown Solicitor for New South Wales.

J. B.

(1) (1905) A.C. 230.
(2) (1905) A.C., at p. 234.
(3) (1859) I. F. & F. 505 [175 E.R. 828].
(4) (1861) 6 H. & N. 839 [158 E.R. 346].
(5) (1889) 22 Q.B.D. 504.
(6) (1909) 1 K.B. 591.
(7) (1912) A.C. 238.
(8) (1912) A.C., at p. 239.
(9) (1919) A.C., at p. 777.
(10) (1917) S.C. (H.L.) 48.
(11) (1919) 35 T.L.R. 214.
(12) (1930) 47 T.L.R. 39.