a board has been appointed, because he has it in his power to apply for the appointment of a board, or not. Mr. *Morris* forgets that not only has the one party that power, but obviously, also, the other party to the dispute has the same power. For these reasons I am of opinion that it is unnecessary that a board should actually have been appointed under the Industrial Disputes Act, to make a person liable under sect. 6 (1).

WARD, J.: I am of the same opinion. It seems to me that the effect of the decision of the Magistrate is that employees may go on strike until a board has been appointed, and then they must cease striking until a month after the board's report has been given. This point was not before the Court in the case of *R.* vs. *Glynn*. The question then before the Court was whether it was necessary for the Crown to allege that the period during which striking was unlawful had not expired. The extent of the period was not before the Court, and the observations in the judgment as to what that period is are *obiter dicta*. For the reasons stated by the JUDGE-PRESIDENT, I am of opinion that, provided there is an industrial dispute, the parties may not declare a lock-out or go on strike prior to the appointment of a board or until one month after the board's appointment. In this case there is an allegation in the summons of the existence of an industrial dispute, and the words of sect. 6 of the Act have been followed. It seems to me, therefore, that the summons was good.

Appellant's Attorney, H. D. BERNBERG.]

[Reported by ADOLF DAVIS, Esq., Advocate.]

SMITH, BRISTOWE and CURLEWIS, J.J. 23rd June, 1st August, 1911.

BRIESCH *vs.* GEDULD PROPRIETARY MINES, LTD.

Master and Servant. — Workmen's Compensation. — "Accident."—Rupture.—Act 36 *of* 1907.

To constitute an accident within the meaning of Act 36 *of* 1907, *the injury must be caused by some untoward*

or unexpected event, capable of definite ascertainment as to nature, time and place, but there need not necessarily be any agency external to the workman injured.

An event is unexpected if unexpected by the workman injured, or by any reasonable person, having regard to the nature of the work being performed at the time of its occurrence; the physical condition of the workman is immaterial.

A strain occasioned to a workman in the course of his employment which causes a complete rupture incapacitating him from employment is an accident within the meaning of Act 36 *of* 1907, *even though previous strains in the course of his employment have started the protrusion leading to the rupture.*

1911.
June 23.
August 1.

Briesch *vs.* Geduld Proprietary Mines, Ltd.

Special case stated at the instance of the defendant for the decision of the Supreme Court, under section 4 of the Workman's Compensation Amendment Act, 1910.

The facts as found by the Magistrate were that the plaintiff was a trammer in the employ of the defendant; the nature of his employment involving the undertaking of heavy strains. Amongst other duties were the screwing and unscrewing of lengths of iron piping, the threads of the connecting screws at the ends of which were usually rusty. On the 9th of January, 1911, in the course of his employment, he was unscrewing a length of piping which had been in use for two days, and which he saw was rusty, and he applied an extra strain in order to accomplish his purpose. The strain was, however, no greater than he had had to exercise under similar circumstances on previous occasions. He felt a pain in the groin, and it was discovered that he was suffering from a complete inguinal rupture. The process of rupture had commenced during the course of his employment by the

defendant at some time within the preceding three months, but the date could not be specified. It became complete on January 9th, in consequence of the strain on that occasion, and he was thereby permanently incapacitated from work as a trammer.

The starting of the rupture was due to congenital predisposition to rupture, and the nature of his employment would probably not have produced rupture in the absence of this predisposition. The rupture would, in the absence of any strain have become complete in the ordinary course of life, within about three months from the 9th of January. The injury arose out of and in the course of plaintiff's employment.

On these facts the Magistrate reserved the following question for the decision of the Court: "Whether the personal injury the plaintiff has sustained was caused by accident."

C. F. Stallard (with him *J. T. Barry*), for the defendant: The main question is whether the provisions of section 17 of Act 36 of 1907 apply. To make the defendant liable there must be, (1) an accident, and (2) a personal injury caused by such accident. In our Act a distinction is drawn between the words "accident" and "personal injury," and they are not confused, but in the English Act the words are used interchangeably. The facts as found by the Magistrate negative anything having happened in the way of an accident. An accident must be something outside the individual himself, it must be caused by some event which is fortuitous—an untoward event. The Magistrate found that the plaintiff was exercising an extra strain to overcome a usual difficulty. On the meaning of the word accident see *Innes* vs. *Johannesburg Municipal Council* (1911, T.P.D. 12). There was no accident on the 9th of January. Even if there were an accident, it was not the accident causing personal injury. The personal injury was the original rupture. The time when the injury occurred is unascertainable, *Marshall* vs. *East Holywell Coal Co.* (21 T.L.R. 494); *Clover, Clayton and Co.* vs. *Hughes* (1910, T.L.R. 340), where, according to Lord MAC-

1911.
June 23.
August 1.

Briesch *vs.* Geduld Proprietary Mines, Ltd.

NAGHTEN's judgment, an accidental injury is the same as an injury by accident. In our Act a distinction is clearly made between an injury and an accident. There must be a "personal injury caused by accident," whereas in the English Act the injury itself can be the accident. According to LORD MACNAGHTEN the English Act refers to "personal injury arising by accident," whereas our Act refers to "personal injury caused by accident." See also *Steel* vs. *Cammell, Laird and Co.* (21 T.L.R. 490); *Hamilton, Fraser and Co.* vs. *Pandorf and Co.* (12 A.C. at p. 524); In re *Scarr and Genl. Accident Assurance Corporation* (1905, 1 K.B. at p. 393); *O'Hara* vs. *Hayes* (3 B.W.C.C. 586); *Coe* vs. *Fife Coal Co., Ltd.* (2 B.W.C.C. 8); *Hensey* vs. *White* (1900, 1 Q.B. 481); *Barnabas* vs. *Bersham Colliery* (103 L.T. 513).

H. H. Morris, for the plaintiff: We have only to consider the decisive moment when the injury occurs. That moment was at the time the plaintiff was permanently incapacitated by the rupture: *Hensey* vs. *White* (*supra*). Before the 9th of January there was no rupture, although the process of rupture might have begun prior to that date. The word "accident" in the Act refers to the result and not the cause of the injury: *Fenton* vs. *Thorley* (5 W.C.C. 1). If the workman received an injury in the course of his employment, owing to any untoward event, he can claim compensation. The event need not be of a violent nature; sect. 17 of Act 36 of 1907 may mean any injury caused accidentally without reference to an external event. See *Willoughby* vs. *Great Western Railway Co.* (6 W.C.C. 28). The Court will look to the plaintiff's present physical condition and not to his condition prior to the 9th of January: *Ismay, Imrie and Co.* vs. *Williamson* (1 B.W.C.C. 232); *Ward* vs. *London and North Western Railway Co.* (3 W.C.C. 192).

C. F. Stallard replied: In *Ismay, Imrie and Co.* vs. *Williamson* (*supra*), the LORD CHANCELLOR said that the deceased died from what amounted to "accidental death,"

but LORD MACNAGHTEN, in dissenting, said that death was due to the physical state of the workman and the nature of his work.

Cur. adv. vult.

Postea (August 1st).

SMITH, J. (after stating the facts as above set out) continued:

The first question as framed appears to me to be one of fact, of which the Workman's Compensation Act of 1907 makes the Magistrate the sole Judge, and from whose decision on the point there is no appeal; and it is not therefore competent for the Magistrate to ask this Court in effect to direct him as to how he should find upon a question of fact.

Knowles in his work on the Workman's Compensation Act, p. 177, cites a passage from an unreported Scotch case (*Warnock* vs. *Glasgow Iron and Steel Co.*), as follows: "The question whether the death resulted from or was accelerated by accident is a pure question of fact," and in the English cases the question is always treated as one of fact. In *Clover, Clayton & Co.* vs. *Hughes* (102 L.J. 340), the LORD CHANCELLOR and LORD MACNAGHTEN both treat the question as to whether the death of a workman from the bursting of an aneurism whilst engaged in his ordinary work was due to "personal injury by accident," as purely one of fact, declining to interfere with the decision of the County Court Judge that the death arose from such an injury, though intimating that they might have come to a different conclusion themselves. (See also *Coe* vs. *The Fife Coal Co.*, 2 B.W.C.C. 9.)

I think, however, that we may treat the question as though it had been framed in the form "whether there is any evidence of personal injury caused by accident," leaving the Magistrate free to find whether in fact the injury was so caused, if we come to the conclusion that such evidence exists.

For the defendant it is contended that upon the proper construction of the Workman's Compensation Act, 1907,

1911.
June 23.
August 1.

Briesch vs. Geduld Proprietary Mines, Ltd.

to entitle a workman to compensation three things must be established:—(1) A personal injury, (2) that this injury arose out of and in the course of his work, and (3) that it was caused by an accident.

"Accident," it was said in the sense used in the Act, is something fortuitous or untoward happening outside the individual and causing the injury, and it was contended that the facts found disclose nothing of that nature. The plaintiff's ordinary work involved heavy strains, and he was only exerting a usual strain to overcome the known difficulty of unscrewing a rusty pipe on January the 9th, when the rupture manifested itself.

Further it was contended that the injury to the plaintiff was the rupture which had been caused at some unascertainable date before January 9th, and that if there could be held to be an accident on that date, it did not cause the injury, which was pre-existing, and only became complete on that date.

The first question that arises is whether on the facts stated by the Magistrate there is any evidence of an accident within the meaning of the Act.

In the case of *Innes* vs. *The Johannesburg Municipal Council*, this Court, following the decision of *Fenton* vs. *Thorley* (1903 A.C. 443), decided that the word is to be taken in its ordinary and popular sense. But this does not help us very much. As Lord LINDLEY says in *Fenton* vs. *Thorley*, at p. 453, "speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them."

If the word in a popular sense may mean either cause or effect or a combination of the two, it is obviously one of wide signification.

In *Innes* vs. *The Johannesburg Municipal Council* the Court also adopted as a test the criterion laid down by LORD MACNAGHTEN in *Fenton* vs. *Thorley*, viz., that the

word denotes an unlooked for mishap, or an untoward event which is not expected or designed, and it also laid down that the mishap or event must be a specific event, the nature of which, and the time, place and circumstances at and under which it happened must admit of definite ascertainment.

It has been urged upon us that, in having regard to the decisions of the Court of Appeal and the House of Lords, we must not lose sight of the fact that the language of our Act differs from the wording of the English Act, and that the view taken of the meaning of "accident" in the English cases prior to the decision of the House of Lords in *Fenton* vs. *Thorley*—a decision which it is not too much to say revolutionised the view of the meaning to be placed upon the word—is the proper one to be taken here.

In the English Act the words are: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, etc." Our Act runs, "If any workman become permanently incapacitated by reason of a personal injury arising out of and in the course of his work caused by any accident," etc.

The only difference in the two Acts appears to me to be that in the English Act the injury must be caused by an accident arising out of and in the course of the employment, whilst in our Act it is the injury which must arise out of and in the course of the employment, and be caused by an accident which presumably may be something extraneous to the employment. I doubt, however, whether there is any substantial difference in meaning even on this point; as it is clear that even under the wording of the English Act the accident need not arise directly out of the work itself. Thus in *Andrew* vs. *Failsworth Industrial Society* (1904, 2 K.B. 33), the death by lightning of a bricklayer working on a scaffolding, and in *Challis* vs. *L. and S.W. Railway Co.* (93 L.J. 330), injury to an engine driver by a stone thrown by a boy from a bridge underneath which the train was passing, were both held to be due to accidents arising out of the employment within the meaning of the Act.

1911.
June 23.
August 1.

Briesch vs. Geduld Proprietary Mines, Ltd.

That under both Acts the injury must be caused by accident is I think clear. In our Act of course the wording admits of no other construction, and the same construction has been placed upon the English Act. Thus in *Clover, Clayton & Co.* vs. *Hughes,* LORD LOREBURN says, "The injury must be *caused* by an accident and the accident must arise out of the employment." In *Steel* vs. *Cammell, Laird & Co.* (93 L.T. at p. 359), COZENS HARDY, L.J., says: "It must be shown not merely that there was an injury arising out of and in the course of the employment, but also that the injury was *caused* by accident arising out of and in the course of the employment."

LORD ASHBOURNE, in *Ismay, Imrie & Co.*, vs. *Williamson* (1908, A.C. 437), a case in which a stoker in a debilitated state of health died from the effects of a heat stroke, says, "If the Act is to be interpreted according to its ordinary and popular meaning, as LORD HALSBURY said was right in *Brinton* vs. *Turvey,* would not the generality of mankind say that what occurred was an injury caused by accident?" And again, "Although a heat stroke may be called a disease, it is in this case in my opinion a disease directly *caused* by an accident arising out of and in the course of an employment. . . ."

These quotations show that the expression "personal injury by accident," occurring in the English Act, is equivalent to personal injury caused by accident, and thus there is no difference in the construction to be placed on our Act.

The English decisions, though not of course binding upon us, are the decisions of the Courts of the highest authority upon Acts of Parliament which may be regarded as the source whence our Act is drawn, and are entitled to the greatest weight, and in my opinion we should not depart from the principles they lay down except for very good cause.

It is quite well settled now that the fortuitous element in the sense intended by LORD HALSBURY in *Hamilton, Fraser & Co.* vs. *Pandorf & Co.* (12 A.C. 518), need not necessarily be present in the accident contemplated by

the Workman's Compensation Act, and that an event is none the less an accident if it was the result of a deliberate act in the course of a workman's ordinary occupation. *Fenton* vs. *Thorley* (1903, A.C. 443); *Ismay, Imrie & Co.* vs. *Williamson* (1908, A.C. 437).

It is also I think established that accident does not necessarily denote an agency external to the injured person. This was laid down in *Stewart* vs. *Wilson and Clyde Coal Co.* in which LORD MACLAREN says, "If a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, I consider this is accidental injury within the meaning of the statute." This dictum was cited with approval in *Fenton* vs. *Thorley*, both by LORD MACNAGHTEN and LORD LINDLEY. It is referred to again by LORD SHAND in his dissenting judgment in *Clover, Clayton & Co.* vs. *Hughes*, as showing that LORD MACLAREN used the words to controvert the argument that accident must necessarily refer to some agency external to the injured person. LORD LOREBURN in the latter case says, "No doubt the ordinary accident is associated with something external, the bursting of a boiler or an explosion in a mine for example. But it may be merely from the man's own miscalculation, such as tripping or falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think it may also be something going wrong within the human frame itself, such as the straining of a muscle ,or the breaking of a blood-vessel."

For these reasons I think that the two elements contended for by Mr. Stallard—the fortuitous event and the external agency—need not necessarily be present to constitute an accident within the meaning of the Act of 1907.

Taking then the determining factors in an accident, *i.e.*, (1) some untoward or unexpected event, (2) an event capable of definite ascertainment as to nature, time and place, and (3) the consideration that there need not be any agency external to the injured workman, we have to determine whether the facts found amount to evidence of an accident in this case.

1911.
June 23.
August 1.

Briesch *vs.* Geduld Proprietary Mines, Ltd.

There is, I think, an untoward or unexpected event—a complete rupture occurring on January 9th, as the result of a strain occasioned in the course of, and arising out of, the employment. It would thus appear *prima facie* that there was evidence of injury caused by accident within the meaning of the Act as explained by the decided cases.

It is contended, however, that the two elements above mentioned, though apparently present, are in reality non-existent. With regard to the first, it is said that there was nothing untoward or unexpected on January 9th. There was, according to the Magistrate's finding, nothing unusual or extraordinary about the work then being performed. The workman had to employ greater force to unscrew the rusty piping than if it had not been rusty, but that was all. The piping was habitually rusty and known to be so, and it was his ordinary work to unscrew rusty piping. But there was an injury to the workman caused by a strain in the course of this employment, and that seems to me to have been an untoward or unexpected event. Indeed the event would be the more unexpected occurring in the ordinary course of employment.

With regard to this the question arises:—Unexpected by whom? By the workman himself or by any reasonable person with a knowledge of all the facts, *i.e.*, a person knowing that an inguinal rupture was in progress? On this question, which arose in *Clover, Clayton & Co.* vs. *Hughes*, there is a considerable conflict of opinion. Lord Macnaghten says: "An occurrence is, I think, unexpected, if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen." The Lord Chancellor says, "It was unexpected in what seems to me the relevant sense—namely, that *a sensible man who knew the nature of the work* would not have expected it. I cannot agree with the argument presented to your Lordship that you are to ask whether a doctor acquainted with the man's condition would have expected it."

On the other hand Lord Atkinson says, "And if the physical state of the workman be such that those ac-

quainted with it, and capable of forming an intelligent opinion upon the effect which those influences would under such conditions produce upon him regard the injury as the certain or highly probable consequence of their action, I fail to see how the injury could be regarded as an accident."

In *Ismay, Imrie & Co.* vs. *Williamson,* LORD MACNAGHTEN appears to lay great stress upon the debilitated state of the stoker, and says, "The death was due to the physical state of the workman and the nature of the employment. . . ." "It was, I think, just what anybody would have expected who saw the man and knew what a trimmer has to do. And the fact that the man was wholly inexperienced, ignorant of what ought to be done in case of emergency, and the result would be a foregone conclusion."

In this case he was of opinion that death was not due to accident. There is, I think, considerable difficulty in reconciling his view in this case with those subsequently expressed in *Clover, Clayton & Co.* vs. *Hughes* quoted above. In the latter case, too, he says that "the fact that the man's condition predisposed him to such an accident seems to me to be immaterial."

In *Wicks vs. Dowell & Co., Ltd.* (1905, 2 K.B. 225), a workman liable to epileptic fits was injured by falling during an epileptic seizure into the hold of a ship near which he had to stand in the course of his employment. The Court of Appeal held that this was a case of injury by accident, and that the idiopathic condition of the workman was immaterial.

In my opinion the balance of authority is in favour of the view that an event is unexpected if unexpected by the workman or by any reasonable person, having regard to the nature of the work being performed at the time of its occurrence, and the physical condition of the workman which may have contributed to the happening of the event is immaterial.

Here the workman was ignorant of the fact that an inguinal rupture was in progress, and no one seeing him at work unscrewing a pipe would expect him to rupture himself.

1911.
June 23.
August 1.

Briesch vs. Geduld Proprietary Mines, Ltd.

For these reasons I am of opinion that evidence of the first element—the untoward and unexpected event—exists in this case.

With regard to the second, it is contended that the injury sustained by the plaintiff was the rupture which had occurred at some time which could not be definitely ascertained before January 9th, and that the event of January 9th was only the final stage of this pre-existing injury, and would inevitably have occurred in the ordinary course of things without the interposition of any strain, within about three months.

Reliance was placed upon the cases of *Marshall* vs. *East Holywell Coal Co.*, and *Gorley* vs. *Backworth Collieries* (93 L.T. 360), *Coe* vs. *East Fife Coal Co.* (2 B.W.C.C. 8), and *Steel* vs. *Cammell, Laird & Co.* (1905, 2 K.B. 232).

The two former cases were cases of personal injury arising in the course of a miner's occupation, one the case of what is known as "beat hand," caused by the jar of the pick, the other known as "beat knee," caused by friction whilst kneeling to work a seam of coal. In both cases the injury is one of gradual development, and it is impossible to fix any date at which it began to accrue, or any particular act as the cause. The Court of Appeal held that under these circumstances the injury was not due to accident. *Steel* vs. *Cammell, Laird & Co.* was the case of paralysis arising from lead poisoning, the poisoning being a gradual process in the course of the employment of handling lead. The Court of Appeal decided that it was not possible to indicate a time at which there was an accident which caused the injury, and the workman was not entitled to compensation.

All these cases were subsequent to the decision in *Fenton* vs. *Thorley*.

On the other hand the necessity for fixing the precise time at which the accident, as apart from the injury, occurred, does not seem to have been always recognised. Thus in the case of *Turvey* vs. *Brinton's*, Ltd. (1904, 1 K.B., 328; 1905, A.C., 230), a workman contracted anthrax in the course of his employment, the disease being due to the lighting of the bacillus of anthrax

upon some part of the body. The Court of Appeal unanimously, and the House of Lords by a majority, decided that the case was one of personal injury caused by accident within the meaning of the Act. The element of accident relied upon was the lighting of the bacillus upon such part of the body as allowed of its growth, thus causing malignant disease resulting in death. So far as the report goes there does not appear to have been any evidence of the time when the bacillus lighted upon the deceased man. In this respect the decision in this case is hard to reconcile with the later case of *Marshall* vs. *The East Holywell Coal Co.*

The English Act, I may observe, requires notice of the accident to be given, whilst our Act requires notice of the injury.

The case of *Coe* vs. *The Fife Coal Co.* is in some respects most like the present case. In that case a miner's employment involved the letting of full hutches of coal down a steep gradient by hand, an occupation involving great strain. On May 1st, whilst engaged in this work he felt a sharp pain in his chest, but was able to continue to work to the end of the shift. He was unable to work on the next working day, but resumed for the next four working days. He was then incapacitated for about three months. It was found as a fact that the incapacity arose from cardiac break-down due to the fact that the work was too heavy for him; that the injury did not arise by any sudden jerk, but the repeated excessive exertion strained his heart unduly until finally it was overstrained, and caused the harm on May 1st. The Court of Session declined to interfere with the decision of the sheriff substitute, who had found that the injury was not due to accident. The injury was not caused by any specific act, any unlooked-for mishap, "but was the ordinary and necessary consequence of continuous work lasting over a considerable time."

I think the present case may be distinguished from all these cases in that it is found here that there was a specific event—a strain on January 9th, which occasioned an injury—a protrusion of the intestine which incapacitated the workman.

1911.
June 23.
August 1.

Briesch *vs.* Geduld Proprietary Mines, Ltd.

If the idiopathic condition of the workman due to disease is not to be taken into account, still less should it be taken into account where it has been brought about by the nature of his occupation. This man's condition on January 9th was such that a strain was very likely to cause a rupture. As the result of a strain on that day there was a rupture, *i.e.*, a protrusion of the intestine which incapacitated him for work, and this seems to me to be none the less a specific injury that the process by which the intestine came into the position where the strain caused it to protrude, had been started by previous strains in the course of his employment.

The intention of the Legislature was that a workman should be compensated for injury incapacitating him for work, arising out of and in the course of the employment and caused by accident. This is not a case of disease; the plaintiff has undoubtedly in my opinion been incapacitated by personal injury arising out of and in the course of his employment; there was no such injury in respect of which he was entitled to compensation prior to January 9th, inasmuch as up to that date he was not incapacitated from work though he had sustained a rupture; on that date there was an injury—a complete rupture—causing incapacitation for work, and due to a specific strain, and in my opinion there is evidence that it was caused by accident within the meaning of the Act.

For these reasons I think that the answer to the first question should be that there is evidence on which the Magistrate may find that the plaintiff sustained a personal injury caused by accident.

[The remainder of the judgment is immaterial hereto.]

BRISTOWE and CURLEWIS, JJ., concurred.

[Plaintiff's Attorney, MAX COHEN.
Respondent's Attorneys, MACINTOSH & KENNERLEY.]

[Reported by ADOLF DAVIS, Esq., Advocate.]