ERRATA. Please note that the words PRESIDENTIAL ASSURANCE wherever they occur should be corrected to read as PRUDENTIAL ASSURANCE.

DE SOYSA
v.
THE PRESIDENTIAL ASSURANCE COMPANY LIMITED

COURT OF APPEAL.
G. P. S. DE SILVA, J. (PRESIDENT) AND DHEERARATNE, J.
C.A. 436/76 (F).
D. C. COLOMBO 244/A.
MAY 5, 6, 7, 1987.

Insurance Law–Death by accident directly or indirectly occasioned or accelerated by mental illness–Exception clause excluding proximate cause–Burden of proof.

The life of the deceased who in later life was afflicted with "manic depressive illness" was insured with the defendant–company on three policies totalling Rs. 100,000. Each of the policies contained a clause securing an additional benefit of double the sum assured in the event of accidental death. The deceased died in a train accident. The defendant–company paid Rs. 125,000 (sum assured with bonus) but denied liability to pay the double accident benefit of Rs. 100,000 relying on the following exception clause–

"provided that the death occured within three months after the accident and was not directly or indirectly occasioned or accelerated–

(*a*) by suicide or self-inflicted injuries while sane or insane.

(*b*) by bodily or mental infirmity or illness or disease of any kind.

The deceased was knocked down by a train when he was walking along a rail track, and died but the Insurance Corporation refused to pay the double accident benefit and at the trial relied on (*b*) of the exception clause.

Held–

(1) The inclusion of the words "directly or indirectly" in the exception clause excludes the application of the maxim causa proxima non remota spectatur and a more remote link in the chain of causation is contemplated than the proximate and immediate cause.

(2) The burden of proof of the application of the exception clause is on the defendant. As the evidence on the point is equally balanced it cannot be said that the defendant has discharged its burden of proving that the deceased was suffering from mental infirmity on the day of the accident and that owing to his mental infirmity he took an early morning walk along the rail track.

Cases referred to:

(1) *Winspear v. Accident Insurance Co. Ltd.–(1880) 42 Law Times 900.*

(2) *Lawrence v. The Accident Insurance Co. Ltd.–(1881) Law Times 45 QBD.P. 29.*

(3) *Smith v. Cornhill Insurance Co. Ltd.–[1938] 3 All ER 145, 150.*

(4) *Coxe v. Employers' Liability Assurance Corporation Ltd.–[1916] 2 K. B. 629.*

(5) *Tootal, Broadhurst, Lee & Co. v. London and Lancashire Fire Insurance Co.–(1908) Times, May 21 quoted in General Principle of Insurance Law by Ivamy 4th Edn. P. 444.*

(6) *Miller v. Minister of Pensions–[1947] 2 All ER 374.*

APPEAL from judgment of the District Judge of Colombo.

Dr. H. W. Jayewardene, Q.C. with *M. A. Bastiansz* and *I. Keenavinna* for plaintiff-appellant.

K. N. Choksy, P. C. with *Ronald Perera, C. Nadesan, Nigel Hatch* and *H. Wimaladharma* for defendant-respondent.

Cur. adv. vult.

July 24, 1987.

DHEERARATNE, J.

Sylvester de Soysa was truly a gentleman of leisure; he was a wealthy landowner, a lover of literature, music, sports and art; adding to his cherished possessions were a collection of valuable paintings and a music band in which he himself played. Later, a dark cloud was found ominously casting its shadow on Sylvester's otherwise sunshiny life; for, he was struck down with a sad mental malady which required intermittent medical attention. Early hours of the 17th of October 1969, saw Sylvester depart his life at a comparatively early age of 45 years, being tragically knocked down dead, by a moving train.

Sylvester's life was insured with the defendant-company on three policies, all totalling to a sum of Rs. 100,000. Each of the policies contained a clause securing an additional benefit by way of double the sum assured, in the event of accidental death. The defendant-company paid a sum of Rs. 125,000 representing the sum assured and the bonus accrued thereon, to the plaintiff, the widow of Sylvester and the administratrix of his estate, but it denied liability to pay the additional benefit of Rs. 100,000, which sum the plaintiff claims in this action. The basis of the denial of liability to pay the additional sum, is the identical exception clause containing in each of the policies, the material portion of which reads as follows:–

"provided that the death occurred within three months after the accident and was not directly or indirectly occasioned or accelerated–

(*a*) by suicide or self-inflicted injuries while sane or insane,

(*b*) by bodily or mental infirmity or illness or disease of any kind."

In the original court, counsel appearing for the defendant-company, having exercised the right to begin, at the close of his case, explicitly abandoned the position that Sylvester's death was occasioned by suicide or self-inflicted injuries and informed court that he was relying only on para (*b*) of the exception clause. In spite of this, the learned trial Judge, quite strangely reached the conclusion, that Sylvester met with his death by suicide and proceeded to dismiss the plaintiff's action. The plaintiff appealed. When the appeal was argued before us for the first time, we made order remitting the case back to the District Court for a trial *de novo* as the learned trial Judge had totally misunderstood the issue presented to him-(vide judgment dated 24.10.1986). The defendant-company then sought special leave from the Supreme Court, to appeal from our judgment. At the hearing of that application to grant special leave, counsel for both sides had agreed that the judgment given by us ordering a fresh trial, should be set aside. Consequently, we have been directed by their Lordships, to hear this appeal and come to a decision on the basis of the oral and documentary evidence recorded in the lower court, disregarding all findings on primary facts arrived at by the learned District Judge-(Vide S. C. Leave to Appeal Application 191/86; order dated 20.02.1987). We find ourselves now placed in not too easy a situation of having to draw inferences and reaching conclusions from the evidence led in the District Court, not having had the benefit of seeing or hearing the witnesses ourselves. However, I may add that our task has been made less arduous by the able assistance we have received from counsel appearing on either side, to whom we are indeed indebted.

Assuming that Sylvester did suffer from a mental infirmity, Dr. Jayewardene for the appellant submits that to come within the exception clause, the defendant-company must show that Sylvester's mental infirmity was the proximate and not a remote cause of his death. Strong reliance was placed in support of this argument on two cases, which I shall instantly refer to.

The first of these cases is the case of *Winspear v. Accident Insurance Co. Ltd.* (1) approved by the Court of Appeal – 43 Law Times page 459. In that case, William Winspear was insured against death or injury by accident. While the policy was in force, Winspear in crossing or fording a stream was seized by an epileptic fit, fell down in the stream and whilst suffering such fit, was drowned instantly. The

relevant portion of the exception clause on which the insurer relied on to deny liability, read as follows:–

"Provided further, that the insured shall not be entitled to make any claim under this policy for any injury from any accident, unless such injury shall be caused by some outward and visible means.....; and that this insurance shall not extend to death by suicide,.....or to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease,.....or to any death arising from disease, although such death may have been accelerated by accident."

In rejecting the defence of the insurer, Kelly C.B. said at page 903:–

"Had death arisen from one cause – for example from disease and that disease had been preceded by another cause, and that one by another more remote, and that again by a fourth cause remoter still, we must still have looked at the final actual cause, the *causa causans,* as logicians term it. What then is the *causa causans* in the present case? If it had been epilepsy, then without doubt the insured's death would not have been within the terms of the policy, and the plaintiff would not have been entitled to recover. But if there be meaning in words and if the English Language admits of a statement with a plain grammatical meaning of the cause of an individual's death, it is to my apprehension clear that here drowning was the cause, and the only cause, of the death of the insured. The drowning may have occasioned by the deceased having fallen down in the water from a fit of epilepsy, and that fit may have been occasioned by a constitutional habit of the body, making it dangerous for him to expose his limbs to the action of cold water, the one cause preceding the other, and being what logicians call the *causa sine qua non,* but for which the death would perhaps not have happened, but not being in the proper sense of the word the actual proximate cause of death. The real *causa causans* in this case was the influx of water into the deceased man's lungs, and the consequent stoppage of his breath and so he was drowned. Anything which led to that, such as his being, if he were, subject to epileptic fits or being seized with a fit while crossing the stream, would be a *causa sine qua non.* If he had not had the fit he probably would have crossed the stream in safety, but that does not make the fit *causa causans,* the actual proximate cause of death."

The second case relied on by Dr. Jayewardene, is the case of *Lawrence v. The Accident Insurance Co. Ltd* (2). In that case, the deceased insured was standing on a railway platform when he was seized with a fit, fell on the railway line, and was instantly killed by a locomotive engine which was passing at that time. The material words of the exception clause relied on by the insurer to avoid liability read as follows:–

> "......this policy insures payment only in the case of injuries accidentally occurring from material external cause operating upon the person of the injured where such accidental injury is the direct and the sole cause of death of the insured.....but it does not insure in the case of death arising from fits.....or any disease whatsoever arising before or at that time, or following such accidental injury (whether consequent upon such accidental injury or not, and whether causing such death or disability directly or jointly with such accidental injury)."

In that case too, following the doctrine of proximate cause, William, J. expressed himself in the following words at page 31:–

> "Now the question here is whether, upon the true construction of the proviso, this is a case of death arising from a fit. It seems to me that the first maxim of Lord Bacon is directly in point, in which he said that 'it were infinite for the law to judge causes of causes, and their impulsions one of another; therefore it is contenteth itself that the immediate cause, and judgeth of acts by that, without looking to any further degree'. Applying that maxim to the words of this proviso, we must look to the immediate and proximate cause of death, and that would be the injury caused by the engine passing over the deceased. I think that the true meaning of the proviso is that if the death arose from a fit, then the Company would not be liable, but it is essential to that construction that it must be made out that the fit was the immediate and proximate cause of death".

However, the wording of the exception clause in the instant case, is markedly different from those in *Winspear's case* and *Lawrence's case* and it carries the words "directly or indirectly occasioned or accelerated by". As expressed by Atkinson J. in *Smith v. Cornhill Insurance Co. Ltd.* (3).

> "Each case turns on the construction of the particular policy and, unless the language is identical, one case is no authority for another unless the general principle can be extracted."

It appears to me that the use of the words I have referred to above, appearing in the exception clause, have the effect of excluding the doctrine of proximate cause from the ambit of that clause. In my view, the wording of the exception clause in the present case, strikes a close resemblance to that which was used in the case of *Coxe v. Employers' Liability Assurance Corporation Ltd.* (4). At pages 634 & 635 Scrutton J. said:–

"But the words which I find impossible to escape from are 'directly or indirectly'. There does not appear to be any authority in which those words have been considered, and I find it impossible to reconcile these with the maxim *causa proxima non remota spectatur.* If it were contended that the result of the words is that the proximate cause, whether direct or indirect, is to be looked at, I should reply that that result does not appear to me to be consistent or intelligible. I am unable to understand what is an indirect proximate cause, and in my judgment the only possible effect which can be given to those words is that the maxim *causa proxima non remota spectatur* is excluded and that a more remote link in the chain of causation is contemplated than the proximate and immediate cause..... In the present case the Arbitrator has found, as a fact, that assured's death was indirectly traceable to war; and it is clear upon the facts that he was placed in a position of special danger – namely, he had to be about the railway line performing his military duties at night with the lights turned down, in consequence of war and while doing his military duties in that position of special danger he was killed by reason of the special danger which prevails at that particular place to which he was exposed by reason of his military duties. In those circumstances I am unable to hold that the Arbitrator could not reasonably find, as a matter of fact, that the death was indirectly caused by war.....".

There is no dispute in this case, that the burden lay with the defendant-Company, to prove the circumstances specified in the exception clause which constitute an excuse for the denial of liability to pay the claim. As stated by Bigham, J. in the case of *Tootal, Broadhurst, Lee & Co. v. London & Lancashire Fire Insurance Co.* (5) in his summing up to the Jury:

"The excuses for refusing to pay are to be found endorsed upon the policies, and they are as much part of the contract as that which is expressed on the front of the policy, by which they undertake to

pay in the event of fire. The only difference is this, and it is an important difference, and one that you must bear in mind, that, whereas it is for the (insured) to show that their goods have been burned, it is for the (insurers) to show to your satisfaction that the circumstances which constitute an excuse for non-payment of the claim has in fact arisen. To use the common legal language, the onus of proof, so far as the excuse goes, is an onus which rests upon the (Insurance) Company............ And, finally, you must remember that this is what is called an exception in the policy, and it is for the (insurers) to satisfy you that the exception has arisen which excuses them. They must not leave your minds in any reasonable doubt about it, because if they do, they may not have discharged the burden which is upon them."

Admittedly, Sylvester succumbed to the injuries he received as a result of his being knocked down by the train. Once it is ruled out that his death was occasioned by suicide or self-inflicted injuries, I think the proper question I must ask myself, before venturing to make any assessment of the evidence led in this case, is this: "What circumstances has the defendant-Company got to prove precisely to show that Sylvester's death was directly or indirectly occasioned or accelerated by his mental infirmity?. In my view, the defendant-Company has to prove the following circumstances:–

(A) Sylvester was suffering from a mental infirmity on the fatal day and due to his mental infirmity he placed himself on the railway line or its proximity; OR

(B) Even if Sylvester did not place himself on the railway line or its proximity due to his mental infirmity on the fatal day, he failed to take steps to avoid his death–

(a) because he was insensible to the danger of being knocked down by the train, due to his mental infirmity; or

(b) having sensed that danger, he could not remove himself from that danger, due to his mental infirmity.

I must readily admit at this stage, that heavy reliance must necessarily be placed on circumstantial evidence to prove the above circumstances, yet bearing in mind, that on this score, no relaxation of the required standard of proof will ever be countenanced.

From about 1967, Sylvester had been treated off and on for his mental illness, which in the medical parlance is described as "manic depressive illness". His family doctor was a friend of his, one Dr. Schokman, a general practitioner, whose association with Sylvester spanned a period of about three years immediately prior to his death. Dr. Schokman knew that Sylvester was taking psychiatric treatment from some doctors in Colombo. The only occasion on which Dr. Schokman was consulted for Sylvester's mental illness, was about 3 to 6 months before his death, when Dr. Schokman was summoned one night to Sylvester's house. On that occasion, Dr. Schokman obtained for Sylvester, the services of a specialist in that field–Dr. Rodrigo, Professor of Psychiatry at the Peradeniya University and a Consultant at the Kandy General Hospital. Sylvester was treated by Dr. Satkunanayagam, Psychiatrist, Mental Hospital, Angoda, at the Mental Hospital itself, at two private nursing homes in Colombo and at Sylvester's Colombo residence. From 18.12.68 to 18.01.69, Sylvester was warded at the Mental Hospital and from 23.09.69 to 04.10.69, at the Wycherly Nursing Home, Colombo, both occasions under the treatment of Dr. Satkunanayagam. It was only 13 days after Sylvester was discharged from the Wycherly Nursing Home, that he met with his death.,

All these three Doctors, Schokman, Rodrigo and Satkunanayagam, were called as witnesses on behalf of the defendant-Company. According to Dr. Schokman, there was a period when Sylvester used to leave his home in Peradeniya; where he usually resided, early in the morning, and it was not infrequently that the plaintiff telephoned him to obtain his assistance to trace Sylvester. On one such occasion Dr. Schokman took Sylvester home. When specifically questioned as to why Sylvester behaved in that manner, Dr. Schokman replied that he could not say. It may be, that modesty made Dr. Schokman not to venture an opinion on a field he was not quite conversant with, or it may be that Dr. Schokman, knowing Sylvester as well as he did, genuinely thought that there was nothing peculiar about Sylvester's behaviour. His evidence further was that, he did in fact ask Sylvester why he left his house in the early hours of the morning, and Sylvester's reply was that he went to listen to the temple bells. On two occasions, Dr. Schokman did meet Sylvester near the Dalada Maligawa when he went in search of him. Dr. Rodrigo's evidence, does not have any bearing, in my opinion, on Sylvester's leaving the house early morning in relation to his mental illness. On 04.10.69, Dr. Satkunanayagam

found Sylvester fit to be discharged from the Wycherly Nursing Home, yet to continue the medicine. However, Dr. Satkunanayagam did not exclude the possibility of Sylvester getting a relapse. In my opinion, it is Dr. Satkunanayagam who is best equipped to say whether Sylvester's early morning walks, particularly the walk on the fatal day, bore a relation to his mental infirmity. I would therefore set out the relevant parts of the evidence given by Dr. Satkunanayagam on this important aspect, verbatim, in the question and answer form.

Q. His (Sylvester's) wife had stated before the Coroner that when in a depressed state he had the habit of leaving the house without informing anyone; is that a symptom of his illness?

A. Well, I cannot say precisely that it is a symptom of his ailment.

To Court:

Q. When a person does an unusual thing and when it is a person who has this type of illness, could you relate it to that illness?

A. His sleep could have been disturbed and he may have awakened in the early hours of the morning and he could possibly do that kind of things.

Q. Are those a probable result of his conditions?

A. Yes.

XXD:

Q. Is the leaving of the house a symptom of his illness?

A. Not by itself.

Q. If I told you that after he left the nursing home he became religious and got up early morning to go to some religious institution, will that be a symptom of this kind of disease?

A. Being interested in religion is not a symptom of the illness. ....

....

Q. At the time you discharged him he had recovered from whatever illness he had?

A. He had improved.

Q. Improved to such an extent that he could go home?

A. Go home and continue the treatment.

Q. Could he look after himself?

A. Yes.

Q. Could you say whether by the 17th of October his condition would have deteriorated?

A. I cannot say that.

Q. Either way you cannot express an opinion?

A. Yes.

At this point, I must pause to say that, taking Dr. Satkunanayagam's evidence in isolation, I do not feel sure to conclude that Sylvester was suffering from any mental illness on the fatal day, or that he did not, I do not feel equally sure, that he did take a walk on the railway line due to his mental infirmity, or not. If Dr. Satkunanayagam with all his special knowledge of Sylvester's illness could not say that for certain, one may ask, who else could be more sure? It seems to me that it is certainly not an argument which advances the defence case to say, "well, no medical man can ever say that for certain".

I will now pass on to the accident itself. Besides the three doctors referred to above, on behalf of the defendant-Company the engine driver Lamseed and the fireman Hemangoda were called as witnesses. The plaintiff's evidence given at the Coroner's inquest, was also marked as an admission; but I propose to refer to that statement, later, when I deal with the evidence of the plaintiff. Sylvester was knocked down about 4.13 a.m. by the train proceeding from Peradeniya to Kandy, driven by Lamseed, after it completed negotiating a sharp right-hand bend at Mulgampola. The speed of the train, which had a steam engine, was between 18 to 20 m.p.h. Lamseed saw nothing; being positioned on the right-hand side of the cabin, he was watching that side of the bend, as was expected of him. Hemangoda was positioned in the left-hand side of the cabin, and he spotted the deceased "standing on the middle of the track" 100 feet away, as the train was negotiating the bend, when he promptly sounded the whistle and alerted Lamseed to bring the train to a halt. It was too late; and when the train was brought to a halt, the engine and one bogie had gone over Sylvester. The head light of the engine, did not directly fall on Sylvester, as the engine was negotiating the sharp bend; and Hemangoda frankly admitted that he was unable to say whether Sylvester was on the middle of the track or by its side, except that Sylvester's body, lying in the middle of the track, was retrieved from under the bogie. Hemangoda was not questioned as to whether Sylvester was facing the train or not and it is quite apparent from his evidence that all what he saw, and indeed what he could have seen,

was a fleeting glance of a figure of a man, with the aid of the glow of the head light, which head light did not fall on the man directly. If one were to assume that Sylvester was walking towards Kandy from his home, as suggested on behalf of the plaintiff, he would probably have been knocked from behind. Hemangoda admitted that he did not see Sylvester being actually knocked down, for, this would have been impossible, because the nose of the steam engine forming the boiler in front, is 30 feet long.

Are the facts that Sylvester took a walk on the railway track and that too in the early hours of the morning, indicative of his mental infirmity? It is not unusual for people to walk on the railway line in Sri Lanka, whatever the position be in other countries. Lot of people do walk on the railway track, but why at 4.13 a.m.? I shall consider the explanation offered by the plaintiff later, but apart from any mental infirmity, we cannot overlook the evidence in this case that Sylvester was a man prone to eccentricities. For instance, quite unlike most men of his wealth, social standing and education, Sylvester usually went about dressed in a silk shirt and a silk sarong, in which dress he was clad even on the fatal morning. This peculiar sartorial taste of Sylvester, was never presented to us, or to the court below, as a mark of his mental infirmity. One cannot but also take serious note of the fact, that Sylvester was knocked down near a sharp bend on the railway track, and that such treacherous places are not unknown to have counted the lives of men, even known to be perfectly sane.

Dr. A. B. N. de Fonseka who held the postmortem examination on the body of Sylvester, being not available to give evidence, as he was said to have left the country, the defendant-Company only relied on his postmortem report and in consequence, the best evidence to reconstruct the manner in which Sylvester was knocked down by the train, was not forthcoming. Dr. Balasubramaniam, the Senior Consultant, General Hospital, Kandy, and a visiting lecturer in Pathology at the University of Peradeniya, gave evidence for the plaintiff. It transpired from his cross-examination that he thought that he had been summoned to give evidence on the question whether Sylvester did commit suicide or not, which question was actually redundant at that stage, that position having being abandoned by the defence. The field of forensic medicine was not foreign to Dr. Balasubramaniam as he had performed and supervised about 25,000 postmortems in Sri Lanka and about 300 in the U.K., yet as far as this case is concerned, he was severely handicapped by the fact that he

was relying on a report given by someone else. I may add here, that Dr. Balasubramaniam did not even claim to have had the opportunity of examining the steam engine which knocked down Sylvester. The body of Sylvester was not mangled. Barring two serious injuries – the severance of the right leg 1 1/2 inches below the knee; and an abrasion 2 1/2 inches broad starting from the front of abdomen in line with the umbilicus and extending upwards and outwards to the back of chest and ending at the lower angle of scapula (an imprint of the railway line), other injuries found on Sylvester were minor lacerations and abrasions. Dr. Balsubramaniam attempted to reconstruct the accident and suggested that Sylvester, while walking at the edge of the track, was probably struck by a projection of the engine, and then "sucked in" or "rolled in" to the track. However, cross-examination revealed that this was a mere theory and that Sylvester could have equally suffered the injuries found on him even if he was knocked down while being on the centre of the railway line. Was Sylvester on the edge of the track or on the centre? Did Sylvester, having being on the track attempt to make a hasty getaway? Or perhaps the most significant question of all – Was Sylvester going in the same direction as the train or in the opposite direction? These remain unanswered.

Dr. Balasubramaniam was a personal friend of Sylvester. Sylvester died on a Saturday, the Wednesday before, he dropped in to see Dr. Balasubramaniam and arranged to have lunch with the Balasubramaniams along with his wife the following Sunday which he failed to reach. The suggestion appears to be, that Sylvester was quite normal on that day, and he probably was, on the fatal day. There is no reason to cast any doubt on this evidence of Dr. Balasubramaniam, but it does not help very much to decide the issue as to whether Sylvester was perfectly normal on the morning of the 17th October or not.

The plaintiff – Mrs. Soysa, giving evidence, stated that after Sylvester was discharged from the Wycherly nursing home, he was quite normal. Whether Sylvester was suffering from his mental infirmity or not, he used to walk to temples in the early hours of the morning, leaving home without informing anyone. He used to go to the Dalada Maligawa and the Gatambe shrine, walking along the railway track. If ever she felt that Sylvester was ill and if he did not return home in time, she used to ask Dr. Schokman to look for him. After Sylvester returned from the nursing home, he took a walk early

morning for the first time, on the day he met with his death. On the fatal day, he had left home early morning as usual, without informing anyone. She did not go in search of him, but about 11 a.m. a Police Officer informed her that Sylvester had met with an accident and she was taken to the Coroner for the purpose of the inquest. She denied having telephoned Dr. Schokman on the 17th morning asking him to search for Sylvester, because only when Sylvester was ill that she informed Dr. Schokman. She did not know where Sylvester had left for on that day, and it was about 5 or 5.30 a.m., that she noticed that Sylvester had left the house. She did not go in search of Sylvester on that day, as there was no necessity to look for him.

On behalf of the defendant-Company, the statement made by the plaintiff to the Coroner in Sinhala, was produced as an admission and strong reliance was placed on this statement, to show that Sylvester left his home early morning in a state of mental infirmity. A translation of that statement reads as follows:–

"In 1959 my husband suddenly fell ill. Thereafter he was taken to the Colombo General Hospital and according to the diagnosis of the doctor (there), it was a mental illness. Thereafter, the disease surfaced several times frequently. Treatment was obtained from several doctors but because there was no change in the condition, for the last three years continuously, treatment was obtained from Dr. Schokman and in the meanwhile, treatment was also obtained from Colombo doctors. It was his practice to leave the house without informing anyone, when he got an attack of this disease. On one such occasion, Dr. Schokman brought him home. On several occasions, he had gone away like this. Today about 6.30 or 7 a.m. when I woke up I saw the bath-room door open. When I searched he was missing. I and my servants searched for him. About 11 a.m. I learnt from my uncle K. P. M. Jayasekera, that he had died as a result of his being run over by a train. I do not suspect foul play."

The evidence of Mrs. Soysa came under heavy attack from Mr. Choksy, learned counsel for the defendent-Company, who contended that her evidence given in the District Court is materially different from the statement made at the inquest and her summary of evidence appended to the plaint. It was submitted, that the contents of the statement made by Mrs. Soysa to the Coroner, at the earliest available opportunity regarding the circumstances leading to Sylvester's

death, before any dispute arose, are true and they show that Sylvester left the house on the fatal morning in a state of manic depression.

The question then arises as to what probative value should be attached to that statement made to the Coroner. It is not beyond one's imagination, to picture the agitated state of mind of Mrs. Soysa when she made that statement, having being conducted directly to the inquest, soon after the tragic news of her husband's death was broken to her. Could it be that what was foremost in her mind, as is not unusual of any person near and dear to the dead, to clear the dead and his immediate family of any stigma generally attached to a case of suicide? Was that the reason she stated that other doctors having failed, Dr. Schokman was continuously treating Sylvester for his mental infirmity for the previous three years, which position is not true according to Dr. Schokman? Or, in her anxiety to stifle any iota of suspicion of foul play, did she put the cause of Sylvester's morning walk on his mental infirmity? These possibilities cannot be excluded. In any event, it appears to me, that Mrs. Soysa had rushed into a conclusion to which medical opinion was somewhat hesitant to reach. I might mention here, that Dr. Schokman himself denied that he ever told the Coroner that he treated Sylvester for a period of three years for his mental infirmity, although it has been so recorded by the Coroner. He was equally emphatic, that he did not use the high flown Sinhala words attributed to him in his statement to the Coroner and that he does not speak or understand them.

It is contended by learned Counsel for the defendant-Company, that Mrs. Soysa's evidence that Sylvester became religious and was in the habit of visiting shrines in the early hours of the morning, is an afterthought, fabricated for the purpose of this case, to explain away Sylvester's early morning walk. But in the very evidence of Dr. Schokman, on which the defendant-Company relies, there is confirmation of Sylvester's early morning visits to Dalada Maligawa. Much was made about the sharp contradiction between the evidence of Dr. Schokman and Mrs. Soysa, as to whether or not Mrs. Soysa did contact Dr. Schokman over the telephone about 6.30 a.m. on the 17th morning, seeking his assistance to search for Sylvester. Dr. Schokman says Mrs. Soysa did contact him, while according to Mrs. Soysa she did not. It is suggested that in all probability Mrs. Soysa did contact Dr. Schokman, but she was suppressing that fact, because had she admitted so, it would lend support to the view that Sylvester

was mentally ill on that day. On the other hand, it was suggested that Dr. Schokman may have been confused on Mrs. Soysa having contacted him on that day, for some other occasion when he was in fact contacted. Then it is pointed out that Dr. Schokman was not cross-examined on the point on the basis that he was mistaken. It is material to observe that Dr. Schokman's evidence on this point is remarkably void in any detail; and that in his statement to the Coroner there is complete silence on this matter. Without seeing or hearing either Dr. Schokman or Mrs. Soysa give evidence, I find it difficult to resolve this conflict either way.

Well then, if the question be asked: Was Sylvester suffering from any mental infirmity on the fatal day? My answer would be–probably he was; probably he was not. If the question then be asked: Did Sylvester take the early morning walk due to his mental infirmity? My answer equally would be–probably yes; probably no. If this is the conclusion I can arrive at, after an assessment of the totality of the evidence, I am unable to say that the defendant-Company has discharged its burden. In this context, I think it is apposite to quote the words of Denning, J. in the case of *Miller v. Minister of Pensions,* (6):

> "This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. This degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say, 'We think it more probable than not' the burden is discharged, *but if the probabilities are equal it is not*" (emphasis is mine).

For the above reasons I would allow the appeal, set aside the judgment of the learned District Judge and enter judgment for the plaintiff as prayed for in the plaint. The plaintiff will be entitled to her costs of the Court below and costs of this Court fixed at Rs. 525.

G. P. S. DE SILVA, J.–I agree.

Appeal allowed.

Application No. 103/87 for special leave to appeal from this judgment was refused by the Supreme Court on 26.01.88.