Colombo.

LABOUR LAW

LESSON XVI

LAW ON INJURIES TO WORKMEN

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Position under the Common Law

Under the common law an employer was liable for injuries sustained by his workmen in the course of their employment. The branch of law applicable in this regard is "Tort" as known in English law or "Delict" in Roman Dutch Law. The employer owes a duty of care towards his workmen in providing a safe working environment. Any breach of this duty gives rise to employers' common law liability.

An employee bringing an action against his employer in respect of injuries suffered by him had to prove: -

[a] that the employer has been negligent in not providing a safe work environment that is; the employer failed either to provide reasonably safe premises or reasonably safe machinery or he has failed to instal and maintain a reasonably safe system of work. The employer could be also sued for injuries caused to his workmen by negligence of the co-workers.

(b) Another element that the plaintiff has to prove is that he suffered the loss as a result of the negligent conduct on the part of the defendant. In other words he must prove how the defendant's negligence caused him the harm he suffered. Generally, if there is a causal connection between the negligent act and the loss the defendant will be held liable. But, if the defendant contests the connection between these two, then the onus will fall on the plaintiff to establish the connection. Any damage which is too remote will not be recoverable.

If an employee died as a result of the negligent conduct of the employer, the former's dependants had no cause of action under the English common law. The position was that "the death of a human being could not give rise to an action in law." However, a significant change in the English law was brought about by the Fatal Accidents Acts of 1846 and 1864. The position under the Roman Dutch Law was more beneficial as an action could be brought by the dependants against the employer in default, for prospective loss of support. Mckerron says; "The rule is that an executor can recover nothing in respect of future loss to the estate by reason of death. There would appear to be no reason, however, why the dependants of the injured person should not have a claim against the wrongdoer for prospective loss of support."

An action under the common law should be brought in the District Court and the following defences are available to the Defendant.

(i) The plea of "volenti non fit injuria". This means that the employee freely accepted the risk of injury when he entered the employment of a dangerous nature such as mining. The employee after knowing the risks involved and by freely and willingly accepting the job, took the risk of injury upon himself. In Bowater v Rowley Regis Borough

Council[2] a road-sweeper was persuaded by his foreman to take out a horse for his cart, although he knew the horse to be nervy in traffic. The horse bolted when he was leading it through the town and he was thrown off and injured. It was held that the employee was not prevented from claiming that he had been given "unsafe equipment" to work with, since he had not volunteered to face the extra danger.

[ii] Another defence available to the defendant is "Contributory Negligence." The employer can claim that the employee too has been negligent. If the court accepts this plea it will then divide the loss between the plaintiff and the defendant in proportion to their respective degrees of negligence.

[iii] The defendant also could plead that the damages claimed are not sufficiently connected with the negligence averred or what is known as remoteness of damages. The question is how closely the damages must be connected with negligence, particularly when the results are unexpected. Controversial views have been expressed on this topic in English cases such as Re Polemis[3] and The Wagon Mound.[4] However, the position now is that damages could be claimed if the defendants have reasonably foreseen them.

From the above discussion it will be seen that common law action was not an easy one for a workmen as he had to prove a number of averments and the defendant too had a number of pleas availble to him. Further the court proceedings could be long drawn out and expensive.

The legal position however changed with the enactment of legislation on workmen's compensation. This Ordinance was based on an entirely new principle that of strict liability. The liability did not depend on negligence on the part of the employer, the common law defences were no longer available to the employer, compensation became payable

automatically whenever a workman contracted an industrial disease or met with an accident in the course of his employment incapacitating him.

The Choice between Common law and Statutory Remedies

The workman, however, still has the choice of electing between common law and statutory remedies. If he thus prefers common law remedy then the common law will apply. Imlar and Others v Nagoor Pitchai Transporters Ltd,[5] is a case where the plaintiffs preferred common law remedy to statutory benefits. It should be noted that the plaintiff has to choose between the two remedies and cannot have recourse to both.

THE WORKMEN'S COMPENSATION ORDINANCE

Introduction

This Ordinance provides for the payment of compensation to workmen who receive injuries in the course of employment or contract occupational deceases. This enactment which was first passed in 1934, amended in 1946, again underwent an amendment in 1957, and minor amendments in 1959 and 1966. The Ordinance thereafter remained unaltered for a long time making its provisions outdated and obsolete until it was subject to a major revision by Act No. 15 of 1990.

This Ordinance stipulates that if a workman receives personal injury or dies as a result of an accident "arising out of" and "in the course of" employment or contracts an occupational decease his/her employer should pay compensation as prescribed.[6] The employer's liabilty will

arise only if the workman is disabled for a period of more than three days which is referred to as the "waiting period". Prior to the amendment in 1990 the "waiting period" was seven days. Where the period of disablement exceeds 3 days the employer will be liable to pay compensation provided the other requirements of the Ordinance are satisfied. The negligence of the workmen will not be a good defence, nor contributory negligence will reduce the quantum of compensation. However, there are certain circumstances under which the employer will not be liable, they are:

[1] where the workman had at the time of the accident been under the influence of drink or drugs,

or

[2] where the workman has wilfully disobeyed a rule very clearly given for the safety of workmen

or

[3] where the workman has deliberately removed a safety guard which he knows has been provided for the safety of workmen.

However, if the accident results in the death of the workman then even the above exceptions will not apply and the employer will be liable to pay compensation to his/her dependants.[7]

Similarly, if a workman contracts an occupational disease listed in schedule 111[8] of the Ordinance or contracts a disease which is reasonably attributable to the nature of his/her employment[9] the employer will be liable to pay compensation.

The Workman

The persons who are entitled to receive benefits under the Ordinance are workmen and their dependants. Prior to the 1990 amendment the term "workman" was defined in the Ordinance to mean any person who was employed on wages not exceeding Rs.500/- per month in any such capacity as specified in schedule II. Accordingly, a workman not only had to be in receipt of a wage of Rs 500/- or less but had also to be engaged in such work as listed in schedule II. But persons whose employment was of a casual nature and who were employed outside the employer's trade or business were excluded from the above definition. Similarly, the members of the Army, Navy and the Police service were also excluded. The schedule II contained 42 categories of employment in which a workman had to be employed to be qualified for the benefits under the Ordinance. For example the item no. 1 of schedule II refered to any person who was employed in any capacity except in a clerical capacity in connection with the operation or maintenance of any vehicle. Likewise the schedule listed out various other categories such as factory workers, miners, estate workers etc other than those employed in a clerical capacity. In certain establishments there had to be in addition to the above categories total of at least ten workmen. This definition shut out almost all the workmen from qualifying for the benefits as by the year 1990 the minimum wages were far above Rs 500/- per month. Further the schedule II was also completely outdated as it did not include many new trades. The whole purpose of the Ordinance was thus lost due to the obsoleteness of the definition of the term "workman". The Act No. 15 of 1990 brought about a complete change in this area by introducing the definition of workman given in the Industrial Disputes Act into the Workmen's Compensation Ordinance. The only difference between the definition given in the amendment and the definition in Industrial Dispute Act is that the former excludes persons

employed for purposes outside the employer's trade or business. Persons such as domestic servants, personal drivers and others who are not employed in connection with any trade or business are not be covered under the new amendment. Apart from this exclusion all the other categories of workmen are now included in the Workmen's Compensation Ordinance irrespective of their monthly earnings and the capacity in which they are employed.

The Employer

The liability to pay compensation rests with the employer. According to Sec. 2[1] the term employer includes

[a] the Republic of Sri Lanka except army, navy, airforce and the police. Accordingly, all the other government employees are covered including the civilian employees in the armed forces.

[b] any body of persons, corporate or unincorporate

[c] any managing agent of an employer

[d] heirs, executors and the administrators of a deceased employer.

[d] the principal employer in a situation where an employee is temporarily lent to another. It will be noted that the Ordinance has not attempted to define the word "employer" as in the Industrial Disputes Act. The Ordinance uses the word "includes" and goes on to specify the categories to be added to its ordinary meaning.

In Palm Products and Sales Co-operative Society Ltd., Kilinochchi v Valli Kandiah, a toddy tapper who was also a member of the Society claimed compensation from the

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Society under the Workmen's Compensation Ordinance. He had sustained injuries due to a fall from a tree while engaged in tapping. The following questions of law were raised in appeal :-

(a) whether there was an employer - employee relationship as between the Co-operative Society and a member of the society;

(b) whether a member of the co-operative society is also a workman within the definition and meaning of the Workmen's Compensation Ordinance.

Here, it was held that the Co-operative Society being incorporated, was a body corporate and was distinct from its members. The Society can employ its members.

If a person employs an independent contractor who in turn employs a workman who suffers personal injury as a result of an accident the workman has an option with regard to the person from whom he can claim compensation. He can claim compensation either from his immediate employer or his employer's employer - the principal[11], but he cannot claim from both. If the principal employer pays compensation, he has a right to claim the sum paid from the contractor known as the right of indemnity.[12]

The Accident

Another requisite for the payment of compensation is that any personal injury should have been caused by an accident "arising out of" and "in the course of employment"[13]. The word "accident" is not defined in the Ordinance but it can generally be stated as an event happening by chance, a mishap, an unexpected event or an unintended occurence which causes a loss. eg. a man while crossing the road is run over by a lorry or an electrician gets a shock while doing some electrical repairs.

The terms "arising out of " and "in the course of employment" have led to numerous judicial interpretations.

Briefly, "in the course of employment" means in the process of the employee's assigned work or duty which is normally performed during the employee's working hours. In other words the workman should be doing his normal work during his working hours at the time of the accident. Justice Thamotheram says; "the expression 'in the course of employment' suggests a point of time. The injury must be caused by an accident taking place during the currency of the employment." [14]

In Elo Nona v Fernando [15] a workman was injured whilst loading into a cart some dismantled machinery which had been removed by him from an old building on the day previous to the accident. He was not entitled to compensation as he was not injured in course of doing that work which is referred to in the schedule.

In Dias v Jane Nona [16] a factory worker on an estate used to go to his superintendent's bungalow to sleep after finishing his work in the estate. He also looked after the superintendent's poultry. One day when he was closing the fowl cage he was bitten by a snake and he died. It was held it was not an accident arising out of and in the course of employment since the accident happened after the workman finished his work on the estate and the tending of the fowl pen was a private arrangement between the superintendent and the deceased.

The English Courts have given a very wide interpretation to the phrase "in the course of employment" to include even authorized tea breaks, smoking intervals and similar matters normally incidental to employment. However, if a workman overstays such intervals, such overstay will not be considered to be in the course of employment. In R v Industrial Injuries Commissioner ex parte AEU [17] the workman was entitled to a 10 minutes break. Smoking was not permitted in the workshop but smoking booths were provided

outside. They were nearly always full and workers would squat in the passage waiting for room. While the workman was doing this he was run over by a fork lift truck. The time was 5 minutes after the normal tea break. Therefore he was not entitled to compensation. Although this accident arose out of employment it was not in the course of employment of the workman.

The English law considers travelling to work in the transport provided by the employer as "in the course of employment. "Arising out of" means that there should be a causal connection - a cause and effect relationship - between the conditions under which the job was done at the time of the accident and the resulting injury.

In Alice Nona v Wickramasinghe,[18] a bus driver died as a result of ignition of petrol while it was being pumped into a tank under the seat of the driver. The ignition was caused by a match being struck by a passenger. It was held that the death was by an accident arising out of and in the course of employment.

In S. Parupathy v Additional Controller of Establishments[19] the deceased workman was employed as a labourer in the Divisional Agriculture office, Trincomalee. He died by electrocution when attempting to open a refrigerator in the vetenary surgeon's dispensary which was situated in the same building as the Divisional Agriculture Office. Although the vetenary surgeon stated that none except himself, his peon and the vaccinator had the right of access to the refrigerator, it was disclosed in evidence that water was also kept in the refrigerator by the deceased who was in the habit of fetching cooled water from it for the officers. Before the accident the workman was seen going with a glass in his hand towards the refrigerator. It was held that the accident arose out of the workman's employment." Where an employer, in spite of a prohibition of a practice imposed by him, has tacitly permitted the practice to be followed, 'winked', as it is called, at the disregard of his

orders, he cannot be permitted to shield himself from liability."

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In State Distilleries Corporation v Mary Nona the workman who was employed as a lorry driver by the Corporation died of an heart attack in the course of employment. The questions that arose for determination under Sec. 3 of the Ordinance were:-

(a) whether the workman's death was caused by an accident, and

(b) whether the accident is one that arose "out of" and in the "course of" his employment.

Tambiah J, answering the above questions said; " In Fenton v Thorley [1903 A.C. 443] where the House of Lords held that a rupture caused to a workman by over exerting himself in turning a wheel was an accident. Lord Macnaghten at page 448 defined an 'accident' as 'an unlooked for mishap or an untoward event, which is not expected or designed.' The other Lords who partook in the decision in the case agreed in substance with Lord Macnaghten's definition of 'accident' in his speech. I find no difficulty in coming to the finding that the workman's death was due to an accident within the meaning of section 3 of the Ordinance."

" The Appellant - Corporation conceded that Albert died of a heart attack in the course of his employment. The only matter that remains to be decided is whether the heart attack arose "out of" his employment."

" The words 'out of' involve the idea that the accident arises out of a risk incidental to the employment. The question is whether the nature of the employment was such that the likelihood of a heart attack was connected with and incidental to the employment. [see Charles Appu v The Controller of Establishments [1946] 47 NLR 462]".

"There is no evidence that the deceased workman had a pre-existing heart disease. There is also no evidence that by reason of his bulky body or of his food, drinking and smoking habits or mental stress or of pre-existing disease such as diabetes, hypertension etc., he was a person prone attack. But there is evidence that the lorry drivers of the Corporation generally work from 8.30 a.m. to 6.30 p.m. and the deceased workman had worked on Saturdays, Sundays and on some Poya days too. Even the day before he died he had worked from 8.30 a.m to to 8.30 p.m. The medical evidence is that lorry driving is strenous work, it causes tension and that long hours of driving can cause heart disease. In the absence of evidence to show that even without the work this workman was engaged on, he, none the less, would have died of a heart attack.

attack, it is reasonable for me to conclude that the work, he was engaged upon, brought about his death."

Disablement

The type and the quantum of compensation payable depends on the results of the injury suffered by the workman. The results of injuries can be classified into four types:-

[1] Temporary disablement
[2] Permanent partial disablement
[3] Permanent total disablement
[4] Death

Temporary disablement: The injured workman's earning capacity gets reduced for a limited period as he is unable to perform his normal duties or he becomes totally incapable of earning in any capacity for a temporary period. Example: A carpenter cuts his finger slightly and becomes incapable of using his carpentary tools, but he may be able to assist another carpenter. Here the carpenter's earning capacity is reduced as he is unable to perform the work of a skilled workman. This is a case of temporary partial disablement. If the carpenter cuts his finger so badly that he becomes incapable of performing any duties at all for sometime, it then becomes a case of temporary total disablement. For both types of temporary disablement the basis of computation of accident benefits is the same. The workman is not entitled to any payment for the first 3 days; the waiting period. Thereafter he is entitled to a half monthly payment computed in accordance with the column 4 of schedule IV of the Ordinance. This schedule has now been revised by the recent amendment [Act No. 15 of 1990] and provides for fairly realistic payments.

Permanent partial disablement: The workman's earning capacity is permanently reduced as a result of the accident. Example; loss of an arm, leg, hearing, finger, toe, as a result of which the injured workman will not be able to carry out his normal duties in the manner he used to prior to his accident. The Schedule I of the Ordinance gives the estimated percentage of loss of earning capacity in respect of each type of permanent partial disablement. Examples: -

Injury	% loss
Permanent and incurable paralysis of the limbs or injuries resulting in being permanently bedridden.	100
Eye Injuries	
(1) Total loss of sight in both eyes	100
(2) Total loss of sight in one eye	50
Hearing Injuries	
(1) Total loss of hearing	60
(2) Total loss of hearing in one ear	30
Loss of Speech	
(1) Total loss of speech	75
Sensory Loss	
(1) Total loss of senses of smell and taste	50
(2) Total loss of sense of smell	25
(3) Total loss of sense of taste	25
Arm Injuries	
(1) Loss of arm at or above elbow	75
(2) Loss of arm at or below elbow	65
Hand Injuries	
(1) Loss of both hands	100
(2) Loss of hand or loss of thumb & 4 fingers	65

The above are only some examples of the type of permanent partial/total disablement listed in the Schedule I as

amended in 1990. When compared with the previous schedule the new schedule shows a vast improvement. New categories of disablement such as sensory loss, paralysis, scarring and disfigurement have now been introduced. Further, any physical loss not mentioned in the Schedule can also be assessed by a Medical Officer upto a maximum of 50% of the total esarning capacity of the workman. However, it must be mentioned that the above categorisation of disablement is still arbitrary. For example, can one say that total loss of speech amounts only to 75% of total earning capacity? Would any one employ a workman who is totally dumb or blind in one eye? But the schedule stipulates the loss of one eye as only 50% of the earning capacity.

Permanent total disablement: The employee is completely disabled and loses his earning capacity fully, in other words he is unable to all the work which he was capable of performing at the time of the accident. Examples of total disablement are those where the total loss of earning capacity is given as 100% in Schedule I. Permanent total disablement includes loss of both hands, both eyes, incurable paralysis etc. and cases where the total percentage loss in the earning capacity on account of multiple injuries amounts to 100%. Eg. loss of arm at or above the elbow is 75% , loss of a big toe is 25% and a loss of a tooth is 5% . All these injuries will add up to 100% making it a case of permanent total disablement.

Compensation

The quantum of compensation payable for permanent disable ment is given in Schedule IV of the Ordinance. For example according to the revised schedule IV [1990] a workman receiving a monthly wage of Rs. 2000 will get a lump sum of Rs. 134,093 as compensation for permanent total disablement. If the injury has resulted only in permanent partial disablement, say loss of sight in one eye which

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according to schedule I is 50%, the workman will get half of Rs. 134,093. Similary in the case of loss of sense of smell which is given as 25% loss, he will get 1/4 this amount. If a workman within this wage range dies his dependants will get Rs. 122,918.[22] Prior to the revision of schedule IV in 1990 the maximum amount of compensation payable for permanent total disablement was 14,750 and for death Rs. 12,900/-. Now both these amounts have been increased to Rs. 250,000/-. It should be also mentioned that the 1990 amendment has done away with the distinction between adults and minors. Previously the minors recieved a reduced amount as compensation.

Industrial Diseases

If a workman contracts an occupational disease as described in the Ordinance the contracting of the disease will be considered to be an accident. Before the 1990 amendment, the schedule III listed out a number of occupational diseases. However, this list was thoroughly out dated as it had not been updated to keep in step with modern developments. In Sumsu v Ceylon Petroleum Corporation[23] the workman claimed compensation from the Corporation on the basis that he was employed for a period of 16 years by the Corporation as an oil tank guager and he contracted an occupational disease called oil dermatitis. The court held that even if there was evidence to prove that the workman was suffering from oil dermatitis yet the illness did not come within the category of the occupational diseases within the schedule III of the Ordinance. The 1990 revision saw a number of new occupational diseases being included such as lung cancer, hearing impairement, skin diseases caused by physical chemical or biological agents.

In addition to the diseases recognised in the schedule, the new amendment also includes a general provision to permit recognition of diseases not listed in the schedule. Thus, the amended Section 5 now provides for compensation for any disease that is reasonably attributable.

to the nature of the workman's employment. This clause will now cover cases such as oil dermatitis referred to in Samsu v Ceylon Petroleum Corporation provided there is a causal connection between the disease and the nature of the wokman's employment.

Dependants

If a workman dies as a result of an accident or a work related disease his or her depedents are entitled to claim compensation. The rights of dependants under the Ordinance are independent of the workman's rights that is they do not obtain their rights through the workman. There are two main categories of Dependants recognised by the Ordinance. First category being the workman's closet relatives namely wife, a minor son, an unmarried daughter or a widowed mother. A husband or father is not included in this group. Those in this group have only to establish the relationship and there is no necessity to prove dependency. The other category consists of persons who should prove that they were wholly or partly dependent on the earnings of the deceased at the time of his or her death. In their case there is no presumption of dependency. Those in this second category includes a husband, a father, a minor illegitimate son, an unmarried illegitimate daughter, a married daughter either legitimate or illegitimate who is a minor or a widow, a minor brother, an unmarried or widowed sister, a widowed daughter in law, a minor son of a deceased son or daughter or where no parent of the workman is alive a parental grand parent.[24]

Where there are both total and partial dependants the Commissioner may apportion the compensation among them.[25]

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NOTES

1. See Gaffoor v Wilson 1990 1 SLR 142.
7. 1944 A.E.R 465
3. Re Polemis 1921 3 K.B. 560
4. The Wagon Mound 1961 1 A.E.R 404
5. 1986 2 SLR 167
6. Sec.3 & 5 of Workmen's Compensation Ordinance [WCO]
7. Sec.3 WCO
8. Sec.4 WCO
9. Sec.5 WCO as amended by Act No.15 of 1990
10. 1984 1 SLR 230
11. Sec.22[1] WCO
12. Sec.22[2] WCO
13. Sec. 3 WCO
14. "The Law Relating to Workmen's Compensation" by V.T.Thamotheram at page 76.
15. 1937 39 NLR 71
16. 1942 44 NLR 289
17. 1966 2 Q.B 31
18. 1936 38 NLR 408
19. 1962 64 NLR 522
20. 1981 2 SLR 223
21. Column 3 of Schedule IV
22. Column 4 of Schedule IV
23. 1987 2 SLR 259
24. Sec.2[1] WCO
25. Sec.10[3] WCO