No. 28 of 1958

(11)

IN THE HIGH COURT OF AUSTRALIA

THE COMMONWEALTH OF AUSTRALIA

V.

MACKEY

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY, 19th OCTOBER 1959.

W. M. Houston, Govt. Print., Melb.

THE COMMONWEALTH OF AUSTRALIA

v.

MACKEY

ORDER

Appeal allowed ~~with costs~~. Order of the County Court, Melbourne, set aside. In lieu thereof order that the appeal to that Court be dismissed. No order as to costs.

THE COMMONWEALTH OF AUSTRALIA

v.

MACKEY

JUDGMENT DIXON C.J.

THE COMMONWEALTH OF AUSTRALIA

v.

MACKEY

This appeal from the County Court at Melbourne exercising federal jurisdiction concerns a claim under the Commonwealth Employees' Compensation Act 1930-1956. It was a claim in respect of a death which was found to have been the result of a ventricular fibrillation precipitated by a coronary occlusion. The question whether the deceased was acting in the course of his employment at the time the fibrillation commenced to develop depended on very special facts which were fully dealt with by his Honour Judge Nelson in a very careful judgment. But when he delivered his judgment the decision of this Court in The Commonwealth v. Ockenden 1958 Argus L.R. 772 had not been given. That decision appears to be incompatible with the success of the claim.

At the hearing of the appeal in this case by the Commonwealth the respondent whose claim had succeeded in the County Court did not appear. The Court after hearing the appellant's argument so far as it depended upon the application of the decision in Ockenden's case stopped the appellant's counsel, but in view of the fact that cases were under consideration in appeals concerning awards made in other jurisdictions in respect of heart disease the Court did not immediately pronounce judgment in this case. Those cases have now received our consideration and, as far as I am concerned, I have found no reason for thinking that we were wrong in the view we were disposed to take that the order of the County Court cannot stand in face of the decision in Ockenden's case.

I think that the appeal from the County Court should be allowed, the order of the County Court discharged, and in lieu thereof an order made that the appeal to the County Court be dismissed. In the circumstances there should be no order as to costs.

COMMONWEALTH OF AUSTRALIA

v.

MACKEY

JUDGMENT FULLAGAR J.

COMMONWEALTH OF AUSTRALIA

v.

MACKEY

I agree with the judgments of the Chief Justice and Taylor J., and I have nothing to add.

THE COMMONWEALTH OF AUSTRALIA

v.

MACKEY

JUDGMENT

TAYLOR J.

THE COMMONWEALTH OF AUSTRALIA

v.

MACKEY

In somewhat unusual circumstances the question arose in a proceeding before a County Court judge whether the death of the respondent's husband resulted from injury by accident caused to him in the course of his employment by the Commonwealth, or, alternatively whilst he was travelling from his place of employment. The proceeding in which the question arose was an appeal, pursuant to section 20 of the Commonwealth Employees' Compensation Act 1930-1950, from a determination of the Commissioner for employee's compensation by which the respondent's claim for compensation had been disallowed. Upon appeal the learned County Court judge reached an affirmative conclusion to the question posed above. Accordingly he allowed the appeal and made an award in favour of the respondent. This appeal is now brought from his Honour's order.

The deceased was a senior engineering officer in the Postmaster-General's Department and during the evening upon which his death had occurred he had attended a function arranged by a social club within the Department to farewell a retiring officer. He attended this function by invitation to make a formal presentation to the retiring officer on behalf of the members of the club. Towards 10.30 p.m. the deceased left the hall where the final stages of the function were still in progress and proceeded to walk along a level footpath in the direction of a nearby tramstop. About fifteen minutes later his dead body was found about a hundred yards from the hall.

From this brief statement of some of the material facts it is apparent that there was room for doubt whether the deceased's activities that night constituted something done in the course of his employment and, also, whether

it could properly be said that at the time of his death he was travelling from his place of employment. These questions were not, however, debated before us for when the appeal came on for hearing there was no appearance on behalf of the respondent and counsel for the appellant informed us that the decision of this Court in Ockenden v. the Commonwealth (1958 A.L.R. 772) meant that even if they were answered in favour of the respondent her claim must still fail. The judgment of this Court in Ockenden's case was delivered after the learned County Court judge had dealt with the present case.

An examination of the evidence and findings in the case show that the appellant's contention is correct. The cause of the deceased's death was coronary disease and the ultimate precipitating cause was a coronary occlusion which, as was found, probably commenced to develop before he left the hall to go to the tramstop. But there was no evidence to suggest that the development of this condition was related, otherwise than in point of time, to any of his activities that night. The learned County Court judge's finding was that "the occlusion had resulted from the natural progression of the disease from which he suffered and it was not contended by the appellant that death was precipitated by any factor other than the development of the disease itself". Ockenden's case is clear authority for the proposition that in those circumstances the respondent's claim cannot succeed and accordingly it becomes unnecessary to consider any other question in the case. That being so the appeal should be allowed and the order of the County Court judge set aside.

No. 28 of 1958

(8)

IN THE HIGH COURT OF AUSTRALIA

PRINCIPAL REGISTRY

1958 No. 28.

ON APPEAL FROM THE COUNTY COURT HELD AT MELBOURNE BEFORE HIS HONOUR JUDGE NELSON

B E T W E E N:

THE COMMONWEALTH OF AUSTRALIA

Appellant
(Respondent)

- and -

GLADYS MAY MACKEY

Respondent
(Appellant)

REASONS FOR JUDGMENT OF HIS HONOUR JUDGE NELSON

H. E. RENFREE,
Commonwealth Crown Solicitor,
450 Law Courts Place,
MELBOURNE.

REASONS FOR JUDGMENT

Court	:	County Court, Melbourne.
Parties	:	Gladys May Mackey v. The Commonwealth of Australia.
Nature of Proceedings:		Appeal pursuant to Section 20 of the Commonwealth Employees' Compensation Act 1930-1956 from a Determination of the Commissioner for Employees' Compensation dated 16th October, 1957.
Bench	:	Judge Nelson.
Order of the Court	:	Appeal allowed; an award for the Appellant for £2,350 with costs to be taxed on the appropriate scale.
Date	:	30th May, 1958.

MACKEY v. COMMONWEALTH OF AUSTRALIA

Appeal under Section 20 of the Commonwealth Employees' Compensation Act 1930-1956, against a determination of the Commissioner disallowing a claim by the appellant for compensation under the Act in respect of the death of her husband Maxwell Arthur Mackey.

The deceased was an employee of the Commonwealth and at the time of his death held the appointment of Superintending Engineer of the Services Branch of the Engineering Division of the Postmaster General's Department in Victoria. The Superintending Engineer is the senior officer of the Branch and in the direct line of responsibility in Victoria is junior only to the Assistant Director in charge of the Engineering Division and the Director of Posts and Telegraphs for the State. The Services Branch for which he was thus responsible was divided into four sections, one of which, the Supplies and Training Section, had included amongst its functions that of the training of technicians, linemen and engineers in the Department. The training of linemen was carried out in the Section by the Linemen's Training School, which was situated in Port Melbourne.

A senior technical instructor in the School, one Mr. Rawiller was due to retire from the Department after 33 years' service on the 12th April 1957. It is and has for many years been customary amongst officers of the Department, for a presentation to be made to a retiring officer from moneys subscribed by fellow officers. The staff of the School had some years previously formed a social club, which had no official standing in the Department and which organised social outings and functions for staff members and their families. The Social Club took steps to organise a presentation to Mr. Rawiller and a "farewell" function at which the presentation would take place.

NELSON J.

This was done with the active concurrence of the Principal of the School who indeed spoke in his evidence of "instructing" the Social Secretary to write to the Divisional Engineer seeking approval for the printing and distribution throughout Victoria of circulars relating to the presentation and function. I do not think that the fact that the organisation of the presentation and function was carried out by the Social Club impressed the function with any character different from that of the general run of functions for retiring officers of the Department which were normally organised by their fellow officers. Its existence amongst the officers of the School provided a convenient body to do what Mr. Davidson, the Assistant Director (Engineering) informed me would usually be done by the officer immediately junior to the retiring officer, or by ad hoc committees.

Retiring functions were often held during working hours towards the end of the day and some time prior to 12th April one of the instructors at the School approached the deceased as Head of the Branch and asked if the function for Mr. Rawiller could be held at 4 p.m. at the School at Port Melbourne. The normal knocking off time in the Department is 5.6 p.m. The deceased would not approve of the function being held at 4 p.m. as the time involved in travelling for a number of men who had been trained under Mr. Rawiller and who now are located at various depots would mean too great a loss of time to the Department. He considered also that facilities were not adequate at the School to provide for the number of men who could be expected and he suggested that an evening function should be arranged at a suitable cafeteria under the control of the Department. He was then asked whether if the function were held in the evening he would be agreeable to make the presentation and he stated that he would. The Social Club thereafter

arranged for the function to be held at the Post Office cafeteria at 8 p.m. on 12th April. The cafeteria was located in the Postal Workshops and was controlled by the Welfare Section of the Personnel Branch, a Branch which is not a part of the Engineering Division but is directly under the control of the Director and which through its Welfare Section controls staff amenities for the various branches of the Department. Approval for the use of the cafeteria had accordingly to be obtained from this Section. The arrangements having been completed, a formal written invitation to deceased to make the presentation was sent by the Social Club to the deceased and accepted by him. As there was some doubt as to whether the deceased might be well enough to attend the function, an official of the Social Club asked Mr. J.S.MacGregor, a divisional engineer in the Technical Training Division, if he would be specially present so as to make the presentation if deceased were unable to attend. The deceased did attend the function. Two presentations were made to Mr. Rawiller. Mr. Walters, the Principal of the School, on behalf of the members of his staff presented a coffee table which had been constructed and paid for by members of the staff. The deceased presented a wallet of notes which had been subscribed by officers of the Department throughout the State, and in the course of a speech thanked Mr. Rawiller for his services to the Department and to the country.

For four or five years prior to this evening the deceased had suffered from and received medical treatment for hardening of the arteries which had manifested itself particularly as coronary sclerosis. During this time he had been taking drugs in the form of tablets prescribed for his treatment by his doctor. The tablets were of two types, which were not identified by the doctor in his evidence, but one of which he described as treatment for the underlying condition and the other of which he described as treatment

for the urgent symptoms such as anginal pain from which the deceased sometimes suffered. These latter tablets were probably trinitran. He had been last seen by his doctor prior to the 12th April on the 13th February 1957, when he had complained of feeling rather more tired than usual, a symptom which the doctor attributed as much to the weather as to anything else, In the week prior to the 12th April, he had had what was described by the Senior Clerk of his Branch as a very strenuous week at work and appeared very fatigued on 12th April. After dinner at home he dozed for about half an hour and then left for the function at about 20 past 8. At the function he appeared to Mr. MacGregor to be not in the best of health, and was observed by him to take one of his tablets shortly prior to the commencement of the speeches which began at about 9.15 p.m. He appeared brighter during his speech and then told Mr. MacGregor that he would be going home shortly and that he would go around amongst the rest of the people to say good evening. Whilst in conversation with a Mr. Lloyd, he said that he would go home as he was not feeling well and he swallowed some pills (to the number of, the witness thought, two) which he had taken from a bottle. He asked Mr. Walters to apologise for his absence if occasion arose, again stating that he did not feel well, but declining any assistance, and left the hall at about 10.30 p.m. Approximately 15 minutes later he was discovered apparently dead on the nature strip of the foot-path on the path he would normally have taken to catch a tram to his home, and at a point approximately 100 yards from the hall. The death certificate tendered in evidence certified that his death occurred on 12th April 1957 at the corner where he was found. No post-mortem examination was made of the body but the medical evidence satisfies me on the balance of probabilities that his death resulted from a ventricular fibrillation precipitated by a coronary

occlusion. The occlusion had resulted from the natural progression of the disease from which he suffered, and it was not contended by the appellant that it was precipated by any factor other than the development of the disease itself. I am satisfied that the occlusion commenced to develop while the deceased was at the function, and that its subsequent development resulted in a ventricular fibrillation while he was travelling from the function to his home. Although he was probably aware of his arterial condition, I infer from the fact of his attendance at the function and his refusal of assistance when leaving it, that the occurrence of the occlusion and of the consequent ventricular fibrillation were unexpected by him. As the appellant was wholly dependent upon the earnings of the deceased, her right to compensation under the Act depends upon the answers to two questions, viz., whether the attendance of the deceased at the function constituted a part of his employment by the Commonwealth, and whether his death resulted from personal injury by accident within the meaning of the Act.

Consideration of the first question involves an examination of the duties of the deceased. The only written statement of his duties was a document which was put in evidence (Exhibit D), and which the parties agreed set out the duties of his office as laid down by the Director-General of Posts and Telegraphs with the approval of the Public Service Board. The Chairman of the Public Service Board however subsequently stated in evidence that it is incorrect to say the Board approved the statement. He said that it was prepared in the Department and that its purpose was to give a general description of the job and to enable the Board to fix the appropriate pay for and classification of the position. I accept this description of the statement. The statement sets out in general terms the matters for which the officer is responsible but does not purport to express

in exhaustive detail the various duties he must discharge in the performance of his several responsibilities. Although applicant's Counsel tendered this document by agreement with the respondent, he made it clear that he did not tender it as an exhaustive statement of the duties of the deceased. To illustrate this he called evidence which established that after the preparation of the duty statement a further duty had been assigned to the deceased, viz., to organise and administer in the Department what was known as the "Raise our Sights Forum", an activity which was designed to bring administrative officers and staff together for discussion in order to instil enthusiasm in the individual for his job and thus improve efficiency and morale. He contended further, that apart from duties which could be ascertained by reference to the duty statement or which had otherwise by the specific direction of superiors been assigned to the deceased, custom could attach responsibilities to the office and the discharge of such responsibilities constituted a part of the employment of the officer. In regard to the particular activity upon which the deceased had upon the evening of his death been engaged, he contended firstly that it fell within paragraph 4 of the statement of duties under the heading of "staff" and secondly, that if it did not fall within that statement, it was a responsibility attached to his office by custom. The immediate superior of the deceased, Mr. Davidson, who had signed the statement of duties, said in evidence that he understood the expression "Responsible for the particular administrative functions carried out in respect of his Branch under the heading of 'Staff'" to include responsibility for not only control, discipline, promotion and transfer but also for the general well being and enthusiasm of the staff, including questions of morale. There was also a considerable body of evidence as to the custom in the Department in relation to presentations to retiring officers. This

evidence satisfied me that for very many years, it has been customary among officers of the Department for a presentation to be made to an officer upon his retirement; that such presentations are subscribed for by his fellow officers and are presented at a function arranged for the purpose; that the time for the holding of these function varies, some being held in the closing stages of the working day, some immediately after work finishes and some in the evening, the time being determined according to the status of the retiring officer, the number of fellow officers expected to attend, the distances they would have to travel, and the loss (if any) of Departmental working time involved; that a senior officer of the Branch or Division in which the retiring officer has been employed is invited to make the presentation, the standing and length of service of the retiring officer being relevant in determining how senior the officer so invited should be; that an officer so invited was expected both by the members of his staff and by officers superior to him to accept such an invitation as an incident of his position; that if the appropriate officer were unable to attend he would normally arrange for the next senior officer below him, who was able to attend, to deputise for him; that no officer could be instructed to make the presentation if he did not desire to do so and he could not be subjected to any disciplinary action if he refused but his failure without reasonable excuse to do so if invited would be regarded by his superiors as indicative of a lack of interest in the welfare of his staff. Evidence was tendered by the applicant and was admitted by me, subject to objection by the respondent, that the deceased on a number of occasions had stated that it was his duty to attend the particular function on the evening of the 12th April. If a particular act does not fall within the scope of a worker's employment, his belief that it is his duty to

do it does not bring it into the sphere of his employment, but at the time when the evidence was tendered and objection was taken to it, it appeared to me that the reasons which had led to the deceased attending the function might well be relevant to the question as to whether it was part of his employment to attend it. I therefore admitted the evidence, reserving any question as to whether it should subsequently be regarded as relevant. It is established to my mind that the deceased believed that in consequence of his position in the Department, it was at least morally incumbent upon him to attend the function. As some point was made in argument that this function was held outside the normal working hours in the deceased's branch, I think I should record a further finding, viz., that the deceased had attained a position of executive seniority where the normal knocking off time in the Branch had little more than formal significance for him; as in the case of many officers of similar status, the performance of his duties frequently involved his working beyond the normal time of 5.6 p.m., and his working in the evening, either at his home or elsewhere.

It was contended by Mr. Menhennit that the word "employment" where it first appears in Section 9A should be interpreted to mean the actual work that the employee is employed to do, and should not be given the more extended meaning which upon the authorities it bears in the expression "in the course of the employment." It appears to me however, that, unless it is clear that the Legislature intended otherwise, the word should be given the same meaning in Section 9A as it is given in Section 9. I cannot find in the two sections anything which suggests such a contrary intention. Indeed where the word "employment" secondly appears in subsection (1) of Section 9A, it is clearly used in the same sense as in Section 9, and it is difficult to conclude that

where the same word is used twice in the same comparatively short subsection, the Legislature intended it to have two different meanings. Moreover as a result of successive amendments of the section, the expression "travelling to and from his employment" has taken the place of what was originally "travelling to and from work" and the change of the word "work" to the word "employment" which throughout appeared in Section 9, appears to me to reinforce the conclusion that the Legislature intended that "employment" should have the same meaning in each section. Nor do I think that with the possible exception of Fullagar J, any of the Judges in The Commonwealth v. Wright (1957) A.L.R. 111 express views inconsistent with this conclusion. Fullagar J does say that the immediate purpose of the employee in making the journey must be either to enter upon duties which his employment imposes upon him or to absent himself temporarily from those duties, but that statement must be read in the light of the facts with which His Honour was then dealing, and I do not think it necessarily implies that His Honour's view was that in all circumstances "employment" in Section 9A is limited to the performance of duties which are part of the contract of service and which are of such a nature that the failure to perform them would render the employee liable to disciplinary action.

If I am correct in holding that "employment" has the same meaning in Section 9A as it has in Section 9, it is I think clear on the authorities, that the worker's employment comprises more than the performance of duties which he could be instructed to perform. It includes the whole of his service to his master. It may include the doing of acts which while they are not imposed by contractual obligation arise out of his service by practical compulsion, if I may adopt an expression by Lord Wright in Weaver v. Tridegar Iron & Coal Co. ((1940) A.C. 955 at p.976). It normally includes the doing of acts which are incidental to the work he is employed to do, acts which he may reasonably be

required, expected or authorised to do in order to carry out his actual duties. In some cases the question of whether he could have been compelled to do the act might be decisive as to whether it formed a part of his service; in other cases it is not. The mere fact that the thing which he does is connected with his employment is not in itself sufficient to make it a part of his service, e.g. the voluntary attendance of a worker at night school might improve the service he gives to his master but it is something which he does as an individual and not "by virtue of his status as an employee". Different tests have been applied in different cases to determine whether a worker is engaged upon the service of his employer, and I think it is apposite to cite what Lord Wright said at pp.975-6 of Weaver's Case: "Lord Buckmaster in Stewarts Case" (1917) A.C. 249 "uttered a warning against the mistake involved in attempting to define a fixed boundary line between the cases which are within the statute and those which are without. 'This' he said 'it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case upon particular facts is or is not within the meaning of the phrase'. The realities of each case must be regarded." Looking at the realities of this case, I find that a senior officer of the Postal Department has attended a social function for the purpose of making a presentation to a retiring subordinate; that he has been invited to attend and has attended in his capacity of the Senior Officer of the Branch; that while under the terms of this service he was not contractually bound to perform this task in the sense that he could have been disciplined for failing to perform it, a longstanding custom in the service and the attitudes of both his superiors and his subordinates were such as would be calculated to make him believe and did in fact make him believe that he was morally bound to perform it as an incident of his position; and that while the performance of the task could not be said to fall

strictly within the terms of his responsibility for staff, as set out in the formal written statement of his duties, it would be a factor in maintaining the enthusiasm and the morale of his staff, and as such would facilitate the maintenance of that administrative control which was specifically assigned to him. I have no doubt that what he did was done because he believed that it was a part of the service that he owed to his master and that what he did he was expected by his superiors to do as a part of that service. Once it is established that his service to his employer is not limited to those duties which he is bound under his contract of service to perform, it seems to me that the above recited facts leave little doubt that in attending at the function to make the presentation, he was acting in the service of his master, and that consequently he was engaged upon his employment. When he left that function to go to his home he was in my opinion travelling from his employment by the Commonwealth. I have already found that the occlusion commenced to develop while the deceased was at the function and that its subsequent development resulted in the ventricular fibrillation which, while he was on his way home, caused his death. I cannot on the evidence say whether the occlusion had completed its development before he left the hall, or whether its development continued during the 100 yards he travelled to the point where he collapsed. But this I think is immaterial. While at the hall he was in the course of his employment and thereafter he was travelling from his employment and if the occurrence of the coronary occlusion constituted personal injury by accident, his death is in either event compensatable. Although one of the grounds of appeal to me was that the Commissioner was in error in determining that the death of the deceased did not result from injury by accident arising out or in the course of his employment, appellant's counsel opened the case as one of injury by accident while travelling from his employment. Following a discussion during the hearing, he reaffirmed that

he was resting the case on that basis. The discussion however arose in relation to the question of whether he could also rely on a submission that the injury arose out of the employment and I do not think that the course he took either precludes me from dealing with or involves any unfairness to the respondent if I deal with the alternative position that the injury occurred in the course of the employment. In order to determine whether deceased was travelling from his employment, it is necessary to determine whether it was part of his employment to attend the function and consequently whether he was in the course of his employment whilst there and both evidence and argument were directed to this issue.

Mr. Menhennitt further contended that personal injury by accident had not been caused to the deceased. The expression "personal injury by accident" has in recent years been discussed in several cases. The legislation being considered in these cases differed in important respects from that which I am considering, but in each case it related to workers' compensation and the reasoning adopted by the Court is strong persuasive authority upon the question before me. The first case to which I refer is Willis v Moulded Products (Australia) Ltd. (1951) V.L.R. 58. In that case a worker had died as a result of a cerebral haemorrhage suffered whilst travelling between his place of employment and his place of residence, and the Full Court had to determine whether injury by accident had occurred to him, within the meaning of sub-section (5) of Section 5 of the Victorian Workers' Compensation Acts. This sub-section had been added to the Principal Act in 1946 by Act No. 5128, which had also substituted the disjunctive "or" for the conjunctive "and" between the expression "arising out of" and the expression "in the course of" throughout the Acts, and had inserted wide definitions of "disease" and "injury". Lowe A.C.J. (as he then was) and Barry J, who agreed with his reasons, rejected an argument for the employer, that there can be no injury

by accident unless there is shown to be some agency or some circumstance extraneous to the worker which has brought about the injury and that there cannever be injury by accident where all that can be shown is that the worker has suffered injury from the inevitable result of the progressive degeneration of his arteries by disease. His Honor stated that in arriving at this conclusion he had not found it necessary to rely upon the amended interpretation given by Act No. 5128 to the word "injury" though it might well be that this interpretation would of itself lead to the like ~~inclusion~~ conclusion. Sholl J also rejected this argument for the employer and at pp 68-69 of the report, states "it follows that I am prepared to uphold the Board's second proposition, viz, that the cerebral haemorrhage in this case, having occurred in the course of a journey to which Section 5 (5) (b) (i) applied, was a compensatable injury by accident, even if it was due solely to the progress of the diseases of hypertension and athorosclerosis, and notwithstanding that there was no temporal or causal connection with his employment and notwithstanding even that there was no event or circumstance physically external to the worker, not associated with his employment, contributing to the injury. And I am prepared so to hold on the basis at least of Mr. Eggleston's second submission, viz, that any ascertainable lesion, or lesion observable ante or post mortem, of part of the body occurring during a protracted period, is per se and of itself injury by accident and does not require any external element to make it such." And as I follow his judgment His Honour reaches this conclusion, as the other members of the Court did, without relying on the amended interpretation of the word "injury" in the Act. It appears to me therefore that the reasoning which led each of these Judges constituting the Court to this conclusion would have led them to a similar conclusion if they had been considering the expression "injury by accident" in the section of the Commonwealth Act with which I am dealing. Mr. Menhennitt submitted however, that this reasoning should no longer be followed

because of the subsequent discussion of the same Act by the Privy Council in James Patrick & Co. Pty. Ltd. v Sharpe (1955) A.C.1. In that case a worker had died as a result of an auricular fibrillation suffered by him while travelling between his residence and his place of employment. There was no finding that the occurrence of the auricular fibrillation was contributed to by any event or circumstance external to the worker. In the Full Court it was argued that even if Willis's case was correctly decided it was distinguishable because there the worker had suffered an "injury" in the ordinary acceptance of the term, whereas auricular fibrillation was no more than a functional disturbance of the heart. Both Herring C.J. and Sholl J. agreed that this distinguished the case from Willis's case but both decided that the issue was concluded against the employer by the definitions of "injury" and "disease" contained in the Victorian Act. (Vide 1953 V.L.R. at 210 and 223). The Court again decided that the worker had suffered injury by accident. The case was taken on appeal to the Privy Council where the judgment of the Full Court was affirmed. I am unable to find anything in the judgment of their Lordships which casts doubt upon the reasoning of the Judges in Willis's Case. Their Lordships say at p.20 "In both Willis's case and the present case the authorities were fully reviewed, particularly by Sholl J, and their Lordships agree with the decisions". While agreement with a decision may not involve agreement with the reasons for that decision, there is no suggestion by their Lordships that the authorities which had been fully reviewed in Willis's case did not support the conclusions which the Court had reached without regard to the extended definitions of "injury" and "disease" in the Act. Their Lordships indeed point out that the words "by accident" are not defined in the statute and must therefore be interpreted in the light of the authorities (p.17) and it was this phrase with which the Court in Willis's case was concerned. So far from being inconsistent with the reasoning of Lowe A.C.J.

NELSON J.

and Sholl J. the judgment of their Lordships appears to me to support it. Mr. Menhennitt relied further upon a decision of O'Bryan J. in Campbell v Australian Shipping Board (1958) V.R. 59. His Honour was there dealing with a provision of the Merchant Service Guild Award, whereby compensation was payable if personal injury by accident arising out of and in the course of the employment was caused to an employee. His Honour did in that case express the opinion that a fibrillation of the heart muscle which was due solely to the progress of disease in the body of a worker was not injury by accident within the meaning of that provision, and from the context in which this opinion is expressed, it does appear that His Honour was expressing the view, not merely that a functional disturbance of the heart did not constitute injury, but that the composite expression "injury by accident" referred to a condition resulting in part at least from some external event or action of the deceased. If that was His Honour's view, it appears to me to be inconsistent with the reasoning of the members of the Full Court in Willis's Case and with what I take to be the approval by the Privy Council of such reasoning, and it is proper that I should follow the latter.

I am satisfied for the foregoing reasons that injury by accident was caused to the deceased either whilst in the course of his employment at the function or while travelling from his employment and that his death resulted from such injury. There will be an award for the appellant for £2350 with costs to be taxed on the appropriate scale. Certify for 3 refreshers. Stay 21 days.

as amended by me

I certify that this is a true copy of the Judgment delivered by me on the 30th day of May, 1958.

JUDGE

NELSON J.