EMPLOYERS' LIABILITY FOR WORKMEN'S COMPENSATION

Kuppusamy v. *Golden Hope Rubber Estate Ltd.*[1]

The facts of the case were as follows. On the morning of October 2, 1961. the deceased, a weeding labourer went to the 'muster' where she received instructions for the day's work. As she had provided herself with a wrong tool, she went home without getting the permission of her supervisors to fetch the appropriate implement for work. When she got home, she fell outside the kitchen of her house and died. The medical report was that she died of haemorrhage resulting from the fall. The dependent children claimed compensation.

The labour commissioner recorded evidence that the parties agreed that the deceased fell as a result of an accident and sustained injuries after the 'muster'. He concluded that in his view the deceased died of an accident arising out of and in the course of her employment and that compensation was payable. In the arbitration proceedings that followed, the arbitrator found that compensation was payable to the dependents. In determining the question of liability of the employer to pay compensation, the arbitrator proceeded on the basis of the evidence recorded by the labour commissioner.

The High Court, on appeal held that as the employment of the deceased for the day had not commenced at the time she met the accident, the deceased had not died by reason of an accident arising out of and in the course of her employment. According to Ong J., the returning of the deceased to fetch a proper implement could not be taken to be within the period of employment so as to include the accident as arising out of and in the course of employment.[2] On appeal from the decision of the High Court, the Federal Court held that the deceased did not return home to fulfil any of her own purpose, but for a purpose which would facilitate her work in the course of her employer's business. That being so, the accident arose out of and in the course of her employment and hence compensation was payable.

The substantive law regarding employer's liability is to be found in sections 4 and 5 of the Women's Compensation Ordinance 1952.[3] Under these provisions to hold an employer liable:

(1) There must be an accident causing personal injury;

(2) Either the accident must have arisen out of the employment or, it must have happened during the course of employment.

By virtue of section 4(1)(d), an accident could be deemed to have happened within the scope of employment in spite of the fact that the act of the employee which resulted in the accident was in contravention of any express provision of rules and regulations or had been done without permission, which *stricto senso* would be outside the scope of employment.

1. [1965] 1 M.L.J. 178.

2. [1965] 1 M.L.J. 179.

3. Section 4. (1) (a) If in any employment *personal injury by accident arising out of and in the course of the employment* is caused to a workman, his employer shall, save as hereinafter provided, be liable to pay compensation. . . . . in accordance with the provisions of the Ordinance. . . . .

(b) An accident happening to a workman shall be deemed to arise out of and in the course of his employment notwithstanding that he was at the time of the accident acting in contravention of any statutory or other regulations applicable to his employment, or that he was acting without instructions from his employer, if —

(i) the accident would have been deemed so as to have arisen had such act not been done in contravention as aforesaid or without instructions from his employer, as the case may be; and

(ii) such act was done for the purposes of and in connection with the em ployer's trade or business. . . . . .

Section 5. For the purpose of this ordinance an accident arising in the course of a workman's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment.

To bring an accident within the scope of employment in spite of contravention of rules, two conditions stipulated in sub-clause (1) and (2) of section 4(1)(d) must be satisfied.

(1) If in its nature, it could be said that the accident happened within the scope of employment irrespective of the contravention of rules, and

(2) That the act which resulted in the accident was done for the purposes and in connection with the employer's trade and business. By the provision of section 5, an accident arising in the course of employment shall be deemed to be arising out of that employment.

An 'accident arising out of employment' and an 'accident during the course of employment' are two related but distinct concepts. The former contemplates the origin and cause[4] of the accident as emanating out of the nature of that particular employment — the employment being the contributory cause of accident. The latter refers to the time, place and circumstances of the accident.[5] In either case it is a question of fact, variable with the varying circumstances of each case.[6] Arising out of and in the course of employment, is a formula which is susceptible of a wide or narrow interpretation, by which it is possible to limit as well as enlarge the scope of the liability of the employer.

To determine the scope of the liability of the employer under the legislative principle "arising out of and in the course of employment", various judicial tests have been formulated. Lord Atkin in *Crimes* v. *Guest, Keen and Nettle Fords*[7] stated that the test in such cases is "whether the workman was at the time and place where the accident occurred doing something in performance of a duty to the employer arising out of the contract of employment." The Court of Appeal in this case held that the phrase "in the course of employment" would be satisfied if the workman was in the place where the accident occurred by reason of an implied contract of service.[8] In later decisions of the House of Lords and Court of Appeal, the locus of employment or the premises of the employer, for the purposes of liability was extended up to and from the work-site.[9] In these later cases the test of 'control of the premises'[10] as laid down by Lord Atkin in *Crimes'* case was considered not an essential test.[11] Instead, the test of "obligation" or "necessity" of the workman to be at the place where he met with the accident by reason of the "contract of service" was introduced. In order to limit the liability of the employer, the doctrine of "added peril" [12] or the theory of "absence of obligation" on the part of the workman [13] was employed. Thus, judicial determinations afford only certain viable principles and tests which could be conveniently applied to facts enabling the determination of the scope of employer's liability under the statute.

In Malaysia under the provisions of sections 4 and 5 of the Workmen's Compensation Ordinance,[14] which are in *pari materia* with the corresponding provisions of the English statute, the scope of liability of the employer to pay compensation to the employee could be extended to any limit subject only to judicial interpretation according to the facts and circumstances of each case. To illustrate, under the provisions, whenever an accident arises during the course of employment resulting

4. *Simpson* v. *Sinclair* [1917] A.C. 127 at 135.

5. *Ibid.*, at p. 138.

6. *Cross Tetley & Co., Ltd.* v. *Catterall* 18 B.W.C.C. 445.

7. [1908] 1 K.B. 469.

8. *Ibid.*

9. See *Riley* v. *William Holland & Sons, Ltd.* [1911] 1 K.B. 1029; *John Stewart & Son, Ltd.* v. *Longhurst* [1917] A.C 249; *Weaver* v. *Tredegar Iron & Coal Company, Ltd.* [1940] A.C. 955.

10. [1918] A.C. 81.

11. *Ibid.*

12. *Lancashire & Yorkshire Railaways Co.* v. *Highly* [1917] A.C. 352.

13. *N. Helens Colliery Co., Ltd.* v. *Heintson* [1924] A.C. 59.

14. Workmen's Compensation Ordinance, 1952.

in personal injury, the employer is liable. This liability is further extended in the following manner:

Firstly, an accident could be deemed also to have arisen out of employment.[15]

Secondly, it could be deemed so, even if the employee had acted in contravention to express prohibitory order and an accident had resulted.[16]

Thirdly, an accident could be deemed to have arisen out of employment, if it is in the course of employment.[17]

And finally, there is the doctrine of notional extension of the employer's premises to deem an employee to be engaged in the course of employment, and to widen the scope of the employer's liability.

The earlier decision determining the scope of liability of an employer to pay compensation, also point to a liberal interpretation and application of the phrase "arising out of and in the course of employment." In *Raub Rubber Estate Ltd.* v. *Controller of Labour*,[18] a coolie employed in the estate while sick went to the dispensary of the estate and took formic acid in place of quinine, supplied to him by mistake by the person in charge of the dispensary at the time, and died. The Commissioner of Workmen's Compensation held that "the taking of the medicine though voluntary, was one of the ordinary incidents of the life of an estate workman and incidental to the employment in that estate" and so the accident happened during the course of employment and compensation was payable. On appeal, the High Court upheld the decision of the Commissioner holding that the deceased in going to the dispensary and taking the medicine did "what he was not only permitted to do, but which he had a right to do", and so the employer was liable to pay compensation.

In another case,[19] the hospital dresser of a rubber estate was assaulted by the attendant of the hospital. The question raised was whether the accident arose out of the employment or not. The respondent company conceded that the accident arose "in the course of" the employment but denied that the accident arose "out of" the employment. The Commissioner of Workmen's Compensation, Singapore, in elucidating the principles determining liability of the employer, stated that an accident could be deemed to have arisen out of the employment, if it had directly arisen out of the circumstances encountered by the workman within the scope of his employment, or if the injury suffered resulted from an abnormal risk inherent in the employment, the undertaking of which was necessarily incidental to the performance of his work, or there was a liability on the part of the workman under the contract of employment to undertake the risk, and thereby incurred the injury. The Commissioner decided that as there was sufficient evidence to infer that the applicant was exposed by his employer to the risk of assault and the assault which led to the injury was an accident arising out of as well as in the course employment.[20]

In *Re Narasamah*[21] where the female coolie engaged in the weeding work of a rubber estate was killed by lightning during a thunderstorm to which she was exposed, the Commissioner of Workmen's Compensation held that as the deceased was not exposed to any greater danger than any other person who happened to be in that locality at that time, the accident did not arise out of and in the course of employment of the deceased.

In *Sungei Salak Rubber Co. Ltd.* v. *Dy. Commissioner of Labour*,[22] the deceased

15. Section 4(1) (d) of the Ordinance.

16. *Ibid.*

17. Sec. 5 of the Ordinance.

18. (1936) 6 M.L.J. 74.

19. *Jacob Samuel Pillay* v. *Hanyang Plantations Ltd.* (1938) 7 M.L.J. 64.

20. *Ibid.*

21. (1940) 9 M.L.J. 5.

22. (1949) 15 M.L.J. (Supp.) 153.

was a daily labourer on the New Labu Estate of the appellant company. On the day in question, the deceased attended the 'muster' in the labourer's lines and received instructions for his duties which was to commence in the second shift in the afternoon. In the afternoon he boarded the lorry of the appellant company to proceed to his place of work from the quarters where he lived. On the way he fell off from the lorry and as a result of the injuries sustained he died. The deceased had no express permission to travel in the lorry; nor was he forbidden from doing so. On a claim for compensation the Commissioner of Labour decided that the deceased died of an accident arising out of and in the course of employment; and ordered the payment of compensation. On appeal the High Court of Seremban held that the deceased boarded the company's lorry to proceed to his place of work. As such he was in the lorry only and solely for the purpose of going to his work; and so compensation was payable. The court also held that the site of the accident was an estate road running through the employer's plantation, implying thereby that the *locus* of the accident was under the control of the employer and within his premises.

In the next case, *Dy. Commissioner of Labour, Perak* v. *The Sitiawan Transport Company Ltd.*,[23] the facts were that a band of bandits shot dead the conductor of the bus. It was admitted before the Commissioner that the deceased died as a direct result of the injuries, and that the accident arose in the course of his employment. But it was denied by the respondent that the accident arose out of the employment of the deceased. Accepting the respondent's argument the Commissioner dismissed the application for compensation. On appeal, the High Court of Ipoh held that the Commissioner had taken an unduly narrow view of the matter. The court decided that as it cannot be said that there was no casual connection at all between the employment of the deceased and his death as a result of the accident, the deceased died as a result of injury by accident arising out of and in the course of employment. The court, in its judgment, cited with approval the observations of Scot, L.J. in *Wilson* v. *Chatterton*: [24]

> ". . . It is true that the words 'arising out of and in the course of employment' impose two conditions precedent in the statutory obligation of the employer, and that the words 'out of' introduce a factor which might seem to throw back the inquiry into causation one step further from the final effect than the words 'in the course of'. But so to read the condition is in our opinion, to misread it. It is only when the accidental injury had no causal connection with the employment at all that it can be said not to arise out of it, though it may occur in the course of it. . ."

To sum up, in the *Raub Rubber Estate* case, while the court found it convenient to invoke the "obligation or duty" concept and found that the accident arose in the course of employment, it discounted the application of the doctrine of 'added peril' taken as one of the grounds of appeal in the case. In the case of *Jacob Samuel Pillay* and in *Re Narasamah* the Commissioners applied the test of "nature of risk undertaken was that which was involved with the performance of the employer's work to which the workman was exposed, it was deemed that the accident arose out of employment and compensation was ordered; whereas in the latter case, since the risk was an ordinary one which everybody had to undergo in those circumstances and no special risk was undertaken by the deceased on account of the employment, it was held that the accident was not one that arose out of the employment and compensation was denied. In the *Sungei Salak Rubber Co.* case, the court applied the two tests of "the purpose fulfilled by the employee at the time of accident", and that of "the control of the premises by the employer" and found that the accident arose out of and in the course of employment. In the *Sitiawan Transport Company* case while applying the test of "causal connection between the employment and the accident" to hold that the accident arose out of and in the course of employment, the court disapproved of the dichotomy involved in the language of the section implying two conditions to impose liability upon the employer for compensation payable to workman. Thus though the tendency had been to enlarge the sphere of employer's liability, judicial opinion has not favoured any one particular test, or any overall deciding criterion to fix the liability of the employer. Rather, it had applied the test that suits the particular circumstances and facts of each case in deciding employer's liability.

23. (1951) 17 M.L.J. 59.

24. [1946] 1 All E.R. 431.

In the present case, contravening the rules of the estate, the deceased went home and met with an accident there and died. On the facts it could be held that the right of compensation to the dependent exists by virtue of the provisions of sub-section (1) (d) of sec. 4 of the Ordinance which is analogous to sec. 1 sub-sec. (2) of the corresponding English statutes. But Ong J. of the High Court held that compensation was not payable as the deceased had not commenced her work for the day at the time of the accident. The learned judge added "It seems to me that, unless muster necessarily coincides with the start of employment of that day which is not the case here — any accidental injury sustained by a labourer while on his way to work must come within the four corners of paragraph (b) of Sec. 4(1) if it is to be 'deemed to arise out of and in the course of employment' ".[25] Thus the grounds on which the High Court set aside the award of the Commissioner appears to be that the accidental injury did not arise and happen in the course of employment. In other words, on theory, in terms of liability the employer would be liable only when the accident occurs at a time when the workman is engaged in the employer's work at the place of work. This is borne out by the statement of the learned Judge that the Assistant Labour Commissioner in his conclusion "failed to bear in mind that, for the accident to have happened in the course, of employment, the deceased's employment for the day must have commenced before the fatal injury." [26]

The decision of the High Court could not be supported in view of the liberal interpretation accorded to the phrase "in the course of employment" both under English law and Malayan law. In England, the Court of Appeal has held that the phrase "in the course of" is satisfied if the workman was at the place of accident as a matter of duty under the contract of employment.[27] So also has it held that in the course of employment does not mean "in the course of doing industrial work. . . ." Going to his working place on the master's premises or going from the working place at the cessation of work were both in the course of employment though they were not part of the time when the worker was doing the industrial work.[28]

In *Johnson* v. *London, Midland and Scottish Railway Co*.,[29] where a railway guard on receiving instructions travelled in an empty railway compartment to the place of his work was found dead on the way, the House of Lords held that the inference of the arbitrator that the deceased died of accident during the course of employment was justified and the inference could be displaced only by evidence that the accident was due to some action of the workman outside the scope of his employment.s[30] Again, in *Noble* v. *Southern Railway* Co.[31] the deceased, an employee of the locomotive department, contravened the prohibitory orders,[32] by crossing the rails to reach the place of work and met with an accident. The arbitrator found that the deceased was doing a prohibited act involving an added risk and so the employer was not liable. The House of Lords held that as the employee took the shorter route deviating from the safe route, for the purposes and in connection with his employer's trade or business and so in the circumstances, the accident must be deemed to have arisen out of and in the course of employment; and the employee's dependents were entitled to compensation.

The decision of the High Court in the case was not in line with the decision in *Sungei Salak Rubber Co. Ltd.* v. *Dy. Commissioner of Labour* referred to earlier. In the light of these decisions it would be difficult to lend support to the decision of the High Court in this case, unless it be conceded that by such a narrow interpretation of the statutory provision it was to limit the scope of employer's liability in Malaysia. For, it was essential and only to fulfil the obligation that arises under the contract of employment that the deceased after the muster and receiving instruc-

25. (1964) 30 M.L.J. 18.

26. *Ibid.*

27. [1908] 1 K.B. 469.

28. [1911] 1 K.B. 1029 at p. 1033.

29. [1931] A.C. 351.

30. [1931] A.C. 351, *per* Lord Thankerton.

31. [1940] A.C. 583.

32. The Prohibitory Order provided that the employee working on the lines and crossing the rails, except when required to do so in execution of their duty, will be acting outside his employment.

tions for the day's work went home to fetch an implement which would facilitate her work of the day.

Thus though the decision of the High Court in this case could not be approved as it purports to negate the right of the employee for compensation, it is equally difficult to accord approval to the criterion applied by the Federal Court in deciding the present case. The decision of the Federal Court in the case is of vital significance in the law of employer's liability for payment of compensation to workman as applicable in Malaysia.

The Federal Court decided that the deceased had not returned home to fulfil any of her own purpose, but to facilitate her work in the course of employer's business. Therefore, the accident arose out of and in the course of employment and compensation was payable. The logical fallacy of that reasoning is in assuming that if a workman is not pursuing his or her own purpose; he or she must necessarily be pursuing the purpose of the employer. What would be the case where the workman pursues the purpose of a third party? There can be a variety of circumstances, of border-line cases, where the intention and purpose of the workman in contravening the prohibitory orders or in taking additional risk involved or in deviating from the normal course of work, is submerged with the purpose of the employer. Hitherto the law had been that where the act by which accident occurred falls outside the scope of employment, it is thereby taken out of the sphere of liability of the employer to compensate. But to demarcate the border-line cases an objective test had to be formulated.

The decision of the Federal Court, is no doubt in line with the decision *in Noble* v. *Southern Railways* Co.[33] But it is submitted that in that case it was a positive test that was suggested by the House of Lords. The test was that whether it was for the purposes and in connection with the employer's trade or business that the workman deviated from the ordinary route. If that is so, the accident arose during the course of employment. To suggest an alternative test that, if the workman had not gone for his own purpose, he had been performing his employer's purpose, would be a corollary based on doubtful premises. To adopt such a test would only add to the indefinitness and uncertainty that already exist in the field of the law relating to employer's liability in spite of the statute.

In the field of the law of workman's compensation, the liability of the employer is invariably correlated with the right of the employee; and is statutorily deemed to be co-extensive with it. In a decision where the right of the employee or his dependents is decided, it is at once deciding the liability of the employer too. The law had been that where an employee of his own volition engages in an activity violating the rules of employment the employer was absolved of the liability to pay compensation in case of accidents.[34] Of late, there had been been a tendency to extend the scope of liability of the employer to pay compensation, both statutorily and judicially, to conform to the objective of such statute. But to extend the limits of the notion and scope of liability to the extent, implied in this decision of the Federal Court, by the test it had applied would raise difficulties in the future. The test applicable in such cases should be, whether it was or was not part of the injured person's employment to hazard or suffer or do that which caused his death, while doing the same thing violated the rules of the employment.

P. G. KRISHNAN.

33. *Supra*.

34. [1904] 2 K.B. 32.