[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . APPELLANT;
RESPONDENT,

AND

OCKENDEN . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE COUNTY COURT AT MELBOURNE, VICTORIA.

H. C. OF A. 1958.

MELBOURNE, *May* 15, 16, 19;

SYDNEY, *Aug.* 14.

Dixon C.J., Fullagar and Taylor JJ.

Workers' Compensation—" personal injury by accident arising out of or in the course of . . . employment "—Meaning—Application to progressive disease not connected in origin with employment—Discovery in member of Navy of defective working of aortic valve in heart as result of gradual process following childhood illness—Time when valve became defective not known—Necessity for sudden and distinct physiological change to constitute injury by accident—Necessity for proof that change took place while employee engaged in duties of employment and not, e.g., on leave—Commonwealth Employees' Compensation Act 1930-1956 (No. 24 *of* 1930—*No.* 93 *of* 1956), *s.* 9 (1).

Under s. 9 (1) of the *Commonwealth Employees' Compensation Act* 1930-1956 it is necessary for an applicant seeking to recover compensation to show that he has sustained " personal injury by accident arising out of or in the course of his employment ".

Held, that a worker does not suffer such an injury where he suffers, at his place of employment, a sudden and distinct physiological change as the product of the inevitable development of a progressive disease from which he is suffering and where such change can in no way be attributable to or associated with some incident of his employment.

James Patrick & Co. Pty. Ltd. v. *Sharpe* (1955) A.C. 1, discussed and distinguished.

Held, further, that in the circumstances of the case, an applicant for compensation had not proved that he was entitled thereto.

Decision of the County Court at Melbourne reversed.

APPEAL from the County Court at Melbourne, Victoria.

James Bruce Ockenden, by application dated 20th January 1955 claimed from the Commonwealth of Australia compensation under the provisions of the *Commonwealth Employees' Compensation Act*

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1930-1956 in respect of personal injury allegedly sustained by him and arising out of or in the course of his employment by the Commonwealth. The facts on which the applicant relied are set out in the judgment hereunder.

The application having been refused on 23rd September 1955 by the delegate of the Commissioner for Employees' Compensation the applicant appealed, by notice dated 7th October 1957, to the county court at Melbourne, an extension of the time allowed for lodging an appeal having previously been granted.

The appeal was heard before his Honour Judge *Mitchell* who, on 5th February 1958, ordered that the appeal be allowed with costs and that the respondent pay to the applicant the sum of £8 2s. 6d., the cost of medical treatment received by the applicant.

From this decision the Commonwealth of Australia appealed to the High Court.

C. I. Menhennitt Q.C. (with him *W. H. Tredinnick*) for the appellant. The condition which developed in the applicant as a result of the gradual progression of the disease was not injury by accident within the meaning of s. 9 (1) of the *Commonwealth Employees' Compensation Act*. The fact that the condition was of gradual development eliminates the element of accident. [He referred to *Roberts* v. *Dorothea Slate Quarries Co. Ltd.* (1); *James Patrick & Co. Pty. Ltd.* v. *Sharpe* (2); *Roberts* v. *Lord Penrhyn* (3); *Miller* v. *Carntyne Steel Castings Co. Ltd.* (4); *Hume Steel Ltd.* v. *Peart* (5).] A physiological or pathological condition caused solely by disease, without any contributing cause external to the disease, is not injury by accident caused to a worker, whether such condition is caused by the gradual or sudden progression of the disease. That proposition flows from the words in the Act " if injury by accident is caused to an employee ". Section 5 (5) of the *Workers' Compensation Act* 1928 (Vict.) in question in *James Patrick & Co. Pty. Ltd.* v. *Sharpe* (6) was in form different from that here in question. On the question of cause see *Fenton* v. *Thorley & Co. Ltd.* (7) and *Innes or Grant* v. *G. & G. Kynoch* (8). *James Patrick & Co. Pty. Ltd.* v. *Sharpe* (6) turned on the definition of injury incorporating the definition of disease in the Victorian Act but the Privy Council made it clear that the previous position had been that there had to be some contributing cause other than disease (9). The case is distinguishable from the

(1) (1948) W.N. 246; (1948) L.J.R. 1409, at pp. 1409-1417.
(2) (1955) A.C. 1, at pp. 14, 17.
(3) (1949) 65 T.L.R. 352.
(4) (1935) S.C. 20.
(5) (1947) 75 C.L.R. 242, at pp. 252, 253.
(6) (1955) A.C. 1.
(7) (1903) A.C. 443, at pp. 455, 456.
(8) (1919) A.C. 765, at p. 798.
(9) (1955) A.C., at pp. 15 et seq.

present. [He referred to *Campbell* v. *Australian Shipping Board* (1).] *Hetherington* v. *Amalgamated Collieries of W.A. Ltd.* (2) was based on a Western Australian Act which did not define the words " injury or disease " and proceeded on the basis that some provoking cause had to be present to constitute injury by accident (3). The words " aggravation, acceleration or recurrence of a pre-existing injury " did no more, if the element of accident was present, than state the law as it had come to be recognised. [He referred to *Maguire* v. *John Watson Ltd.* (4); *Robertson* v. *Broughton & Plas Power Colliery Co. Ltd.* (5).] The necessity for some contributing cause other than disease is also shown by *Ormond* v. *C. D. Holmes & Co. Ltd.* (6); *Fife Coal Co. Ltd.* v. *William Young* (7); *Oates* v. *Earl Fitzwilliam's Collieries Co.* (8); *Hume Steel Ltd.* v. *Peart* (9); *Clover Clayton & Co. Ltd.* v. *Hughes* (10); *Millar* v. *Coltness Iron Co. Ltd.* (11); *Innes or Grant* v. *G. & G. Kynoch* (12); *Campbell* v. *Australian Shipping Board* (1); *Falmouth Docks & Engineering Co. Ltd.* v *Treloar* (13); *Barnabas* v. *Bersham Colliery Co.* (14). The findings by the trial judge that the leaking back of blood took place within the six months prior to 1954 and that it was in the course of the applicant's employment are not supported by the evidence. Whether the medical treatment which the applicant received after his discharge from the Navy was " medical treatment " within the meaning of s. 11 of the Act and whether it was reasonably necessary were matters for the consideration of the commissioner but not of the trial judge.

N. E. Burbank Q.C. (with him *X. Connor*), for the respondent. Where there is a defined but unexpected physiological injury or change in a worker's condition, even though that is due solely to the condition of the worker, that amounts to injury by accident within the meaning of the statute. There is no necessity to show that the injury occurred at a particular time so long as it could be defined as a time during the course of the employment. Something inevitable may nevertheless be unexpected. [He referred to *Clover, Clayton & Co. Ltd.* v. *Hughes* (15).] The evidence shows that the leaking back of blood was not a necessary consequence of the disability from

(1) (1958) V.L.R. 59.
(2) (1939) 62 C.L.R. 317.
(3) (1939) 62 C.L.R., at pp. 325 et seq., 330, 331, et seq., 336, 337.
(4) (1924) S.C. 752.
(5) (1921) 14 B.W.C.C. 186.
(6) (1937) 53 T.L.R. 779, at p. 783; 157 L.T. 56, at p. 59.
(7) (1940) A.C. 479, at pp. 486, 488-490.
(8) (1939) 2 All. E.R. 498, at pp. 502, 503.
(9) (1947) 75 C.L.R., at pp. 257, 258.
(10) (1910) A.C. 242, at p. 245.
(11) (1929) S.C. 429, at p. 437.
(12) (1919) A.C. 765, at p. 772.
(13) (1933) A.C. 481.
(14) (1910) 4 B.W.C.C. 119.
(15) (1910) A.C. 242, at pp. 249, 250.

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which the applicant suffered. The trial judge found that there was a definable stage which occurred during the course of the disease which could be properly termed a physiological injury so as to bring it within the concept of injury by accident. There was evidence to support this finding. The case is distinguishable from those cases cited by the appellant in which there was a continued effect over a lengthy time in which nothing could be pointed to on any one day as a matter significant and distinguished from the rest of the ordinary progress of the disease. It is clear under the English legislation that disease is within the concept of injury in the phrase " injury by accident " and that that is independent of any definition in the legislation. [He referred to *Fife Coal Company* v. *William Young* (1); *Roberts* v. *Dorothea Slate Quarries Co. Ltd.* (2); *James Patrick & Co. Pty. Ltd.* v. *Sharpe* (3); *Pyrah* v. *Doncaster Corporation* (4).] In the past the only reason for investigating the cause of the injury has been to supply the nexus between the employment and the injury by accident. The problem raised here, namely what is injury by accident, isolated from other considerations, has not previously been decided. [He referred to *Willis* v. *Moulded Products (Australia) Ltd.* (5).] It was open on the evidence for the trial judge to find that the leaking back of blood took place in the course of the applicant's employment. The treatment received was medical treatment within the terms of s. 11. Whether it was reasonably necessary was a matter for the trial judge and not for the commissioner.

C. I. Menhennitt Q.C., in reply.

Cur. adv. vult.

Aug. 14.

THE COURT delivered the following written judgment :—

On 25th June 1954 the respondent was discharged from the Royal Australian Navy after a medical examination had revealed that his physical condition was below the standard prescribed for that arm of the Services. Some six months later he lodged a claim for compensation pursuant to the *Commonwealth Employees' Compensation Act* 1930-1956 in which it was alleged, briefly, that he was suffering from a " rheumatic heart " and that this condition had developed during his term of service. His application was rejected by the Commissioner for Employees' Compensation and from this determination he appealed to a county court at Melbourne and was successful in obtaining an order for the payment of a small sum for

(1) (1940) A.C., at p. 484.
(2) (1948) W.N. 246; (1948) L.J.R. 1409, at pp. 1409, 1417.
(3) (1955) A.C., at p. 14.
(4) (1949) W.N. 162; (1949) 65 T.L.R. 347, 352.
(5) (1951) V.L.R. 58, at pp. 63 et seq.

medical expenses. The respondent was not incapacitated either at the time of his application or when the appeal was heard and, consequently, the only form of relief open to him at that stage was the recovery of the cost of necessary medical treatment pursuant to s. 11 of the Act.

Originally the respondent's claim was based upon the assertion that he was suffering from a disease which was due to the nature of the employment in which he was engaged by the Commonwealth. But both the commissioner and the learned county court judge were of the opinion that his condition, as found to exist in 1954, was not in any way attributable to his service in the navy. However, upon the appeal to the county court it was contended successfully on his behalf that the facts established that he had sustained personal injury by accident arising out of or in the course of his employment and that, upon this basis, an order should be made for the payment of his medical expenses. The question now raised upon this appeal is whether, upon the evidence, such a conclusion could or should have been reached and no question arises whether any amount was payable by way of compensation pursuant to the provisions of s. 10.

The respondent, who was born on 5th April 1934, entered the Navy on 29th January 1952 as a naval airman. He was not a flying officer but was trained as a mechanic. He received his initial training at Flinders Naval Depot between the last-mentioned date and 2nd June 1952. On the following day he proceeded to the Naval Air Station at Nowra in New South Wales and received further training there until 15th January 1953. Then from 1st April 1953 until 22nd October 1953 he was stationed at another airfield in New South Wales. On 23rd October 1953 he was admitted to the Naval Hospital at Balmoral near Sydney for the treatment of a recently contracted disease which was in no way related to and which in no way affected his heart condition. He was discharged from this hospital on 17th November 1953 and on the following day he took up duty on the H.M.A.S. "Australia". Between this date and 23rd April 1954 he served in this ship and most of his time was spent on a cruise or cruises to the Great Barrier Reef, New Zealand and Tasmania. There were, however, times when the "Australia" was berthed at Garden Island in Port Jackson. On 24th April 1954 he returned to Flinders Naval Depot where, about a fortnight later, it was found that he was suffering from a disease of the heart. This was discovered in the course of a routine medical examination rendered necessary by the respondent's application to extend his term of service beyond that for which he had originally enlisted.

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Upon examination by Surgeon-Commander Armstrong it was found with the aid of a stethoscope that a murmur could be heard in the region of the respondent's heart. Further examinations of the respondent took place and the medical evidence agrees that this murmur was indicative of aortic regurgitation resulting from some incompetency of the aortic valve. This condition was found to be accompanied by some thickening of the heart muscle and a slight enlargement of the left ventricle. Upon the medical evidence there can be no doubt that the respondent's condition was the result, at that time, of cardiac damage initially sustained in the course of an attack of rheumatic fever during the respondent's childhood or early adolescence. Further, the evidence is unanimous that when aortic valve damage results from rheumatic fever a progressive weakening of the valve with gradual thickening of the heart muscle is inevitable. And so the time comes when the valve will become impaired to such an extent that it will no longer exclude the return to the left ventricle of some portion of the blood received by the aorta. Then, as the disease progresses, the valve will operate with diminishing efficiency. First of all it will permit some leakage back into the left ventricle of blood received by the aorta and then, with further deterioration, the leakage or regurgitation will gradually increase in intensity until its consequences are fatal. The presence of a murmur, it is said, is the first physical sign that this stage of the disease has been reached. These brief observations seem to reflect the substance of the medical evidence concerning the progress of the disease though Dr. Tallent, when asked in cross-examination whether " the final breakdown when it (the valve) ceases and fails to stop the blood from flowing back " was something gradual, said that " the process that produces it is gradual but the actual failure to hold the blood must be sudden ". This is the substance of the evidence upon which the respondent relied to establish the occurrence of a distinct and sudden physiological change and to negative the view that his condition at the time of his discharge was the inevitable and gradual product of a degenerative process induced by a disease of the heart which had been affecting him for some time.

Before going to the findings of the learned county court judge it is necessary to add that when the respondent first entered the Navy he underwent a medical examination and that on this occasion no signs of any heart disease were detected. Further upon his discharge from Balmoral Naval Hospital about six months before his discharge he was again examined and some point was made of this fact during the course of the appeal. But, as already appears, the absence of any clinical signs of heart disease in January 1952 does not mean

that the respondent was then free of heart disease nor does the fact that no signs of heart disease were observed upon his discharge from hospital carry the matter any further for, on that occasion, he was examined merely for the purpose of ascertaining whether the disease for which he had been treated had been cured.

Upon the evidence the learned county court judge found that by May 1954 " the aortic valves of the respondent's heart had reached a stage of inefficiency that blood was flowing back or eddying, and gave rise to a regurgitation " and that this condition had placed " an extra load on the heart muscle which has up to date resulted in only a slight enlargement of the left ventricle ". He was satisfied that the respondent's " condition was due to rheumatic fever, possibly contracted in childhood prior to adolescence, or in early adolescence which " had damaged the aortic valve but did not affect the respondent's apparent well-being nor cause any dramatic physiological change. His Honour went on to say that " eventually, some time, some weeks, and not more than six months prior to the examination by Surgeon-Commander Armstrong (on the medical evidence), the valves had reached a stage of deterioration in which they failed to close and act as a valve, with the result that the blood tended to flow back or leak ". This condition, he was satisfied, resulted from the natural progression of the effects of his rheumatic fever and he was not satisfied that it was in any way attributable to or aggravated by his service in the Navy.

In order to establish his claim it was necessary for the respondent to show that he had sustained " personal injury by accident arising out of or in the course of his employment ". The problem, therefore, is quite unlike that which arose in *James Patrick & Co. Pty. Ltd.* v. *Sharpe* (1) for in that case the Judicial Committee was concerned with legislation which contained an unusual definition of " injury " and under which any injury by accident caused to a worker was deemed to have arisen out of or in the course of his employment if the accident had occurred whilst the worker was present at his place of employment on any working day or whilst travelling between his place of residence and place of employment. It may, perhaps, be thought by some that if a worker sustains personal injury by accident whilst at his place of employment on an ordinary working day he also sustains it in the course of his employment. Indeed in *Dover Navigation Co. Ltd.* v. *Isabella Craig* (2) Lord *Wright* said: " Nothing could be simpler than the words ' arising out of and in the course of the employment '. It is clear that there are two conditions to be fulfilled. What arises ' in the course ' of the

(1) (1955) A.C. 1. (2) (1940) A.C. 190.

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employment is to be distinguished from what arises 'out of the employment'. The former words relate to time conditioned by reference to the man's service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment, that is directly or indirectly engaged on what he is employed to do, gives a claim to compensation unless it also arises out of the employment. Hence the section imports a distinction which it does not define" (1). But it cannot be thought that his Lordship intended to suggest in the earlier part of this passage that all accidental injuries sustained by a worker at his place of employment must, by virtue of that fact alone, be taken to be sustained "in the course of his employment". Still less did he mean that a sudden physiological change produced by the inevitable course of a progressive disease and in no way related to any incident of the employment, could be so regarded. Again the case is somewhat different from the problem dealt with in cases such as *Fenton* v. *J. Thorley & Co. Ltd.* (2); *Falmouth Docks & Engineering Co. Ltd.* v. *Treloar* (3); and *Partridge Jones & John Paton Ltd.* v. *James* (4) where it was necessary to consider the meaning of the expression "injury by accident" in association with the requirement that it should arise out of *and* in the course of the employment. As was observed in the course of *Sharpe's Case* (5) it was, in those cases, "necessary to prove that some external event or some action of the deceased had *caused* the sudden physiological change to happen when it did (6)" and the question for decision in *Sharpe's Case* (5) was whether the effect of the amending Act then under consideration was "to make it no longer necessary to associate the sudden physiological change with any external event or any action by the deceased" (6). In *Hetherington* v. *Amalgamated Collieries of W.A. Ltd.* (7) is to be found an intermediate type of case for there the appellant was entitled to succeed if it could be shown that there had been an injury by accident arising out of *or* in the course of the deceased's employment. But there is no suggestion in any of the reasons in that case that the rupture of the artery which brought about the worker's death could be said to constitute personal injury by accident arising in the course of his employment merely because it happened at his place of employment; on the contrary, the decision turned upon the fact that there was evidence capable of associating the rupture with an incident of his employment. *Sharpe's Case* (5), however, appears to be authority for the proposition that a

(1) (1940) A.C., at p. 199.
(2) (1903) A.C. 443.
(3) (1933) A.C. 481.
(4) (1933) A.C. 501.
(5) (1955) A.C. 1.
(6) (1955) A.C., at p. 15.
(7) (1939) 62 C.L.R. 317.

sudden physiological change in a person's condition may be regarded as an accident whether caused by or associated in any way with any external incident. But it does not, we think, go further and hold that any such change which happens at a worker's place of employment is, by virtue of that circumstance alone, *an injury by accident arising in the course of his employment*. It is true, of course, that " a long course of judicial decisions has extracted from the expression latent implications which make the test of the employer's liability independent of such things as external mishap, traumatic injury and unusual or unexpected incidents of work or duty " (per *Dixon* J. as he then was in *Hetherington's Case* (1)) but until *Sharpe's Case* (2) no judicial tribunal had made the test of an employer's liability independent entirely of incidents associated with the relevant work or duty and, indeed, so to hold now in the circumstances of this case, would be to enter into direct conflict with the actual decisions in cases such as *Kellaway* v. *Broken Hill South Ltd.* (3) and with the observations of the Judicial Committee in *Slazengers (Australia) Pty. Ltd.* v. *Burnett* (4). In the latter case their Lordships, speaking of the view taken by *Latham* C.J. in *Hume Steel Ltd.* v. *Peart* (5) said : " This decision leads to the remarkable consequences on which the learned Chief Justice himself observes. A worker who, having reached his place of employment, dies of a coronary occlusion, being the result of a disease to which the employment was not a contributing factor, is not entitled to compensation : see *Kellaway* v. *Broken Hill South Ltd.* (3), a case clearly decided correctly, though some of the reasoning may be open to criticism. On the other hand, the same worker, if he dies of the same disease, in the course of his journey to or from his place of employment, is entitled to compensation " (6). The acceptance in *Sharpe's Case* (2) of the view that in Victoria it is now no longer necessary to find an external event of some kind associated with a sudden physiological change rested, essentially, of course, upon the special provisions of the amendment introduced into the *Workers' Compensation Acts* of that State by the amending Act of 1946. But the decision does not justify acceptance of the same view in cases where it must be established that the so-called injury by accident arose in the course of the worker's employment. In such cases the traditional view must still prevail that a physiological change, sudden or otherwise, is not an injury by accident arising in the course of the employment

(1) (1939) 62 C.L.R., at p. 333.
(2) (1955) A.C. 1.
(3) (1944) 44 S.R. (N.S.W.) 210 ; 61 W.N. 83.
(4) (1951) A.C. 13 ; (1950) 51 S.R. (N.S.W.) 1.
(5) (1947) 75 C.L.R. 242.
(6) (1951) A.C., at p. 21 ; (1950) 51 S.R. (N.S.W.), at p. 5.

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unless it is associated with some incident of the employment. Indeed to hold otherwise would be to strip the word "accident" of all meaning by treating as such any distinct physiological change which is nothing more than the sole and inevitable result of the ravages of a disease. Such changes, even if they can be called accidents, occur not in the course of the employment, but, it may, perhaps be said, *in the course of the disease.* Accordingly, for the purposes of the *Commonwealth Employees' Compensation Act* it is still true that a worker does not suffer personal injury by accident arising in the course of his employment where he suffers, at his place of employment, a sudden and distinct physiological change as the product of the inevitable development of a progressive disease from which he is suffering and where such change can in no way be attributable to or associated with some incident of his employment.

It has been convenient to deal, first of all, with the broad question which arises upon the appeal and what has been said is sufficient to dispose of the matter. But there are other grounds also which, it seems to us, are sufficient to require us to set aside the order from which the appeal is brought. Not the least of these is that there is a grave doubt whether the respondent suffered any sudden and distinct physiological change. Indeed, if it were necessary to decide the point, we would be prepared to say that the correct conclusion upon the evidence is that he did not. In dealing with this question the learned county court judge appears to have observed some resemblance between the present case and the case where "a blood vessel which, through disease, deterioration, arterial disease, eventually reaches a stage where it cannot hold the blood and it bursts" and he seems to have entertained the view—though it is by no means clear that he did so—that there had been "a pronounced sudden physiological change" in the respondent. But as his Honour pointed out, it was quite impossible to say when this change occurred though in his view it had occurred at some time during the previous six months. In that respect the case is quite unlike cases of sudden physiological change where either the change itself or its consequences, or both, become manifest contemporaneously. However his Honour thought that inability to determine when the change occurred was not a matter of importance; if, in fact, it was possible to say that such a change had taken place then the respondent had suffered injury by accident. But if the respondent did, as was found, sustain personal injury by accident it is clear that neither the respondent nor anybody else was aware of it at the time. Nor indeed is it possible now to say more than that as the condition of the aortic valve progressively and gradually deteriorated a point

was reached where some slight leakage commenced to occur and, subsequently, and, no doubt, after further progressive deterioration, an audible murmur was detected. This appears to be the correct view on the facts of the case and, that being so, it is impossible to hold, even on the most benign view of what may be held to be an " injury by accident ", that personal injury by accident was caused to the respondent.

But even if this view is wrong it is not possible to say, as his Honour held, that the respondent suffered injury by accident within a period of six months before his medical examination in May 1954. The audible murmur which was then heard may have been present for a much longer period and it seems that his Honour's view on this point was based, primarily if not exclusively, upon the fact that the respondent had undergone a medical examination upon his discharge from the Balmoral Naval Hospital in November 1953. It seems clear, however, that when he was examined at that stage he was examined merely for the purpose of ascertaining whether he had been cured of the disease for which he had been treated during the preceding three weeks. But whether the murmur first developed between November 1953 and May 1954 or at some earlier stage there was not the slightest evidence to enable it to be said that it developed whilst the respondent was engaged in the duties of his employment or even at a time when he was present at his " place of employment ". The contrary view entertained by the learned county court judge seems to have rested upon a somewhat tenuous view that the respondent was serving in the Navy and that there was no evidence to establish that during the preceding six months he had been on leave or absent from his ship or station. It was, of course, for the respondent initially to establish that if he had sustained injury by accident he had sustained it in the course of his employment and there is no evidence that he did so. Indeed if—as the fact is—it is impossible to say when the murmur first developed it is, *a fortiori*, impossible to say whether it developed in the course of his employment or not. It would be stretching common sense too far to assume that he was never absent from his employment or his place of employment particularly when it is borne in mind that in October and November of 1953 he was treated for a disease which must have been contracted in extra-occupational activities.

Before parting with the case the additional observation should be made that even if the conclusion could be reached that the respondent sustained an injury by accident in the course of his employment it would by no means follow that a further development

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of the disease resulting in incapacity would mean that he would be entitled to compensation. In that event the very process of reasoning leading to the initial conclusion in circumstances such as these would, or at the least, might well induce the view that the incapacity had resulted from a further accident or accidents after the termination of the employment.

For the reasons given the appeal should be allowed and the order of the county court judge set aside.

Appeal allowed.

Order of the County Court set aside. By consent the appellant Commonwealth to pay the taxed costs of the respondent of the appeal.

Solicitor for the appellant, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

Solicitors for the respondent, *F. Miller Robinson & Co.*

R. D. B.