IN THE HIGH COURT OF AUSTRALIA

NEW GUINEA GOLDFIELDS LTD.,

*V.*

KUHL

# REASONS FOR JUDGMENT

*Judgment delivered at* SYDNEY

*on* FRIDAY 12TH DECEMBER, 1952.

H. E. Daw, Gov. Print., Melb.

C.12280/45

NEW GUINEA GOLDFIELDS LTD.

V.

KUHL

# O R D E R

Appeal allowed with costs. Cross appeal dismissed with costs. Judgment of the Supreme Court of the Territory of Papua and New Guinea discharged.

Order that there be a new trial of the action and that the costs of the former trial abide the order of the Supreme Court hearing and determining the action upon such new trial.

NEW GUINEA GOLDFIELDS LTD.

v.

KUHL

JUDGMENT :

DIXON C.J.
WILLIAMS J.
FULLAGAR J.

NEW GUINEA GOLDFIELDS LTD.

v.

KUHL

JUDGMENT : DIXON C.J.
WILLIAMS J.
FULLAGAR J.

The reasons given by the learned trial judge for his decision in favour of the plaintiff in this case are such that it seems clear that his judgment cannot stand, and the real question which emerges seems to us to be whether this Court should order that judgment be entered for the defendant or should direct a new trial. On the unsatisfactory material before us, it is not possible for this Court to substitute for a finding which was attacked by both parties some finding of its own and hold that the death of Kuhl was caused by negligence on the part of the defendant company or any of its servants or agents other than Kuhl.

We know that Kuhl died by electrocution, and we know that the immediate cause of the electrocution was his own voluntary act. He attempted with a pair of pliers or some such tool to cut through an insulated wire which was connected with a source of electric power. When the metal of the tool reached the metal of the wire inside the insulation, a circuit was completed through the tool and through Kuhl's body to earth, and Kuhl was killed. And that, as Mr. Barwick said, is about all that we do know about what happened. In these circumstances it is difficult to see how the defendant could be held liable in respect of Kuhl's death unless there were something in the electrical installation or in the general

set-up of the premises which was calculated to lead Kuhl to believe that a wire was "dead" which was in fact "alive", or unless there was some breach of a statutory duty resting on the defendant, the performance of which would have prevented the occurrence of the accident.

The learned judge appears to have reached his conclusion by the following process of reasoning. He begins by finding that the defendant company was negligent in that it had failed in six respects to comply with the requirements of the Electric Wiring Regulations enacted under the Electric Light & Power Ordinance 1929-1938 and the Standards Association of Australia Wiring Rules which are adopted by Regulation 10 of those Regulations. The statutory requirements, with which the company is found not to have complied, include those of Rule 501 of the Standards Association Wiring Rules, which, according to the witness Cottis, required that the grinder should be effectively earthed. The wire which Kuhl was attempting to cut was one of three wires normally connected to the three-phase motor of the grinder, near which Kuhl was found lying. It was common ground that the grinder was not earthed. When Kuhl was found, his left hand was grasping the insulated wire, and his right hand the tool which was in contact with the wire inside the insulation. The end of the wire had been detached from its terminal on the grinder motor, but there was no direct evidence as to whether Kuhl himself had so detached it immediately before he proceeded to cut it, or whether it had been detached by Kuhl or somebody else before he approached it on the fatal occasion, or whether it had become accidentally detached. There was evidence that Kuhl used the grinder daily, and no evidence that anybody else would have used it on the day of his death or the preceding day.

His Honour does not regard the breaches of statutory duty as themselves directly affording potential causes of action. He regards them as affording evidence on which it is open to him

to find negligence, and he does find that they amount to negligence. He does not at this stage express any opinion, or make any finding, as to whether any of the breaches which he finds proved caused, or contributed to, the death of Kuhl. His Honour proceeds to say that two defences were raised by the defendant - (1) volenti non fit injuria, and (2) contributory negligence. He observes that counsel did not appear to be very enthusiastic about the former defence. As to the latter defence, he finds that Kuhl also committed a breach of a statutory duty, viz. reg. 11 of the Electric Wiring Regulations. This particular finding, it may be observed (though a finding of negligence on the part of Kuhl was obviously open) cannot be supported. It proceeds upon a misapprehension of the effect of the regulation or of the facts or of both. The point, however, is of no importance. Having found breaches of statutory duty on both sides, his Honour says :- "The question now is - who caused the defendant's death?". He then considers a number of decided cases which deal with contributory negligence as a defence to an action for negligence at common law or to an action for breach of a statutory duty as such. His Honour then returns to the facts. He finds (while realising that he is here approaching the field of mere conjecture) that Kuhl pulled the wire out of its terminal on the grinder motor for the purpose of using some of the wire on the job on which he was working, and he finds that Kuhl was negligent "in cutting the wire". But from this point onwards it is very difficult to follow his Honour. The obvious basis of a finding of negligence on the part of Kuhl would be that he proceeded to cut the wire without ascertaining whether the main switch, with which the wire was connected, was "on" or "off". But his Honour appears not to take this view. He says that he would not be justified in finding that Kuhl "maliciously" (whatever this may mean) pulled the wire out of its terminal while the grinder motor

was running, or that he ought to have taken the precaution of turning off the power at the main switch. In order to turn the power off, Kuhl, he says, would have had to climb over a heap of junk, and "that would be expecting too much of him". The negligence on the part of Kuhl which he does find thus seems to be the breach of statutory duty which His Honour has earlier found. That negligence he does not regard as "contributory", because, he says, Kuhl was entitled to assume that the grinder was earthed. The grinder was not earthed, and his Honour has already found that the defendant was negligent in not having seen that it was earthed.

Whether the above really represents his Honour's view is open to doubt, because his Honour proceeds, in conclusion, to say that that still leaves open the question whether the deceased's breach of statutory duty can be "construed as contributory negligence". In his view, he says, that breach "did not aggravate the position" and "did not increase the deceased's degree of negligence at common law". One has so far had the impression that the deceased is acquitted of negligence at common law. The learned judge concludes: "I find that, although the deceased was guilty of negligence, his negligence was not such as to amount to contributory negligence - that he was not the cause of his own death. I therefore find that it was the defendant's negligence which caused the deceased's death."

The reasoning which is outlined above is open to many comments, among which are the following. The statement that Kuhl would have had to climb over a heap of junk in order to turn off the switch reproduces language used by a witness which is vague and quite capable of conveying a false impression, and the precise nature extent and position of the "heap of junk" is one of the matters which seem to have been insufficiently investigated at the trial. But, apart from that, it could not be seriously suggested that the fact that some slight exertion was required to get at the switch provided a justification

for not looking to see whether the switch was on or off. There is, as has been observed, no foundation for the view that the deceased committed a breach of any statutory duty. On the other hand, there is strong foundation for a finding that he was negligent in taking no steps to see whether the power was on or off. As to this factor in the case there is no finding. The reference to an "aggravation of the position" and the statement that the supposed breach of statutory duty did not "increase the deceased's degree of negligence at common law" are not referable to any legal principle. And the language in which the final conclusion is expressed suggests that his Honour had never had presented to him the real issues of fact and law involved in the case.

Mr. Barwick, for the appellant, was, we think, right in saying, or assuming, that his Honour's judgment rests fundamentally on his finding that "the deceased was entitled to believe that the grinder motor was earthed." The argument founded on this basis requires explanation, but it may be stated very briefly. The defendant was guilty of negligence in that it had not complied with the statutory requirement that the grinder should be earthed. The deceased, on the other hand, cannot be regarded as guilty of contributory negligence, because he was entitled to assume, and may be held to have assumed, that the grinder was earthed, and, if the grinder had been earthed, the accident would not have happened.

The basis on which this argument primarily rests is to be found in a single question and answer in the evidence of the witness Cottis, who was a qualified electrician. He was asked: "Presuming that the grinder had been earthed, and that that particular wire had been pulled out of its terminal, what, in your opinion, would have happened?" The answer was: "The wire would have made contact with the frame of the terminal box, causing a direct current to earth and blowing the fuse."

The witness went on to explain, what is indeed obvious, that the result would have been that the wire, which had previously been alive, would have become dead. The theory is that Kuhl pulled out the wire from its terminal on the grinder motor, believing at the time that the grinder was earthed and that his action would disconnect the wire from the source of power by blowing the fuse.

One answer which might perhaps have been made to this view of the case was that the kind of mischief which happened was not the kind of mischief to which the statutory requirement that the grinder should be earthed was directed. One would imagine that the object of the requirement was to protect any person who might come in contact with the metal of the grinder after it had been accidentally electrified. Cf. Gorris v. Scott (1874) L.R. 9 Ex. 125. This answer, however, is not altogether satisfactory from the point of view of an appellate court. Expert evidence might have been directed to the point. The real answer seems to be that the view in question rests on suppositions, both as to what did happen and as to what would have happened if the grinder motor had been earthed, which are entirely conjectural and cannot reasonably be inferred even as probabilities.

That Kuhl proceeded to cut the wire because he desired to use a short piece of wire for some purpose of his own is a fair enough inference, even though no clearly satisfactory explanation of his purpose was suggested. He may have proposed to use a short piece of wire as a cotter pin to hold a nut in position. But the learned judge himself felt that, in finding that Kuhl first pulled the wire out of the terminal on the grinder motor, he was approaching the field of conjecture. It would indeed appear that his Honour was really entering that field. But one may go further. Actually it would seem very unlikely that Kuhl pulled the wire out in the belief that the grinder was earthed and that

the effect of his action would be to blow the fuse. He would not be likely to seek to destroy a circuit which would have to be repaired before the grinder could be again used. If he pulled the wire out, it would most probably be simply because the wire was of ample length for the purpose it was serving and the small piece which he wanted could easily be spared from it. Yet the theory under consideration would seem to depend on a belief on the part of Kuhl that the disconnection of the wire would earth the current through the grinder and blow the fuse. In any case it depends on the view that the disconnection of the wire would bring the naked end of the wire into contact with the metal of the grinder or the motor, with the result, if the grinder were earthed, of blowing the fuse. And this view does seem to be matter of the purest conjecture, as Mr. Barwick suggested. The plain truth is that we know nothing about how or when or in what circumstances the wire became disconnected, and it is quite unsafe to make any inference as to what happened, or as to what would have happened if the grinder had been earthed. It is really quite impossible to say on the evidence that there is a balance of probability that, if the grinder had been earthed, the accident would not have occurred.

It may, of course, be taken, as Mr. Ward stressed in his clear and vigorous argument, that Kuhl would not deliberately placed himself in the path of an electric current. But it is one thing to say that Kuhl would not deliberately take so serious a risk, and quite another thing to say that he would not act without realising the existence of a risk which a moment's reflection would have made patent to him. It is probably reasonable to say that Kuhl was the last man to use the grinder, and to infer from that that he knew that the main switch was on. He had worked for some time as a motor mechanic and must have had some elementary knowledge of electricity and its habits. But it is not difficult to

imagine his pulling out the wire, or picking it up it if were already loose, and proceeding to cut it without having present to his mind two facts which were actually within his knowledge - the fact that the main switch was on, and the fact that, when the tool touched the metal inside the insulation, a circuit would be completed through the tool and his body. This seems, on the whole, to be what most probably did happen. The result was tragic. But such a happening discloses of itself no ground on which his employer can reasonably be regarded as responsible at law for his death.

One other aspect of the case should be mentioned. The defendant's garage was, at the time of the accident, undergoing alterations, and the electrical installation was said by one witness to have been of a temporary character. The fuse-board was on a pillar about nine feet from the ground, and the main switch was under it and about six feet from the ground. The three wires which led from the main switch to the grinder motor were "draped" from a beam by means of strips of wire or tape, and passed above what was described as a "pile of junk" and apparently consisted of old tyres and wheels and other discarded parts of motor vehicle equipment. This "pile of junk" lay between the pillar, which carried the switch, and the spot where Kuhl was found lying. An attempt was made on the part of the plaintiff to convey a general picture of untidiness and confusion with the object of suggesting that Kuhl might have picked up the wire reasonably believing it not to be a wire belonging to the grinder motor or a wire connected with the main switch. In other words it was sought to put it that the state of affairs in the garage (for which it should not be forgotten that Kuhl himself may have been the person responsible) was such that Kuhl might have been misled into thinking that the live wire, which he picked up, was a dead wire. Any such view is, of course, inconsistent

with the view taken by the learned judge, but in any case there is no evidence on which any such conclusion can be based. There is no evidence that there was any "loose" wire in the vicinity other than the wire which Kuhl picked up, and the connection of which with the main switch would have been apparent to anybody.

For all these reasons we think it clear that the judgment must be set aside. On the whole, however, we have not felt that we are in a position to say that on no possible view of the case could the plaintiff succeed. It has already been mentioned that the learned judge found that the defendant had committed breaches of the Australian Standards Wiring Rules in six respects, and that such breaches constituted negligence on its part. His judgment, however proceeds entirely on one of those breaches, and his Honour does not appear to have considered whether any of the other breaches was causally connected with Kuhl's death. There are two of them that possibly merit further attention. The first is Rule 256, which requires that every switchboard shall be in an accessible position. The evidence does not definitely suggest to us either that the switchboard was really not accessible within the meaning of the Rule or that its position was such as to have caused delay in switching off the current after Kuhl's predicament was seen by McMath, and later by Walker. But the position is left in some obscurity. The other Rule is Rule 334(f), which requires that, wherever they are within six feet above a floor, braided rubber insulated cables shall be adequately protected by earthed metal conduits or non-conducting casings or ducts. The position in relation to this rule also possibly merits further investigation. There are, moreover, certain obscurities in the evidence, particularly with regard to the "heap of junk". In all these circumstances we think, on the whole, that the proper course is to order a new trial. On the new trial the question of contributory

negligence on the part of Kuhl will have, of course, to be reconsidered.

The appeal should be allowed with costs, and a new trial ordered. The costs of the former trial should abide the result of the new trial. The cross-appeal should be dismissed.

NEW GUINEA GOLDFIELDS LIMITED

v.

KUHL

JUDGMENT : McTIERNAN, J.

NEW GUINEA GOLDFIELDS LIMITED

v.

KUHL

JUDGMENT : McTIERNAN, J.

The judgment from which this appeal was brought was given by the Supreme Court of the Territory of Papua-New Guinea. The appeal is by leave of this Court and is upon law and fact. The action was tried by Kelly J. without a jury. It was brought under the Compensation to Relatives Ordinance 1934 of the Territory. This Ordinance introduced into the Territory the remedy provided in Lord Campbell's Act for the relatives of a person whose death is caused by a wrongful act, neglect or default of another person. The appellant was the employer of Edward James Kuhl, deceased, who was the husband and father of the respondents. Their pleaded causes of action were negligence and breach of statutory duty. The negligence was alleged in respect of the appellant's duty as employer to take reasonable care to provide for the safety of the deceased in his employment. The breach of statutory duty was alleged in respect of "The Standard Association of Australia Wiring Rules". By the Electric Wiring Regulations, made under the Electric Light and Power Ordinance 1929-1938 of the Territory, statutory force was given to these Wiring Rules.

The defendant was the occupier of premises at Wau, conducted by it as a garage for the repair of motor vehicles. Electricity was used to operate the appliances in the garage. In February, 1940, or later, the defendant engaged the deceased as a motor mechanic and employed him in this garage. On 6th May, 1950, he was electrocuted while working at his trade in the garage. The plaintiffs' allegations of negligence and breach of statutory duty were supported by evidence of the defective

condition of the electrical installations and the electrical wiring. The trial judge found that a number of precautions required by the Wiring Rules had not been observed in making the electrical installations and arranging and protecting the electrical wiring in the garage. From these findings, the trial judge proceeded to the conclusion that the defendant omitted to take due and reasonable care to safeguard the deceased from injury arising from the use of electricity in the garage. The defendant raised the defence of volenti non fit injuria. There is no evidence to support this defence. In the end, the case came down to the issue whether or not the deceased was guilty of contributory negligence. The trial judge decided that the defendant failed to prove this defence.

The defendant was not held liable for any breach of statutory duty as such. The trial judge used the breaches of the Wiring Rules as proof of breaches of the duty owed by the defendant to take reasonable care to provide a safe workplace for the deceased and safe plant, appliances and materials for his work. The question was argued whether an action would lie for injury sustained merely by reason of a breach of the Wiring Rules. It seems to me to be unnecessary to give a decision upon this question for, in my opinion, the plaintiffs were entitled to succeed upon the count in negligence.

The evidence as to the condition of the electrical installations and the wiring in the garage was as follows. Soon after the deceased was employed to work in the garage, structural alterations of the premises began and, in consequence, the electrical installations and wiring were changed. There was a makeshift arrangement of these installations and wiring while the structural alterations were in progress. The grinder, an appliance placed on a bench at the end of the garage, was disconnected from the power, and the fuse-board was removed from its former position and hung from a girder by a wire; the fuse-board was then about nine feet above floor level.

The electrician, employed by the defendant, was instructed by its foreman mechanic to connect the grinder with the power and he did so. This was done about two months before the accident and during that time the grinder was constantly used. The main switch in the garage was under the fuse-board. On the floor of the garage was a pile of junk consisting of old wheels, springs, truck parts and other scrap. The switch was not accessible unless the person desiring to turn off the power climbed over this junk. Three lots of wire went from the fuse-board. Two sets of wires went to the installations and a third lot of wires hung loosely from the fuse-board. One of the installations to which a set of three or four wires went was the grinder. Evidence as to the way these wires went differed. The trial judge said he accepted the evidence given by Mr. Cottis, a government electrician, on this matter. This witness said that from the fuse-board the wires draped across the pile of junk, then on, or just above the floor, and from that position the wires went through the back of the bench. The deceased was electrocuted by one of these wires. He was found with this wire in his hand, but the end which had gone into the installation was then loose. At the time the accident happened, the grinder was not earthed; it had not been earthed since the electrician connected it with the power. The wire which electrocuted the deceased was insulated. The foreman mechanic admitted that a piece of this kind of wire, obtained by stripping the insulation, is sometimes used as a substitute for a splay pin in a nut and bolt. The work which the deceased was doing immediately before the accident sometimes involves the use of such a piece of wire. The deceased was repairing a three-ton truck when he ceased work for lunch. He returned to the garage, evidently, to resume this work. Soon afterwards, a clerk heard the deceased scream to him to cut off the power. When the clerk arrived the deceased was lying on his back on the garage floor behind the bench, near the wires that draped from the junk, and he was clutching one of them in his left hand and holding a pair of pliers in

his right hand. On the wire were some marks of the pliers. Unfortunately, the witness was not aware of the position of the main switch and did not notice it. He operated every switch near the grinder but the wire in the deceased's hand remained alive. Then taking precautions, he tried to pull it away from him but failed, he next made an unsuccessful attempt to pull down the fuse-board. There was nothing else he could do to save Kuhl's life. He called a driver, who unexpectedly arrived in a truck, and he managed somehow to cut off the power, but not in time to save Kuhl's life. There was evidence, as stated above, that the grinder had remained unearthed for about two months. Mr. Cottis gave evidence as to the consequences which would flow from this omission. The questions which he was asked and the answers he gave to them are as follows:-

"Q: Presuming that the grinder had been earthed and that particular wire had been pulled out of its terminal what, in your opinion, would have happened? A: The wire would have made contact with the frame of the terminal box causing a direct current to earth and blowing the fuse.

Q: What would have been the effect on that particular wire after the fuse had been blown? A: The wire would have ceased to be alive.

Q: With the grinder not earthed what would be the effect of pulling that particular wire from the terminal box? A: The wire would still be alive."

No doubt the wire which the deceased held was loose, but there is no evidence that he pulled it out of the terminal. From the evidence that the deceased called frantically to the witness, who ran to his assistance to cut off the power, it is a reasonable inference that the deceased accidentally caught the wire, or if he caught it voluntarily, he was not aware that it was alive. Clearly he was surprised to find that he had taken a live wire in his hand.

The evidence proves that the main switch was not accessible. This was a breach of Reg. 256(a) of the Wiring Rules. The clerk who ran to the deceased's help might have seen the main switch and turned off the power in time to save Kuhl's life, if the main switch had been in an accessible position. It could not be reached except by climbing over the junk heap. The evidence proves that for some distance, the wire which electrocuted the deceased and the other wires near it, fell so near the floor that, under Reg. 334(f), it was required that they should be protected by earthed metal conduits or non-conducting casing or ducts. If this precaution had been taken, the deceased could not have handled the wire. Thus protected it could not have appeared as if it was part of the scrap heap rather than a part of the electrical equipment of the garage. Reg. 361(d) refers to temporary wiring. This Rule contains this provision "The wiring shall be so arranged or protected that it is not liable to mechanical injury or inadvertent disturbance by workmen or others". As regards the wire which was found in the deceased's hand, no precaution was taken to avoid such a risk. The neglect to earth the grinder was a breach of Division IV of Reg. 501.

The evidence of the condition of the electrical wiring in the garage and of its disconformity with the standards of care enjoined by the Wiring Rules warrants the conclusion that the defendant omitted to take reasonable care to safeguard the deceased from undue or unusual danger arising from the use of electric current to operate the appliances in the garage. This omission was a breach of the defendant's common law duty towards the deceased as its workman. The defendant could have avoided those risks by conforming with the Wiring Rules. Compliance with Rule 334(f) or Rule 361(d) in particular, would have avoided the fatal accident to the deceased. In any case, contact with the wire may not have caused his death if the current could have been turned off earlier. The breach of

Rule 256, requiring the switch to be in an accessible position, contributed to the delay in turning off the current. It is unnecessary to rest the plaintiffs' case upon that negligence. The failure to observe either Rule 334(f) or Rule 361(d) was negligence.

The conclusion that the defendant was guilty of negligence which caused the fatal accident can also be reached from the indisputable fact that the grinder was not earthed. Mr. Cottis, the government electrician, gave evidence, which was accepted by the trial judge, as to the consequence of this omission. His evidence is quoted above. The evidence of this witness establishes that the wire which the deceased held in his hand would not have been alive if the grinder had been earthed. When the deceased was found holding the wire, it was loose at one end. The witness was asked to presume that the wire had been pulled out of its terminal. The condition of the end of the wire led to that conclusion. The trial judge found that it was the deceased who pulled the wire from its attachments to the grinder. There is no direct evidence that the deceased did anything of the kind. The trial judge feared that he could proceed to that conclusion only by going from inference to conjecture. With respect, I think he fell into that error. It would be surprising if the deceased, who was admittedly a competent and conscientious workman, committed such a mischievous act. He was working overtime on the Saturday afternoon when he was electrocuted. The hypothesis that the wire had already been pulled out of the terminal when the deceased picked it up is no less probable than that the wire was pulled from its terminal by the deceased. The finding of the trial judge convicts the deceased of contributory negligence and, indeed, of serious misconduct. It is wrong in principle to presume such faults upon evidence which points with equal force, at least, to the conclusion that the wire was already loose from the grinder when the deceased picked it up. An ordinary prudent workman would expect that

the grinder was earthed. He would not expect that a wire coming over the junk heap towards the terminal in the way described by the witness Cottis, was alive. It is probable that the deceased received the electric shock when his pliers cut through the insulating material covering the wire. The evidence that a piece of such wire could be used in carrying out the job on which the deceased was engaged, points to the conclusion that the deceased was attempting to cut a piece from the wire. There was nothing about the way in which the wire was arranged to bring home to the deceased that the wire was really a part of the electrical wiring conducting current to the grinder or some other appliance. Upon the evidence which the trial judge accepted that the wire was draped loosely over the junk heap, it is a reasonable supposition that an ordinary prudent mechanic might inadvertently regard the wire as scrap material thrown upon the junk pile rather than as part of the electrical equipment of the garage. In my opinion, the evidence does not warrant the conclusion that the deceased was guilty of contributory negligence.

The respondents cross appeal upon the ground that the damages are inadequate. Mr. Ward rightly conceded that the solatium awarded to the widow must be deducted; there is no statutory authority to award any sum by way of solatium to her. The general criticism which Mr. Ward made of the assessment of damages is to the effect that they are not adequate compensation but as there is to be a new trial I shall make no comment on this matter.

In my opinion, the appeal should be dismissed.

NEW GUINEA GOLDFIELDS LIMITED

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JUDGMENT

WEBB J.

NEW GUINEA GOLDFIELDS LIMITED

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JUDGMENT WEBB J.

This is an appeal by leave from a judgment of the Supreme Court of Papua and New Guinea (Kelly J.), finding the appellant company guilty of negligence and ordering the oompany to pay £5,500 damages to the plaintiff for herself and her children in respect of the death of her husband. The action was brought under S.3 of the Compensation to Relatives Ordinance 1934 (Lord Campbell's Act). There is a cross appeal on the ground that the damages awarded were inadequate.

The deceased was a motor mechanic employed by the appellant company at Wau in Papua from January 1950 to 6th May, 1950, when he was electrocuted whilst repairing a motor vehicle engine in a garage. Certain extensions were then being made to the garage and some of the walls had been removed, leaving uprights and beams in position. Electrical installations had also been removed and not fully replaced in their final positions. On Saturday, 6th

May, deceased had lunch with a fellow employee, McMath, a clerk, and then returned to his work in the garage. Shortly after, McMath, hearing the deceased call out "Turn off the power", ran into the garage and found deceased lying on his back on the floor near a grinder which deceased had used daily. He was unconscious and was holding in his left hand an electric cable, i.e. a wire covered with vulcanised rubber and braid, and in his right hand a pliers engaging this wire. The wire was free at the end nearest deceased. The other end was connected with a fuse box. The wire was one of three attached to the grinder which was operated by a three phase motor. McMath attempted to pull the three wires from the fuse box but did not succeed in so doing. He did not go to the switch, as he failed to see it, but another workman did so and turned off the current; but it was too late to save the deceased. It does not appear whether any part of the wire was without insulation when it was found in the deceased's hand. Apparently it was properly insulated when installed. But the insulation was cut through with the pliers down to the bare wire, and more than one attempt appears to have been made to cut the wire. In this way the deceased was electrocuted.

The appellant's case is that there was no known reason connected with the deceased's work which could have warranted the wrenching of the wire

from the grinder and the attempt to cut it; that there was a main switch within six feet of the vehicle on which the deceased should have been working which would have enabled the current to the grinder to be cut off; that although mechanics occasionally use electric wire instead of split pins to hold bolts, there is no evidence showing that, as suggested for the respondent, the deceased's work on the vehicle called for the use of say a split pin, or that the deceased did not have one; that the deceased, for no reason connected with his work, pulled the wire out of the terminal connection with the grinder and attempted to cut it with the pliers, and so caused his own death; and that if the company was guilty of the various breaches of duty found by the trial judge still none of such breaches was causally related to the electrocution of the deceased.

The trial judge found that the deceased pulled the wire from the grinder, and that he was guilty of negligence in so doing. But His Honour also found that the company was guilty of negligence and that the deceased was not guilty of contributory negligence.

For the respondent it is submitted that the trial judge's finding that the deceased pulled the wire from its terminal in the grinder was based on conjecture; and that it was probable that the deceased thought the wire was part of a junk heap when he took

hold of it; or that he tripped and fell and pulled the wire out as he fell. It is also submitted for the respondent that although there were several plier marks on the cable no inference can be drawn that the deceased intended to cut the wire to use it; but that it is probable that he made the cuts after the current went through his body and with the intention of saving himself.

There is evidence of several breaches of duty by the company and of one by the deceased, being in each case an infringement of the Standard Association of Australia Wiring Rules, which by Regulation 10 made under the New Guinea Electric Light and Power Ordinance 1929-1938, were required to be observed in connection with electric installations, motors and wiring. It is not necessary to set out in detail the nature of all these infringements. The infringement by the deceased was that which led to his death, i.e. interference with the wire by attempting to cut it. Included in those committed by the company were two in relation to the wire which discharged the electricity in Kuhl's body, i.e. the failure -

(1) to provide a protective covering for that wire in the nature of a conduit pipe or duct;

(2) to earth the grinder to which the wire had been connected.

These precautions were required for the protection of all persons, other than perhaps electricians working on the premises.

These two breaches were of the kind that give rise to a right to damages by the person injured as a result of the breach (O'Connor v. Bray 56 C.L.R. 464 per Dixon J. at 478), provided that the accident is causally associated with the breach, and contributory negligence is not established. See Caswell v. Powell Duffryn Associated Collieries (1940 A.C. 152).

As already stated the wire had been pulled out of the grinder; but it was not stated by any witness by whom this was done; or as I understand the evidence where the wire was lying when Kuhl took hold of it. When he was found unconscious all three wires from the fuse box draped down to the top of some junk on the floor. The fuse box was hanging from a girder about ten feet above the floor. The junk consisted of some old wheels, springs, parts of truck bodies and other material not specified. Evidence that this was the position of the wires was given by McMath; but in cross examination it was suggested to him that prior to the accident - by which I understand was meant up to the time of the accident - these wires went from the fuse box along a beam and came down at the back of the grinder. McMath replied that he did not know that. Evidence was given for the defendant that prior to the accident these wires went along a beam, as was suggested to McMath. Kelly J. in his reasons for judgment seemed to favour the view that

McMath might have pulled these wires from the beam, when he pulled them after going to Kuhl's assistance; but His Honour disregarded this view when later in his judgment he made a finding against the company of negligence based on the wires being draped across the junk.

His Honour took the view that, as the grinder was required by the Regulations to be earthed, Kuhl could rightly have assumed that it was earthed when he took hold of the wire and attempted to cut it. There was evidence that if the grinder had been earthed the wire on being pulled out would make contact with the frame of the terminal box, cause a direct current to earth, blow the fuses, and become a dead wire. This evidence was given by a man whom the learned judge believed and who held certificates of competency as an electrical fitter mechanic and linesman, and it was not contradicted or claimed to be contrary to notorious facts. Accepting it as stating the facts, the unearthed grinder might well have been a trap to a workman who, like the deceased, had in the course of his training a a motor mechanic acquired some knowledge of electricity, as the evidence shows, and who must be taken to have been acquainted with the regulation requiring the grinder to be earthed and the need to earth it in any event. But while the knowledge of this requirement may be relied upon by the plaintiff for the failure of the deceased to make sure that the grinder was earthed

before he proceeded to cut the wire, the defendant company may also rely on the deceased's knowledge of the regulation prohibiting interference with the electric wiring for its failure to earth the grinder.

As I see the position both the defendant company and the deceased were guilty of breaches of duty and the combined effect of their breaches was the electrocution of the deceased. But one was not as much to blame as the other for the accident. If the defendant company had obeyed the law and had earthed the grinder the accident would not have occurred. Looked at that way the substantial cause of the accident was the company's failure to earth the grinder. It is also true that if the deceased had obeyed the law and had not interfered with the electric wiring the accident would not have occurred. However, I think the defendant company should have anticipated that the deceased, who worked a large amount of overtime, might have become tired and acted inadvertently, and even carelessly, in the course of his work, and more particularly in relation to the grinder, which he used daily and to which he might have found it necessary to make repairs, perhaps after ordinary hours, as on a Saturday afternoon. That points to the duty of the oompany to earth the grinder, apart from any statutory requirement so to do. Then the negligence and breach of duty of the company are clear enough, and the onus was on the company to prove contributory negligence on the part of the deceased and that such contributory negligence

was the substantial cause of the accident. Williams v. The Commissioner of Road Transport (50 C.L.R. 258). Now he was in fact electrocuted on a Saturday afternoon whilst working overtime. Further, he could have been tired, or making urgent repairs to the grinder, or attempting to cut the wire for use in repairing the truck, having found the wire detached from the grinder. The evidence is not inconsistent with any of those things having occurred. Any of these things would have excused if it did not warrant his interference with the electric wiring contrary to the regulations, since that interference would not have resulted in any harm to the deceased, if the grinder had been earthed, as he was entitled to assume was the case. He would have been liable to a penalty if he had not been electrocuted; but I think he would not in addition have been deprived of his right of action to recover damages as the victim of a trap. The regulation against interference with the wiring did not render unnecessary a warning by the company to the deceased of the existence of the trap.

It might be suggested that as the deceased broke the regulations in interfering with the wiring he should have had in mind the possibility that the company had also broken them. But he should not, I think, have contemplated

the possibility that the company had disregarded them to the extent of leaving a trap.

Proof of contributory negligence included proof that (1) the company was not responsible for, or aware of, the wire having been detached from the grinder; and (2) that the deceased was aware, or should have been aware, that the grinder was not earthed. No such proof was forthcoming.

In all the circumstances I am not prepared to find that the deceased was guilty of contributory negligence in failing to have regard for his own safety in attempting to cut the wire. I think the company has not satisfactorily discharged the onus of proof of contributory negligence, and that the negligence of the company should be held to have been the substantial cause of the electrocution of the deceased.

If the evidence were consistent with the theory that the deceased tripped and fell over the junk in, say, going to turn the switch off and caught the wire in so doing and did so at a bare part of the wire and attempted to cut it with the pliers in a fruitless effort to cut off the current, then the liability of the company would be established in that way also. But the only evidence is that the wire was properly covered first with vulcanized rubber and then with braid, and this, I think, disposes of the theory that the deceased tripped and fell and grasped the

wire at a bare part, or with such force or pressure as to create a bare part.

It is a ground of the appeal that the damages awarded are excessive and there is a cross appeal on the ground that the damages are inadequate. It is common ground that the award of £300 as a "solatium" to the plaintiff herself, in addition to the general damages of £3,000 awarded to her, cannot stand. However, it is submitted for the respondent that the reduction of the damages by £250, being an allowance for a relief fund said to have been raised, was not warranted by the evidence. I agree. But the learned judge in calculating damages allowed not for the sums paid by the deceased for the maintenance of his wife and children during his lifetime, but for the difference between those payments and the deceased's earnings, which difference substantially exceeds the sums paid for their maintenance. This was wrong in principle and could have led to an excessive award. This error leaves it open to this Court to fix the damages as they should have been fixed by the trial judge. Now I think the damages awarded would still be on the low side, even without allowing for the correction of this error, although by no means inordinately so. In the circumstances, I would not interfere with the damages

awarded. As to the factors to be taken into account in the assessment of damages in this kind of case see Nance v. British Columbia Railway Co. Limited (1951 A.C. 601 per Lord Simon at pp. 614-5).

I would dismiss the appeal and the cross-appeal.

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