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Note: This case was subsequently appealed to High Court - appeal dismissed.

KUHL & ORS. W.S.16 of 1950.

Kelly, J.

v.

NEW GUINEA GOLDFIELDS LIMITED

Judgment:
27th November 1951.

This action was part-heard at Wau on the 9th,10th,11th and 13th August last, and at Port Moresby on 15th instant.

The plaintiff Frances Kuhl of Mt. Gambier, South Australia, sues on behalf of herself and her four infant children, claiming damages against the defendant on the death of her husband, Edward James Kuhl. The claim is based on Section 3 Compensation to Relatives Ordinance 1934.

The deceased came to New Guinea in early January, 1950. Shortly afterwards he joined the employ of the defendant as a motor mechanic. On Saturday afternoon, 6th May, 1950 the deceased lost his life. Medical evidence showed that he was electrocuted.

After evidence was given on the point, it was admitted by the defence that the deceased was working overtime for the defendant company that afternoon.

At the opening of the case it was admitted by the defence that structural alterations were being made to the defendant company's garage and workshop building, which alterations were still in course of progress on the afternoon in question; and that these alterations had necessitated temporary alterations of the electrical installations. The wall timbers themselves had been removed but the pillars and girders remained - to which the electrical installations were affixed.

Material evidence as to the circumstances surrounding the accident was given by the following:-

For plaintiff -

John Robert McMath, then a transport clerk employed by the defendant. The deceased returned to work, with the witness, shortly after lunch on the Saturday afternoon. A few moments later he heard the deceased cry out - "Jack, Jack, cut off the power." The witness, who was working nearby, rushed into the garage and saw the deceased lying on his back between a grinder bench and the wall being altered, with his hands on his lower chest - the left hand gripping an electric wire and the right hand gripping a pair of pliers connected with that wire. The witness switched off what switches he could see in the near vicinity of the grinder bench. He then endeavoured to pull from the fuse-board other wires connected to the back of the grinder bench; but he failed. The fuse-board "swung backward and forward on its hanging." He then called another employee, James Patrick Casey Walker, who pulled the fuses and switched off the power through the main switch. The deceased was then removed to a clear patch of concrete and artificial respiration was commenced. Medical assistance was called; but at about 5 p.m. life was declared extinct.

This witness gave evidence that he noticed "several marks on the piece of wire which had been clutched by the deceased, as though the deceased had made more than one attempt to cut the wire with his pliers."

He also gave evidence as to the position of the electrical wiring at the time. There seemed to be a slight divergence between some of the witnesses for both sides as to the exact position of the wiring. I do not propose detailing the evidence of the different witnesses as, in my opinion, the divergences are not material. As to the state of the wiring I accept the evidence of the next witness.

Charles Frederick Cottis. Licensed Electrician and Foreman Electrician with the Department of Works and Housing at Lae. He inspected the premises on Monday, 8th May 1950. He found a number of wires loosely draped from the fuse-board across a pile of junk (referred to by other witnesses as "junk" and described by them as old wheels, springs, parts of truck bodies and the like) and going to the bench grinder. He had to climb across this heap of junk to inspect the fuse-board. The fuse-board was approximately 9 feet from floor level. It was not adequately supported. It was hanging by pieces of wire on a girder. The main switch was not on the fuse-board. It was on a pillar practically under the fuse-board. In addition to those to the grinder bench other wires were hanging loosely from the fuse-board going to other installations. The wire indicated to the witness as that having been the cause of the accident had become loose from its terminal in the terminal box with the motor and "had been pulled out from the terminal box." It was a seven-strand wire with rubber insulated coring and vulcanised rubber sheath technically known as V.I.R. The grinder was not earthed. The normal method of earthing would be by direct earth wire or through a cable being one of a number of cables in a flexible lead into the terminal box. The earthing of the grinder would not be a very big job. It would take about one hour's work. The particular wire after becoming loose from the terminal box could not have carried current into the grinder. (This witness was not asked the question, but another witness gave evidence that the grinder was operated through a switch at the back of the grinder but at the top of the grinder, being a part of the machine itself). Had the grinder been earthed the particular wire, when pulled out of its terminal, would have caused a direct current to earth, blowing the fuse, and it would then have ceased to be alive - but with the grinder not earthed it would still be alive.

This witness then instanced defects in the temporary electric installations, to which I shall refer later.

For defence -

William Patrick Parkes. Motor mechanic in charge of defendant company's garage. He gave evidence that the deceased commenced work, under the witness, in February or March, 1950. After deceased commenced work alterations were made to the building and as a result the fuse-board was removed and reswung. The grinder was disconnected. After application to the electrician the grinder was reconnected. That was approximately 6 weeks to two months before the date of the accident. The grinder bench was about 8 or 9 feet away from the wall line. After the grinder was reconnected it was in constant use. The deceased used it every day. The grinder itself is operated through a switch at the back of the grinder but at the top of the grinder. The switch is a part of the machine itself. Between the fuse-board and the pillars at right angles to the grinder the wires were tied in a few places with tape or wire - he just could not say which - and strapped around the beam. The deceased had no authority to interfere with any of the electrical installations in the building. During a motor mechanic's training he learns a certain amount about electricity and electrical power; but not covering electrical installations of houses and factories. In evidence in chief this witness stated that he instructed the deceased to do a general overhaul job on the engine of a 3-ton truck, and "at that stage" there was no occasion to use wire on the job. He himself would not use wire

on the job. In cross-examination he stated that he used the words "at that stage" merely as a phrase; but V.I.R. wire is sometimes used on such a job in place of a splay-pin in a nut and bolt. This witness gave evidence that in his opinion the deceased was a competent mechanic, also a conscientious workman.

James Patrick Casey Walker. Transport driver with the defendant company. He gave evidence that he arrived at the garage about 1 pm on the Saturday afternoon. After the witness, McMath, spoke to him he went into the garage, climbed to the switch, disconnected the power, and pulled the fuses. He then pulled the V.I.R. wire away from the deceased and removed the deceased to a clear spot on the concrete and commenced artificial respiration. The above evidence has already been given by McMath; but I include this witness as giving material evidence as to the wires, at that moment, leading from the fuse-board to the grinder bench. In addition to the wire clutched by the deceased this witness noticed two other wires "also going to the wall and on to the fuse-board. They looped up to the wall parallel with the bench then from the point on the wall back to the fuse-board." He states that these wires were not "hanging loosely."

I interpose: It may be that McMath's effort to pull the wires from the fuse-board pulled them away from their strapping on the pillar - but in view of the evidence of Cottis I do not think this point is material.

The above completes my summary of the material evidence on the circumstances surrounding the accident.

Two sets of wiring rules apply in this case - one, Electric Wiring Regulations enacted under the Electric Light and Power Ordinance 1929-1938, to which I shall refer as the "New Guinea Regulations;" and the other The Standard Association of Australia Wiring Rules adopted under Regulation 2 of the New Guinea Regulations. I shall refer to the adopted rules as the "Australian Rules."

The plaintiff contends that the defendant was in breach of its statutory duty under the Australian Rules in respect of the temporary installations. The witness Cottis gave evidence as to eight breaches of the Australian Rules. A breach of statutory duty does not, in itself, constitute negligence. It is only evidence on which negligence can be found.

I find that the defendant was negligent in the following respects under the Australian Rules:-

(1) The installations were not in accordance with Rules 101 and 256(a). Rule 101 reads:- "Workmanship. All materials and equipment shall be installed in a workmanlike manner to comply with these Rules." Rule 256(a) reads:- "Accessibility. Every switchboard shall be in an accessible position." The three wires leading to the back of the grinder bench were draped, whether loosely or otherwise, across the heap of junk which had to be climbed by any person attempting to reach the main switch.

(2) The three wires leading to the back of the grinder bench were open to interference by unauthorized persons contrary to the requirements of Rule 105 which reads:- "Prevention of Interference. Every reasonable precaution shall be taken to prevent, during installation, interference with the installation and parts thereof by unauthorized persons." The three wires were in such a position leading from the wall line to the grinder bench that they could readily be interfered with by any person.

(3) The three wires leading to the back of the grinder bench were not protected as required by Rule 334(f). This Rule refers to Braided Rubber Insulated Cables - Open Wiring. Sub-rule(f) reads:- "Protection where Liable to Damage. In any position in which they are liable to mechanical damage and wherever they are within 6 feet above the floor, they shall be adequately

protected by earthed metal conduits or non-conducting casing or ducts." For some feet within their entrance to the back of the grinder bench these wires were within 6 feet above floor level. They were not protected in either manner as required.

(4) The three wires leading to the back of the grinder bench were not protected against inadvertent disturbance by workmen or others as required by the second paragraph of Rule 361(d). This Rule refers to temporary wiring. The second paragraph of Sub-rule (d) reads:- "The wiring shall be so arranged or protected that it is not liable to mechanical injury or to inadvertent disturbance by workmen or others." In their position the wires were open to access and inadvertent disturbance by any person.

(5) The grinder was not earthed as required by Rule 501. This Rule lays down Appliances, etc. to be Earthed. Division 4 of that Rule, so far as is material, reads:- "Fixed Fittings, Machines, Appliances, Apparatus etc. The exposed metal frame or case and any other exposed metal of ....motors...." It was admitted in evidence that the grinding unit was operated by a three-phase motor. It was not earthed.

The defence put forth two lines of defence - firstly that the doctrine of volenti non fit injuria applied; and secondly that the deceased was guilty of contributory negligence, both at common law and in breach of statutory duty, which contributory negligence was the cause of his death.

In his address in reply Counsel for the defence did not hold tenaciously to the first line of defence. That doctrine does not apply in this case, wherein the defendant is in breach of statutory duty. Baddeley v. Earl Granville (1887) 19 Q.B.D.423; Davies v. Thomas Owen and Co. Ltd. (1919) 2 K.B.39; Bowater v. Rowley Regis Corporation (1944) K.B.476.

As to the second line of defence. The deceased also was in breach of statutory duty. New Guinea Regulation 11 reads:- "Subject to the provisions of Regulation 12 of these Regulations no person other than the holder of a licence shall carry out work of any description in relation to the connection or installation of electric lamps, motors, wiring, or fittings." New Guinea Regulation 12 reads:- "The holder of a licence may employ a person who is not the holder of a licence to assist him in his work as a workman: Provided that the person who is not the holder of a licence shall not be employed as an assistant upon the work referred to in the last preceding Regulation except under the personal direction and control of the holder of a licence." The deceased was a motor mechanic, not a licensed electrician. It was not contended for him that he came within either of these two Regulations.

The question now is - "Who caused the deceased's death?" One jury might answer- "The defendant,through the defective installations." Another jury might answer - "The deceased himself by cutting the wire." I as a jury must answer one way or the other. But the approach is not clear. Many decisions can be cited on the law of contributory negligence. I refer to the following:-

The Eurymedon (1938) P.41. An English Court of Appeal case on a collision between two ships. Scott L.J. at p.57 states: "During the hearing of the appeal.....cited most of the cases in which the principle of Davies v. Mann has been discussed, but in my view the broad feature which results from the cases is, alike in Admiralty and at common law, that the final question is one of fact, to be decided by the tribunal of fact, with due regard to all the circumstances of the case, as Bucknill J. pointed out at the end of his judgment. I confess to a feeling that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense. I respectfully agree with a phrase of Lord Wright in McLean v. Bell: 'the decision of the case must turn not simply on causation but on responsibility.' When a solution of problems of this type is sought solely in terms of causation,it is difficult to avoid the temptation of concluding that the last act or omission in point of time is of necessity not only the last link in the chain of causation, but the determining factor in the result, since

ex hypothesi but for that last link the result would never have happened. But legal responsibility does not necessarily depend only on the last link."

Caswell v. Powell Duffryn Associated Collieries Ltd.(1940)A.C.152. A House of Lords case wherein an employee lost his life on being dragged into a conveyor machine when a safety plate had not been fixed in position. Lord Atkin at p.164 states: "The person who is injured,as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach. If his damage is due entirely to his own wilful act no cause of action arises; as,for instance,if out of bravado he puts his hand into moving machinery or attempts to leap over an unguarded cavity. The injury has not been caused by the defendants' omission but by the plaintiff's own act. But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand if the plaintiff were negligent but his negligence was not a cause operating to produce the damage there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation. It is negligence which 'contributes to cause' the injury, a phrase which I take from the opinion of Lord Penzance in Radley v. London and North Western Ry. Co. And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis by asking who 'caused' the injury; and you must not be deterred because the word 'cause' has in philosophy given rise to embarrassments which in this connection should not affect the judge. Nor is this question of contributory negligence one that arises only in cases where the defendant is charged with negligence, as though the negligences belong to the same pack and one trumps the other." Lord Wright at p.178: "I am not prepared to agree that the defence of contributory negligence should be excluded in such cases simply on the technical ground that the cause of action is not negligence in the strict sense, whereas contributory negligence presupposes original negligence. I have, however, come to the conclusion on a consideration of the English cases, that English law has accepted contributory negligence as a defence in this class of case. If the matter had been free from authority, I should, I think, have thought it simpler to hold that workman's claim for injury caused by breach of the employer's statutory duty to fence and like duties, is only barred by blameworthy conduct on the man's part of such gravity and so directly causing the accident as in the judgment of the judge or jury to be properly described as the substantial cause of the accident and to shift the responsibility to him. This view would have been in accord with the general intention of the statute and would have avoided the technicalities which have gathered round the doctrine of contributory negligence. But that path is closed by the line of decisions in England, and if contributory negligence is properly defined, I do not feel that the distinction is for practical purposes generally other than one of words. What is all-important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works,to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety." And at p.179:
"The negligence to be contributory must also be, in Lord Campbell's words in Senior v. Ward, negligence 'materially contributing' to the injury. The rules of contributory negligence have been mainly developed in connection with road accidents, but at least since Davies v. Mann, the law in discussing contributory negligence in such cases has disregarded as not materially contributing causes some acts of the plaintiff which might be regarded as negligence in a sense, and treated them as of subsidiary moment in ascertaining the causation

of the injury and has fixed attention on what was judged to be the proximate or effective cause. Hence the question was stated as it was in Swadling v. Cooper to be what was the substantial cause. Contributory negligence involves two elements, negligence and contributing negligence. The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach of his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury. This follows, I think, if the rules of contributory negligence in road accident or collision cases are suitably adapted to deal with breaches by an employer of his statutory duty." Lord Porter at p.185: "Strictly speaking the phrase 'contributory negligence' is not a very happy method of expressing an act of the employee which may relieve the employer from liability. Probably the phrase 'negligence materially contributing to the injury' would be more accurate, but if the word 'contributory' be regarded as expressing something which is a direct cause of the accident, either phrase is accurate enough and the less accurate phrase is, I think, sanctioned by long usage." And at p.187: "The skill gained by a worker may enable him to take risks and do acts which in an unskilled man would be negligence, and on the other hand the fatiguing repetition of the same work may make a man incapable of the same care and therefore not guilty of negligence in doing or failing to do an act which a man less fatigued would do or leave undone."

That case was applied in Piro v. W. Foster & Co. Ltd. 68 C.L.R.313; an Australian High Court case in 1944 which overruled the 1926 High Court case, Bourke v. Butterfield & Lewis Ltd. It was also applied in the English Court of Appeal case, Thurogood v. Van Den Berghs and Jurgens Limited. (1951) T.L.R.557.

The deceased was negligent in cutting the wire, but to decide whether he was guilty of contributory negligence as defined at law I, as a jury, must inform myself on several aspects.

Did the deceased himself pull the wire out of its terminal? There is no direct evidence before me on the point. But at the risk of proceeding beyond the boundary line of inference into the field of conjecture I find that the deceased did pull the wire out of its terminal; but he did so for the purpose of using some of the wire, which he attempted to cut off, on the job on which he was working. He was a conscientious workman. He would not have so acted unless he considered his act expedient.

Should the deceased have switched off all power through the main switch before he pulled the wire? There is no evidence before me as to the "on" or "off" state of the grinder switch, in relation to the grinder motor itself. Again because he was a conscientious workman I would not be entitled to find that he maliciously pulled the wire out of its terminal whilst the grinder motor was running. On the evidence before me I do not think it will be disputed that the deceased was the only employee working at the time who would have had occasion to use the power. Some may say that because of the fact that he was a conscientious workman he should have taken the precaution of turning off all power at the main switch, although that would involve climbing over the heap of junk. But in my opinion that would be expecting too much of him.

Was the deceased entitled to believe that the grinder motor was earthed and that therefore no harm would come to him when he pulled the wire and cut it? The deceased had seen the installations in their temporary state daily for at least six weeks. He had worked the grinder daily. In addition the deceased himself had some knowledge of electricity, and he would probably have known that the earthing of the grinder motor would not have presented any difficulty; and that it should have been so earthed. Therefore I find that under all the circumstances the deceased was entitled to believe that the grinder motor was earthed, and that he would not have anticipated receiving an electric shock when he pulled the wire and cut it.

This still leaves the question as to whether the deceased's breach of statutory duty in interfering with the electrical installations, contrary to the provisions of New Guinea Regulations 11 and 12, can be construed as contributory negligence.

That breach could have exposed the deceased to a criminal action under the provisions of the Electric Light and Power Ordinance 1929-1938. But in my view that breach, in itself, did not aggravate the position, and it did not increase the deceased's degree of negligence at common law, with which I have already dealt.

Under the circumstances of this particular case 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.

There will be judgment for plaintiff.

There is no fixed rule laid down at law for assessing damage in cases such as this. I must adopt the method of weighing losses against gains, the deceased's expectancy of life, his earning capacity but setting off cost of maintenance and upkeep of his wife and family, and his possible future advancement in his occupation amongst other things. I must also consider the probability of the wife's remarriage.

The deceased and his wife were married on 9th September 1937. At the date of his death deceased was 31 years of age; the widow was 31 years of age; with four children - Maureen Ann, 12 years; Robert John 11 years; Desmond James 7 years; and Geoffrey Francis 3 years.

No post-mortem was held, but the medical evidence was to the effect that the deceased was a strongly-built man and, from external examination, he appeared to be in normal health.

The widow gave evidence that their domestic relationships were very happy, that the husband did not smoke, he drank moderately, and as far as she knew he did not gamble.

From the time of his employment with the defendant the deceased was earning wages at £55 per calendar month, with overtime averaging approximately £20 per calendar month. Of this amount he was remitting to his wife £34 per calendar month.

Just prior to his death the deceased had made arrangements to bring his wife to New Guinea. He had purchased some furniture locally, and had placed an order with a friend in Brisbane for some household effects. No evidence was given as to values.

The wife gave evidence that the couple had no bank account, and that "she" had no assets. From the way in which the questions were put to her I interpret the word "she" to include also her husband.

At the conclusion of the evidence for plaintiff it was admitted that the sum of £900 has been paid in respect of the deceased's death under the provisions of the Workers' Compensation Ordinance 1941. I must take that amount into consideration as a deduction in assessing damages.

Exhibit "C", a letter dated 23rd May 1950 from defendant company to The Secretary, Returned Soldiers' League, Mount Gambier, refers to an insurance policy. The amount of this policy was not disclosed. Under Section 7 Compensation to Relatives Ordinance 1934 the amount of that policy must not be taken into account as a deduction in assessing damages.

Exhibit "C" refers also to a subscription fund. The writer states - "I think a subscription fund started by Ted's mates has already approximated £300 and will be forwarded to Mrs. Kuhl in due course."

The amount of the fund is uncertain, but that is no reason why it should be avoided. To be on the safe side I reduce the figure to £250. Much as it may be deemed a vicious rule, I must take that amount into consideration as a deduction in assessing damages. Mayne on Damages, 11th Ed. p.567. Goodger v. Knapman (1924) S.A.S.R.347. 16 A.L.J.p.328.

I assess damages in the total sum of £5,500, to be apportioned in the following manner:-

To the widow, Frances Kuhl, £3,000 with solatium £300.

To Maureen Ann Kuhl, the sum of £450.

To Robert John Kuhl, the sum of £450.

To Desmond James Kuhl, the sum of £600.

To Geoffrey Francis Kuhl, the sum of £700.

I award damages accordingly.

I order that:-

(1) The sum of £3,300 to be paid to the widow, Frances Kuhl.

(2) The sum of £2,200 awarded to the four children be paid into Court to abide the further order of the Court.

(3) The defendant pay the plaintiff's costs, to be taxed.

(Sgd) A. KELLY, J.