"PERSONAL INJURY BY ACCIDENT"

WITH REGARD TO THE ACCIDENT COMPENSATION ACT, 1972

In this article the writer proposes to discuss the meaning of the term 'personal injury by accident' in the context of Workers' Compensation legislation wih a view to showing that the adoption of that term along with nearly three-quarters of a century's judicial interpretation and qualification is not desirable. This will be looked at particularly in regard to the contraction of disease by accident and the distinction between personal injury by accident and the natural progression of disease.

Some consideration will also be given to the provisions of the Accident Compensation Amendment (No. 2) Bill which attempts to define 'personal injury by accident' for the first time in statutory form in New Zealand.

In any compensation scheme such as that established by the Accident Compensation Act 1972 there are four broad areas of interest:

(i) Who gets coverage?
(ii) For what are they covered?
(iii) How much do they get?
(iv) Who pays for what they get?

Throughout the debates, committees, commission and reports on the Accident Compensation Scheme much emphasis has been placed on who will qualify for compensation. The coming into operation of the Scheme was delayed after protests which have resulted in non-earners being included from the outset.

A mere glance at the debates shows that the issue of who pays has been fully argued; the debate over s. 112 being regarded by many politicians, employers, unions and commentators as one of the highlights of the proceedings. The quantum of payments has also received close, if not always accurate attention, but the important issue of the extent of individual coverage appears to have been largely overlooked.

The Woodhouse Report[1] acknowledge the logic of including sickness within the scheme but felt that logic must yield to other considerations, mainly the complexity and upheaval of total co-ordination and the uncertainty of the effects. The Report recommended that sickness cover be restricted as under the Workers' Compensation Act 1956 although it did consider a wider definition of accident based on the International Classification of Diseases[2] and a proposal relating to industrial deafness (s. 68) was adopted. The problems of classifica-

1. Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand, December, 1967.
2. Manual of the International Statistical Classification of Diseases, Injuries and Causes of Death. W.H.O., Geneva, (1957).

tion were acknowledged in the 1969 White Paper[3] but no firm recommendation was made. The Gair Report (1970)[4] considered the matter of definition only as a side issue to the relationship of Social Security and Accident Compensation, and made no positive recommendation. The net result is that there is no statutory definition of the term 'personal injury by accident' in New Zealand although a later proposal has reached the draft bill stage and been referred to the Statutes Revision Committee.

Whether or not the Workers' Compensation Act definition is suitable is important because it determines whether or not a person has cover under the new Act. This in turn is important for two reasons:

(i) Obviously only those with cover under the Act can claim under it. Others must rely on common law or social security. Thus the definition in a very real sense defines the scope of coverage of the Act.

(ii) If a person has cover in respect of the accident then any action for damages in respect of the injury is barred by s. 5 (1) (a). Thus, in circumstances where a person wishes to sue in negligence he may wish to show that he is *not* covered by the Act. Such a situation could arise where a person proposes to sue his doctor for negligent treatment and would want to show the injury suffered at the hands of the doctor was not personal injury by accident.

It is interesting here to note that the scope of cover under the Act in any matter before the court (not being necessarily a claim under the Act) is not a matter for the court, but falls within the exclusive jurisdiction of the Commission — s. 5 (5).[5] However the Commission's decision is able to be taken to the Administrative Division of the Supreme Court but only an appeal from a decision of the Appeal Authority.[6] Unless this appeal procedure is followed through the Commission's decision is conclusive evidence as to cover under the Act.[7]

The aim of this somewhat complex system is to ensure that there is some balance between the Commission and courts. It was felt that the court should not decide the matter in the first instance since one of the premises on which the scheme is based is that the adversary system is not appropriate to a social welfare system of this type. At the same time, it is perhaps undesirable to have the Commission deciding its own case, and so the present compromise situation was devised.

3. Commentary on Report of Royal Commission of Inquiry, 1969, paras. 224-232.
4. Select Committee on Compensation for Personal Injury in New Zealand, paras. 16-18.
5. Inserted between the first and second reading of the Bill.
6. Sections 162 (c), 168 (1) and later amended by the Accident Compensation Amendment Act (No. 2) 1973, s. 65.
7. Section 5(7).

Even s. 5 (5) does not make clear whether the court or the Commission is to decide whether there has been 'personal injury by accident' since it relates to coverage for a person "who has suffered personal injury by accident".

Actions under insurance policies are specifically excluded from the barring of action provisions by s. 5 (3) (b). However, since insurance is merely one form of contract, does this imply that any other contract for compensation would be caught by s. 5 (1)? Arguably, an action based on contract is not strictly an 'action . . . for damages in respect of injury' — s. 5 (1) (a), but is an action in respect of a breach of contract. The question of whether the courts would make this distinction is outside the scope of this article, but is relevant insofar as it provides reasons for an injured person raising of his own volition an issue of interpretation of the scope of the Act. They are situations where the process of the law may be invoked by the injured person not by way of appeal from a Commission decision not to grant compensation, but as part of an action where the defendant will be seeking to show that the plaintiff was covered under the Act and his action is therefore barred. In such a situation one may ask whether it is satisfactory to have the crucial issue of the court's jurisdiction decided by a body other than the court itself; namely a Commission appointed on the recommendation of the Minister of Labour (only one of whose member need be an experienced barrister or solicitor),[8] and bound to carry out the Government's policies as directed by the Minister.[9] While there is eventually a right to appeal to the Administrative Division of the Supreme Court, there is likely to be considerable delay and expense in first going to Supreme Court, then through the Commission's appellate bodies, perhaps to the Administrative Division, and finally back to the original Court.

WORKERS' COMPENSATION ACT INTERPRETATION SURVIVES

The phrasing used throughout both drafts of the Bill and the Accident Compensation Act is "personal injury by accident", the same as in the Workers' Compensation Act. Some sections have been merely adopted from the Workers' Compensation Act, e.g. ss. 66, 67 and 68, as acknowledged in the explanatory note to the Bill.

In adopting the language of the Workers' Compensation Act, it would seem that *prima facie* the interpretation given that language is also adopted.

This view is borne out by a statement over a hundred years

8. For appointment and qualifications of Commissioners see ss. 6-9.
9. Section 20(1). Precedent for such provision can be found in the Broadcasting Corporation Act 1961 s. 11, and State Advances Corporation Act 1965, s. 17.

old by Blackburn, J., in *Mersey Docks and Harbour Board Trustees* v. *Cameron*:[10]

> Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act *in pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew has been put upon the same words before; and unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise.

and further strengthened by the similar comments of Lord Herschell in *Bank of England* v. *Vagliano*.[11]

IS THE LEGACY OF WORKERS' COMPENSATION ADEQUATE?

The Shorter Oxford Dictionary defines *Accident* as

"An event, especially an unforeseen contingency; a disaster."

Injury is defined as

"Hurt is loss caused to or sustained by a person or thing; harm, detriment, damage."

To adopt these definitions would solve many definitive problems, for most if not all accidents, sicknesses and diseases can be regarded as unforeseen contingencies causing hurt or loss to the victim. However, it is not possible to suggest that this is the meaning intended by the Act, in view of s. 65 which *extends* the meaning of "injury by accident" to occupational diseases in certain situations only. In addition, s. 4 (c), the unique section setting out the general purposes of the Act, refers to the paying of compensation to persons suffering injury by accident "in respect of which they have cover under this Act", necessarily implying that there are some personal injuries by accident which will not be compensated. Furthermore to adopt the dictionary definition would be to ignore the vast body of case law developed over more than sixty years by judges who were unable to accept that the legislature intended "injury by accident" to have a literal dictionary meaning under the Workers' Compensation Acts. There is no statutory definition in the Workers' Compensation Act, or in any other New Zealand statute, of the term "personal injury by accident". Nor was there any in the Accident Compensation Bill. However, the Act, in s. 2 offers the following: " 'Personal Injury by Accident' includes incapacity resulting from an occupational disease to the extent that cover extends in respect of the disease under sections 65 to 68 of this Act."

One might have thought this to be sufficiently clear from s. 65 itself which says —

10. (1865) 11 H.L. Cas. 443, 480
11. [1891] AC. 107, 145.

> 'Continuous cover and work accident cover shall extend to occuptional diseases to the extent specified in sections 65 to 68 of this Act.'

It at least implies that disease, if not covered by sections 65 to 68 is not included at all. Unfortunately, there is no attempt to define what is a disease or sickness and what is an accident.

Throughout the Act it is assumed that "personal injury by accident" is adequately defined; e.g. s. 67 (8) refers to the right to recover compensation for disease if that disease is a personal injury by accident "within the meaning of this Act". Indeed the addition to the definition in s. 2 presupposes that the term was already adequately defined but for that addition. It is submitted that this is not so.

Accordingly, it is now necessary to examine the Act to determine the meaning of "accident" in the new scheme, and in particular the relevance and effect of the wealth of Workers' Compensation case law in this field.

JUDICIAL DEFINITION

This will require more lengthy examination. Most of the cases on this point have been decided under s. 3 (1) of the Workers' Compensation Act or its Commonwealth counterparts. It is suggested that there is a fundamental problem in applying these judicial definitions, confused as they already are, to the new Act. Section 3 (1) is a double-barrelled section. To qualify for cover under it, an employee has to show he has suffered personal injury by accident, *and* that it arose out of and in the course of employment. Unfortunately the courts have not always kept these issues distinct. When faced with a problem as to whether there has been a personal injury by accident they have sometimes avoided that issue by deciding that whatever it may have been, it did not arise out of and in the course of employment. Fullagar, J., in the High Court of Australia recognised this tactic and condemned it:[12]

> In all cases it is to be remembered that the question whether there has been personal injury by accident is a question distinct from and logically anterior to, the question whether what has happened arose out of or in the course of the relevant employment. The questions have not always been kept distinct and I am not quite sure that we kept them distinct at all points in *Ockenden's Case* (1958) 99 C.L.R. 215.

An example of confusion of these issues arise in New Zealand in *Mihi Anaru* v. *Richardson and Co. Ltd.*[13] The Court, in a difficult case involving pneumonia, entirely avoided the issue of whether the pneumonia was injury by accident by deciding that this particular case

12. *The Commonwealth* v. *Hornby* (1960) 103. C.L.R. 558, 597.
13. [1927] G.L.R. 575.

of pneumonia had developed too quickly to have arisen out of or in the course of employment.[14]

The distinction between the injury and the accident must also always be maintained. Lord Atkin emphasised this in *Fife Coal Co.* v. *Young*[15] as being particularly important in cases where the injury and the accident can scarcely be distinguished; for example, the heart fails while a worker is turning a screw or lifting his hand. If employment gives rise to a poisonous bacilli infection, the fact that it entered through a "non-employment" cut is irrelevant. If a worker received a trifling cut at work through which non-employment bacilli entered he is compensated because the injury is a direct result of the accident. Such findings necessitate the careful maintenance of a distinction between the accident and the injury.

In *Fenton* v. *Thorley Co. Ltd.*[16] Lord Lindley said:

> The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss.

Even in 1903 this statement was a gross oversimplication and Lord Robertson was closer to the realities of the situation when he said in the same case[17]

> Much poring over the word "accident" by learned counsel has evolved some subtle reasoning about these sections. I confess that the arguments seem to me to be entirely over the heads of Parliament, employers and of workmen.

A further seventy years of judicial activity has not clarified the situation; quite the reverse. The task now is to determine whether the problems of interpretation have been reduced or compounded by the Accident Compensation Act.

It will be obvious that the tactics of deciding whether an injury arose from employment before deciding whether it was an injury by accident will not be available in the majority of cases. In addition, many of the comments by leading members of the judiciary in cases which will be *prima facie* binding will be difficult to apply to a comprehensive scheme. This raises further issues as to how far the previous authorities can be accepted, and if they cannot, what interpretation can be substituted in their place? The principal problem areas in the definition of "injury by accident" are:

(i) Acceleration or aggravation of pre-existing disease.

(ii) Disease contracted by what is alleged to be an accident, including unusual weather conditions.

---

14. In appropriate cases pneumonia has been held to be injury by accident.
15. [1940] A.C. 479, 488, 489.
16. [1903] A.C. 433, 453.
17. Ibid., 452.

ACCELERATION OF PRE-EXISTING DISEASE

It is clearly established that an employer must take his employee as he finds him.

Cozens-Hardy, M. R. in *Dotzauer* v. *Strand Palace Hotel*[18] stated the proposition succinctly:

> the mere circumstances that a perfectly healthy man would not have met with it is no answer at all.

When applied to the comprehensive scheme, this rule may present an undesirable hindrance to the rehabilitation of the disabled into the community, for employers will be less willing to take risks where the period of potential liability is 168 hours per week, rather than 40. This will likely lead to large employers insisting on even stricter medical examinations before employment. The alternative however, would be to allow employers to apply some sort of exclusion clause which would be alien to the concepts of the scheme, and totally undesirable.

HEART CASES

This category involves so many people and so many problems that it deserves individual consideration. In 1970[19] heart disease was responsible for 36% (male) and 30% (female) of all deaths.[20] This amounted to some 8,191 deaths, or one in five of those persons admitted to hospital with cardiac complaints. This is indicative of the large number of persons affected, although it takes no account of those persons being treated for heart conditions outside hospitals.

It is important to these persons, their dependants and advisers to know to what extent heart disease precipitated by effort will be compensated. Under Workers' Compensation legislation a worker merely had to show a causal relationship between the employment and the injury. The leading case in point is *Clover Clayton* v. *Hughes*.[21] A worker was suffering from advanced heart disease, so that his aorta could have burst at any time. In fact it burst while he was using a spanner to tighten a nut, an activity which he performed frequently and involved no special or unusual strain. The House of Lords reaffirmed the definition of "accident" it had given in *Fenton* v. *Thorley* as "an unlooked for mishap or an untoward event, which is not expected or designed," and found that the worker had suffered an accident. On the question of cause, Lord Loreburn said that so long as the employment was one of the causes of the accident and the accident was one of the causes of the injury there was personal injury by accident. He continued:[22] "I do not think we should

18. (1910) 3 B.W.C.C. 387, 389; see also *Belcher* v. *Timaru Borough Council* [1937] G.L.R. 372.
19. 1972 New Zealand Yearbook.
20. By comparison the much publicised road toll for 1970 was 649 deaths.
21. [1910] A.C. 242.
22. Ibid., 246.

attach any importance to the fact that there was no strain or exertion out of the ordinary." It was suggested in argument that if the claim was allowed then everyone whose disease killed him at work would be entitled to compensation. Lord Loreburn replied:[23]

> I do not think so, and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened with he was working . . . In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly.

The same approach is taken in New Zealand, see *Muir* v. *J. C. Hutton Ltd.* a similar fact situation, where Fraser J. said:[24]

> There must be evidence that the strain of work contributed to the death, and that but for that work he would not have died at that time.

Muir's case applied the test as laid down by the House of Lords in *Clover Clayton* and in *McFarlane* v. *Hutton Bros. Ltd.*[25] that the strain need not in any way be out of the ordinary and indeed can even be less than the worker is accustomed to doing.

The above cases all make the point that not every worker who dies from a disease at work will be compensated. Compensation is payable only if the work contributed in some way. However, under the Accident Compensation Scheme, the context of the accident is irrelevant. It is difficult to see how these tests can be reformulated omitting reference to "work" or "arising out of and in the course of employment" under the new scheme. It would seem that any strain, however slight, such as lifting a parcel or digging the garden, if it is a contributing cause to the heart failure, can be regarded as an accident entitling the victim to compensation; since if these acts were done within the scope of employment they would have been compensated and the Accident Compensation Scheme makes no distinction between employment and non-employment accidents so far as entitlement to compensation is concerned. With the House of Lords going so far as to suggest that the turning of a nut can be sufficient strain to create an injury by accident, the Act is imposing a difficult duty on the Commission to draw a distinction between this and the natural progression of the disease.

It should not be assumed that it will be any easier for the injured party to show that his injury occurred by accident. Under Workers' Compensation legislation the plaintiff had to show that there was in fact a strain as a contributing factor and this was not easy to do, even where the worker was a manual worker and found dead in the the process of his allotted task.

---

23. Ibid., 247.
24. [1929] N.Z.L.R. 249, 252.
25. (1926) 20 B.W.C.C. 222.

A final example serves to illustrate clearly the problems likely to be encountered by the Commission in this area. In *Hilton* v. *Billington and Newton Ltd.*[26] a lorry driver strained himself in starting his lorry. Shortly after, he had a month off work with influenza. A month after his return to work he died, the evidence being that he had been continuously ill from the time of the strain until his death. Medical evidence was given that the driver had a longstanding heart disease and could have died from any sudden strain. The Court of Appeal was satisfied, (though the County Judge was not) that the strain had contributed to his death and compensation was awarded. If such a case were to arise after April, 1974 with the strain occurring from shovelling cement at home, would the Commission award compensation? One of the first problems would be establishing adequate proof of the accident and its effects. In Workers Compensation cases the onus of proof is on the plaintiff to show personal injury by accident, and it is not sufficient to show that it is equally as probable that the injury arose from accident as from natural causes. The onus is on the plaintiff to show injury by accident on the balance of probabilities.

A general feeling expressed during the Commission and Committee stages of the Accident Compensation Act was that the benefit of any doubt should be exercised in favour of the injured party. This is consistent with a scheme aimed at social welfare generally, but is not expressed in the Act. In the interests of clarity, and to provide some guidelines for the Commission, there should be a clearly stated presumption of accident, the onus then being on the Commission, if it desired to dispute eligibility, to show that what happened was nothing more than the natural progression of a disease.

CONTRACTION OF DISEASE BY ACCIDENT

"While a disease is not in itself an accident it may be incurred by accident, and that is enough to satisfy the statute." — Lord Kinnear in *Glasgow Coal Co. Ltd.* v. *Welsh.*[27] The problems in this area fall into two major types. They are:

(i) The problems caused by the contraction of traumatic disease, e.g. anthrax, scarlet fever. Where such disease is common in the employment but not elsewhere the courts have assumed there was an accident and drawn the inference that it arose out of and in the course of employment. Will the Commission be as prepared to find an accident where the disease strikes at home or some indeterminable place? Could and should the Commission retain the non-compensatable category which the courts called natural incidents of the employment? If so, what form should it take?

(ii) The problems caused by the extension of the pneumonia, heatstroke, frostbite cases (force of nature) to a comprehensive cover

26. (1936) 3 All E.R. 292.
27. [1916] 2 A.C. 1, 9.

situation, bearing in mind that if an occurrence should properly be regarded as an incident of employment, the courts have not always been prepared to hold that what occurred was an accident.

A distinction has been maintained between traumatic and ideopathic disease. Traumatic diseases are caused by an attack (albeit often seemingly theoretical) on the victim, including attacks by microbes. Ideopathic diseases are spontaneous, having no distinct cause and usually no precise duration. They are, by definition, excluded from the term "personal injury by accident". The question remains as to when contraction of disease by invasion of germs can be regarded as being by accident. The sections relating to compensation for industrial disease are substantially repeated from the Workers Compensation Act as the Explanatory Note to the Accident Compensation Bill acknowledges. The problem is whether this is the only coverage for disease, or whether injury from disease can in other circumstances be compensatable.

It is submitted that ss. 65-68 do not exclude compensation for disease where that disease does not arise out of and in the course of employment, but nevertheless is incurred by accident. The sections, in particular s. 67, deem a disease to be an injury by accident, without further proof if it is shown that it arose out of and in the course of employment. In other words, the section removes the necessity to prove as "accident", if it can be proved that the disease arose out of and in the course of employment. If the causal connection with employment cannot be proved, then a claimant must show that the injury arose by accident. This he can do, even if his injury is in the form of a disease so long as it is incurred by accident. This view is supported by s. 67 (8):

> Nothing in this section shall affect the right of any person to recover compensation in respect of a disease *if the disease is a personal injury by accident within the meaning of this Act* (emphasis added).

Section 67 also extends the time limit for claims for occupational diseases in specific cases up to 20 years and generally to 2 years. The time limit for claims for injury by accident, including disease incurred by accident is 1 year.[28]

In *Brintons* v. *Turvey*[29] Lord Halsbury, L. C. said of the phrase "personal injury by accident":

> . . . it excludes and was intended to exclude ideopathic disease; but when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase "accident causing injury" because the injury inflicted by accident sets up a condition of things which medical men describe as disease.

28. Section 149.
29. [1905] A.C. 230, 231.

In this case there was no doubt that the anthrax bacilli attacked the worker's eye within the course of his employment and the House of Lords held that there was injury by accident. However, their Lordships insisted that not all diseases contracted during employment were to be regarded as accidents within the meaning of the Act.

The problem lies in trying to draw the line between the cases. A line ought to be drawn to guide the Commission, and it is the writer's contention that recourse to Workers' Compensation cases is more likely to confuse than clarify, as the following cases show.

Grant v. *Kynoch*[30] involved a worker who had contracted blood poisoning and died. It was proved that the germ had entered through a cut ,and probably during the course of employment, since the bacillus was common there but rare elsewhere. The origin of the cut was unknown. His widow was awarded compensation. Lord Birkenhead, L. C. made an interesting observation on *Brintons Case*.[31] His Lordship said:

> When *Brintons Case* was decided the area conceded by contemporary science to ideopathic disease was much larger than is the case today. It follows that the area of disease which is now traced to infection by bacillus has correspondingly grown.

Only 14 years separated those cases, and in the 54 years since *Grant's* case the observations of Lord Birkenhead have become even more significant with medical research having established that many more disease are of traumatic origin.

It was put to the House of Lords that to allow compensation in this case would mean that every bacillus infection, including influenza, comes within the statute. Lord Birkenhead replied:[32]

> It is a partial and perhaps complete answer to this objection that in proceedings under the Workmen's Compensation Act it is for the applicant to prove his case. He must satisfy the arbitrator that the bacillus infection which is said to constitute the accident arose "out of and in the course of the employment". Where, as in *Brintons* v. *Turvey* (supra) and the present case, the bacillus is not met with, or is very rarely met with except among the implements or the materials of the particular employment, the onus which is imposed on the applicant is obviously very much lightened. But where the invading bacillus may be found anywhere — in the train, in the home, or in the public-house — a prudent arbitrator will require strict proof such as can hardly in the nature of things be often forthcoming that the "accident" in fact arose "out of and in the course of employment."

30. (1919) 12 B.W.C.C. 78 (H.L.).
31. Ibid., 82.
32. Ibid., 83.

There are obvious and immediate problems in applying this to the Accident Compensation scheme. It is no longer necessary to satisfy anyone that the accident arose out of and in the course of employment: Thus the rarity or otherwise of the bacillus is irrelevant. It was accepted that the invasion, or as the courts say, the assault, by the bacillus constituted the accident. Having accepted this, it would seem that a claimant need show no more than that his injury arose from bacillus infection rather than the natural progression of ideopathic disease.

Thus, if the case of *Donohue* v. *Otago Hospital Board*[33] were to be heard under the Accident Compensation Act, the result ought to be different. In that case the plaintiff was a hospital cook whose representatives alleged she had contracted septicaemia in the course of employment from a patient who had died of the disease. On the facts, it was not able to be shown that the infection was related to the employment, although it was accepted that the deceased did contract septicaemia through micro-organisms accidentally entering her body. Under the Accident Compensation Act, she would be prima facie entitled to coverage on proof of the latter point only.

However, the matter is not altogether as simple as that. Under Workers Compensation the courts have not always been prepared to accept that the invasion of the bacillus could constitute the accident. Sometimes they have insisted that there be some other event which is untoward, unexpected and unforeseen. One such case is *Storey* v. *Wellington Hospital Board*,[34] in which the Court of Appeal considered the earlier English authorities. Myers, C. J. said:[35]

> The difficulty is that in *Brintons* v. *Turvey* and *Grant* v. *Knoch* there would appear to be dicta by same of the learned Lords from which it may be inferred that the mere impinging of bacilli upon a person's body followed by infection is itself in some circumstance sufficient to constitute an accident, while there are dicta by others of their Lordships from which it would appear that, in their opinion, some further and additional circumstance is necessary. I have considered the later authorities . . . but they do not seem to me to clarify the point.

The learned Chief Justice then said that the authorities do not go so far as to show that if disease is incurred in employment, that is enough, and he assumed there must be some further and additional accidental circumstance for the purposes of the case. He discussed the stringent precautions taken at the hospital and said:

> It seems to me difficult to say that the contracting by a nurse of scarlet fever, despite the precautions and methods adopted, can be regarded as something reasonably to be

33. [1933] G.L.R. 438, Fraser, J.
34. [1932] N.Z.L.R. 1553.
35. Ibid., 1559.

> expected. On the contrary, it seems to me to be something unexpected.

MacGregor J. held that the principle to be applied came from *Brintons Case* and

> Even what is ordinarily regarded as a disease may be an accident if it results from an unexpected mishap, the time and occurrence of which can be approximately fixed.[36]

Kennedy J., the other majority judge, commenced by finding that the assault of the bacilli could be the accident but then turned to matters such as the number of nurses who contract scarlet fever, which brings his reasoning closer to that of the Chief Justice, which is objectionable today for a variety of policy, if not legal, reasons. Kennedy J's. reasoning deserves closer attention for it ably illustrates the confusion in the area. It is this confusion which the Commission would be better off without. His Honour[37] cites the passage quoted previously from Lord Birkenhead in *Grant's* case and then cites Lord Buckmaster —

> "It was an accident that the germs fell on the deceased. It was an accident that they came in contact with the abraised surface of his skin, and from these accidental circumstances resulted the illness which ended in death." But this does not in any way decide that it is sufficient merely to prove disease arising out of and in the course of employment. It is still necessary to prove injury by accident, although in the case of infection by bacilli the accidental circumstances will, in general, appear in the mere impingement of assault, as it is called, of the bacilli.

Then follow remarks on the need to show an accident and the comment that,[38]

> Thus disease incidental to the employment which arise by a gradual and natural process from the effects of a workman's occupation are not injuries by accident.

His Honour cites several English cases then quotes from Lord Clyde in the troublesome case of *Raeburn* v. *Lochgelly Iron and Coal Co.*[39]

> The crux consists in laying one's finger on the 'accident' — for, as the decisions in this department stand, the mere involuntary absorption into the human system of an infective germ is not *per se* an 'accident', even if it arises out of and in the course of employment.

This seems a direct conflict with the House of Lords in *Grant's* case. Indeed, Kennedy J. seemed reluctant to accept this statement at face value for he continues:

36. Ibid., 1565.
37. Ibid., 1570.
38. Ibid., 1571.
39. (1926) 20 B.W.C.C. 637.

> Nevertheless as Atkin L. J. pointed out in *Cole* v. *London and North Eastern Railway Co.*[40] . . . it is a little difficult to distinguish between an injury caused by the incursion of a germ and an injury caused by the incursion of an extraneous matter, such as a particle of grit. It may well be that the impingement or assault of the bacilli is itself an accident.

Here Kennedy J. is at the point he had reached before he considered *Raeburn's Case,* although it involved using a Court of Appeal decision to counter one by the Scottish Court of Sessions. He found further support from another of Atkin L. J's. decisions, *Hutchinson* v. *Kiverton Park Colliery Co. Ltd.*[41] where the learned Lord Justice had talked of:

> . . . the proposition, which I do not think would be controverted, that an invasion of the body by a bacillus is in itself, or may be in itself, an accident sufficient to entitle the workman to compensation if it arises out of and in the course of employment . . . As I have said, the invasion of the body by the bacillus is itself an accident.

Then his Honour commenced an approach similar to that adopted by Myers C. J. and said:

> Circumstances may, however, exist in which infection by bacilli is inevitable, and in the absence even of miscalculation as to immunity there is no accident.

Kendedy J. was able to limit comments made by Lord Wrenbury in *Grant's* case, where the learned Lord was prepared to hold that if exposure to the disease was inevitable in the employment then those who contracted it did not do so by accident, by emphasising that he was there referring to the *inevitable* nature of the infection.

Lord Wrenbury had based his dicta on *Broderick* v. *London County Council,*[42] a most unsatisfactory case which will be considered later. The effect of this reasoning was that Kennedy J. and the other majority judges felt obliged to make their finding that there had been an accident on the fact that the great majority of nurses do not contract the disease.

Broderick involved a workman who suffered from enteritis after inhaling sewer gas in the couse of his employment. Cozens-Hardy M. R. accepted that the disease was due to bacillus infection, but far from deciding the case on that ground he continued, citing *Steel* v. *Cammell Laird and Co.*,[43] a lead poisoning case, in which Matthew L. J. said,[44]

> The man was following a dangerous occupation because it might involve the risk of lead poisoning. But the evidence

40. (1928) 21 B.W.C.C. 87.
41. [1926] 1 K.B. 279, 291.
42. [1908] 2 K.B. 807.
43. [1905] 2 K.B. 232.
44. Ibid., 237.

> shows that in the majority of cases the workman would not be affected, though there is a minority in which the injury is sure to arise, and when the lot fell on a particular individual, it could not be said that the case was unexpected or fortuitous or unseen.

Returning to *Storey*, Kennedy J. apparently took a contrary view for his concluding remarks he said:[45]

> On the facts of the case, I think the mere inpingement of the bacilli, notwithstanding precautions to avoid or minimize infection when the nurse was not immune, was itself an accident. The dangerous nature of the employment does not affect the result, for, as Lord Buckmaster said in *Grant* v. *Kynoch* "If, for example, in the case *Brintons Lad.* v. *Turvey* it had been shown that several other workmen had all contracted anthrax, so that the disease could not be described as unusual or entirely unexpected, I cannot think that such circumstances would have destroyed the foundation upon which Lord Macnaughten's opinion was based. The accident would have been more common, but it would still have been an accident.

These cases show the confusion in this area of the law, and the difficulties faced by the Court of Appeal, which is not assisted by the refusal of some of the judges to admit any inconsistency. For further difficulties in this field, reference could be made to *Katsos* v. *General Motors N.Z. Ltd.*[46] where compensation was paid to a worker with back strain caused by a succession of strains which, either individually or collectively were treated as the 'accident'.

INJURY BY FORCE OF NATURE

The problem of definition of 'accident' arises in this field also. The only provision in the Act is s. 89, which is a *mutatis mutandis* adoption of s. 6C of the Workers' Compensation Act. It deems accidents caused by force of nature arising in the course of employment to have arisen out of the employment. When originally enacted, this section had some meaning but with the repeal of s. 56[47] it is difficult to see when it will be needed.

Once again the issue is raised as to whether the fact that the pneumonia, frostbite or whatever has occurred can be taken as evidence of both the accident and the injury, or whether some other "accident" must be proved.

Two New Zealand cases illustrate the complexity in this area. In *Bresand* v. *Northern Steamship Co. Ltd.*[48] it was accepted that the

45. [1932] N.Z.L.R. 1553, 1573.
46. [1958] N.Z.L.R. 1113.
47. By s. 18, Accident Compensation Amendment Act (No. 2) 1973.
48. [1928] N.Z.L.R. 461.

plaintiff suffered from muscular rheumatism as a result of two soakings he received while scraping down ships in dry dock. Fraser J. reviewed the authorities but declined to award compensation on the grounds that

> . . . the plaintiff was not exposed to any greater risk than any other person who was working in the rain, or than any other person who was working in a damp place. It was a risk that was shared by thousands of others, and a risk to which many people are frequently exposed. What happened to the plaintiff cannot by any stretch of the imagination be described in either the legal or the popular sense as an injury by accident arising out of (i.e. causally related to) his employment. It might have happened to anybody, without regard to the nature or particular locality of his employment, who had predisposition to rheumatism, and worked in wet clothes or in a wet place.

In so holding, Fraser J. was applying the reasoning of Fletcher-Moulton L. J. in *Warner* v. *Couchman*[49] as cited with approval in the House of Lords by Earl Loreburn L. C.:[50]

> It is true that when we deal with the effect of natural causes affecting a considerable area, we are entitled to and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather, to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter it does not arise 'out of the employment' because the man is not specially affected by the severity of the weather by reason of his employment.

With respect, these cases are clear examples of the practice referred to by Fullager J. in *The Commonwealth* v. *Hornsby*[51] of by-passing the issue of 'accident' by finding that in any case it did not arise from employment. Further, the *Warner* test is totally inappropriate when considering a scheme under which compensation is not restricted to employment situations.

Under the Accident Compensation scheme once an 'accident' is established there is no need to consider whether it was due to any greater risk caused by the employment of the victim. Yet the element of greater risk in employment has become bound up in the very definition of accident itself, and this is why it would be inappropriate to apply the Workers Compensation cases to the new scheme.

Public Trustee v. *Waitaki County*[52] is a case where Frazer J. commented on his decision in *Bresand* and distinguished it. He said of *Bresand:*

49. [1911] 1 K.B. 357.
50. [1912] A.C. 35, 37.
51. (1960) 103 C.L.R. 558.
52. [1932] N.Z.L.R. 1496.

> The Court held that, as the plaintiff had suffered no greater exposure than any other man who had to work in the open air, in wet weather on damp ground, it could not be said that he had contracted rheumatism as an accident.

The point to be emphasised here is that, at least under the new scheme, if there is an accident, the fact that more or less people are exposed to the risk of it cannot make it any the more or less an accident. In *Waitaki County* Frazer J. also considered *Whale* v. *New Zealand Refrigerating Co.*[53] in which he himself had held that a worker who miscalculates his resistance to a cold draught can suffer an injury by accident. The worker was employed in a hot area and later moved to a freezing chamber. Frazer J. was prepared to find an accident in the worker's miscalculation and held there need be no external happening since an accident can be caused by a miscalculation by the man concerning something in the man himself. This is indeed a welcome step for it reintroduces the necessity to consider the unexpected or untoward event subjectively from the worker's point of view, but it hardly seems consistent with some of the decisions considered earlier.[54]

The worker in *Waitaki County* was working in swamp cutting willow trees prior to his death from pneumonia. As Frazer J. said, as far as anyone was aware at the time of death he died from an ordinary disease. There was no notable incident which could be regarded as an accident in the lay sense. Then months later someone remembered that in some situations a death from disease can, in law, be a death by accident. Nevertheless, Frazer J. was able to find that:[55]

> It is not a case in which a man became ill through ordinary exposure to the elements. It was not intended by the deceased or his employers that he should get himself wet. He had to work in the river but was provided with gum boots in order to keep his legs dry. However, the existence of unexpected potholes, willow roots, and other obstructions frequently caused him to fall. It was by accident, not by design, that he got wet. The facts of the present case are not to be compared for a moment with such a set of circumstances as existed in *Bresand* v. *Northern Steamship Co. Ltd.* This is definitely a case of a man who was set to do work which necessitated his walking in the water with gum boots, and exposed him to the risk of falling in and getting wet. This he did on a number of days. The law is clear that the contraction of pneumonia, if it arises from such circumstances as these, is to be regarded as an accident. Once more, the pneumonia is not an accident, but its contraction may be, and we are satisfied that in this case it was an accident. The present case presents some features similar to those described

53. [1931] G.L.R. 542.
54. E.g. *Broderick's Case* n. 42.
55. [1932] N.Z.L.R. 1496, 1501.

> in *Barbeary* v. *Chugg*,[56] in which the contraction of sciatica by a pilot who accidentally got himself wet while jumping into a boat was held to be due to accident. The wetting, as in the present case, was a fortuitous and unpremediated happening, and it led directly to the contraction of disease.

It is difficult to see why, on this reasoning, the rain which wet the worker in *Bresand* could not be regarded as a fortuitous and unpremediated happening, leading directly to the contraction of the muscular rheumatism. It would seem that the worker in the *Waitaki County* was exposed to no more risk than anyone who chooses or has to work in wet or swampy conditions, as the worker in *Bresand* did on another occasion, when he worked on a different ship in the wet and in mud.

It is these kinds of spurious legal distinctions which led to the acceptance of the view that the adversary system is not suitable for a social welfare scheme. The courts have been largely eliminated from the scheme but, where they do still have a part, there should be positive steps taken to prevent regression to the legal gymnastics involved in cases such as those discussed above. This requires specific statutory provision, not the optimistic adoption of terms from legislation the shortcomings of which the new Act professes to remove.

INJURIES RESULTING FROM CRIMINAL ASSAULT

In *Trim Joint District School Board* v. *Kelly*[57] a schoolmaster was set upon and killed by his pupils. It was held by a majority of the House that the death was caused by accident, and that it arose out of employment. Although the incident was not an accident in the sense that the boys planned to kill him, it was an accident so far as the victim was concerned, for it was obviously unexpected by the victim. The emphasis on the subjective nature of the test should perhaps have received greater recognition in other cases involving the definition of "injury by accident", particularly in the *Broderick* situation.

In New Zealand, in *Smith* v. *New Zealand Express Co.*[58] Stringer J. held, following *Kelly* that a murder was an accident, although on the facts it did not arise out of and in the course of employment. A claim in *Bank* v. *Port Hills*[59] was allowed where a worker died in an effort to avoid assault by a fellow workman, when both were disputing the use of a hammer. With the employment required removed, it would seem that the victim of any assault could claim coverage. Interesting issues could be raised as to what extent the accident was untoward or unexpected, if the claimant had issued a challenge or provoked the fight.

---

56. (1915 8 B.W.C.C. 37.
57. [1914] A.C. 667.
58. (1914) 16 G.L.R. 602.
59. [1934] N.Z.L.R. s. 78.

The Criminal Injuries Compensation Act 1963 established a Crimes Compensation Tribunal which is empowered to award compensation to victims of criminal acts. The scheme has been little used. In 1970 there were 40 claims, of which 33 were paid out, the total amount of awards being $14,552.[60] Section 17 (7) of the Act specifically preserves the right of a claimant to recover other compensation under any other Act. This should be read in conjunction with s. 17 (8) which allows the Tribunal to defer an application until the applicant has exhausted his civil remedies against the offender. The award of compensation under the Accident Compensation Act may or may not be a civil remedy, but it certainly is not "against the offender". The Criminal Injuries Compensation Act does not intend to allow double compensation, for the Tribunal is directed, under s. 19 (7), to deduct from any amount awarded any payments awarded under various other schemes, including both the Social Security Act 1938 and the Workers Compensation Act 1956. However, the Accident Compensation Act is not included in this category, nor is the Criminal Injuries Compensation Act listed in the Third Schedule to the Accident Compensation Act as being consequentially amended. It would seem that in this sphere it is possible to claim compensation under both Acts, since neither takes cognisance of the other.

CONCLUSION:

The cases show the confusion which exists in this area; a confusion of which at present it would seem the Commission is to be the legatee. This confusion ought to be removed, and the Commission given positive guidelines upon which to base its decisions. The Commission is given wide powers to act without Court supervision[61] though not perhaps without Government supervision.[62]

This is not necessarily a bad thing. One of the basic concepts of the scheme is that it is to be an administrative rather than adversary system. However, the Commission's decisions can be appealed against to the Administrative Division of the Supreme Court.[63] This raises an interesting point as to the relationship between s. 5 (4) and s. 168, for while the Commission, not the Court, is to decide the scope of the Act, if a party is dissatisfied with the decision it may be possible to appeal under s. 168. But, what would the effect be of the words in s. 5 (4) " . . . and the Commission shall have exclusive jurisdiction to determine the question"?

More important, for present purposes, is the fact that the Commission will not be able to ignore Workers' Compensation case law since on appeal to the Supreme Court, the court would be obliged, by the rules of construction discussed earlier, to take heed of the

60. 1972 N.Z. Yearbook, p. 253-4.
61. Section 5(4).
62. Section 20.
63. Section 168.

earlier decisions. In light of the new statutory scheme, the courts may be able to decide they are not necessarily bound by the previous decisions. However, the Act clearly assumes that "injury by accident" is sufficiently defined, although the only source of definition is the case law under Workers Compensation legislation.

The removal of the "arising out of and in the course of employment" requirement greatly extends the range of coverage and number of persons covered. This is obviously desirable and to some extent intended since the scheme aims to be more comprehensive than the Workers Compensation Act. However, it impinges upon the Social Security system to an extent perhaps not fully appreciated, insofar as disease is concerned. Government policy, and indeed the statements in the Woodhouse Report[64] and Gair Report[65] show there is no intention to cover disease and sickness at this stage, other than occupational diseases. Both reports are to the effect that while it would be desirable to merge the Accident Compensation Act and Social Security system in the future, this should not be attempted yet. It is submitted that this has been done unwittingly by the adoption, without new statutory definition, of the term "injury by accident."

In the circumstances, the Commission should be given a statutory definition and allowed to interpret it free of the restraints of precedent, but subject to overall Court and Government supervision.

This would be preferable to the Commission having to make its decisions in the light of the vast pre-existing case law involving conflicting and difficult decisions of the House of Lords and Courts of Appeal and Arbitration, most of which were given shortly after the turn of the century and subjected to considerable and confusing interpretation and misinterpretation since then.

PROPOSALS FOR REFORM

A Medico-Legal Committee, set up under the auspices of the Accident Compensation Commission has considered the problem of definition of "personal injury by accident" and was responsible for clause 3 (2) of the Accident Compensation Amendment (No. 2) Bill 1973. This clause did not become law along with the remainder of the Bill but was referred to the Statutes Revision Committee where it is understood that the Commission is to be invited to make further submissions.

The clause at present reads:

> "(2) Subsection (1) of section 2 of the principal Act is hereby further amended by repealing the definition of the expression "personal injury by accident", and substituting the following definition:

64. Paras. 17, 290.
65. Para. 18.

" 'Personal injury by accident' —

"(a) Means (except as otherwise provided in this definition) damage to the human system which is not designed by the person who suffers it, and which —

"(i) Is caused or contributed to by a mishap, or an untoward event, external to the body; or

"(ii) Results from an occupational disease to the extent that cover extends in respect of the disease under sections 65 to 68 of this Act:

"(b) Includes —

"(i) All bodily and mental consequences of any such damage; and

"(ii) The consequences of medical, surgical, or first-aid treatment, care or attention in respect of any such damage, whether or not the treatment, care, attention was proper in the circumstances:

"(c) Does not include —

"(i) Normal physiological changes; or

"(ii) Except as provided in *paragraph (b)* of this definition, abnormal personal reactions to food, drugs, or other material introduced into the body; or

"(iii) Damage to the human system which is the result of disease, except as provided in *sub-paragraph (ii) of paragraph (a) or in paragraph (b) or paragraph (d)* of this definition;

"And for the purposes of this definition —

"(d) Damage to the human system to the extent that is caused by exposure to conditions of temperature . . . or of moisture, fumes, or other physical factors, shall be deemed to have been caused or contributed to by or mishap or an untoward event only if that damage is caused by special exposure on a particular occasion to abnormal conditions of temperature or of moisture, fumes, or other physical factors:

"(e) The human system includes the body and mind;

And 'personal injury' and 'accident' have corresponding meanings."

SUBJECTIVITY

The clause adequately deals with this point by the use of the words "not designed by" which is commendable since the courts under the old legislation had a rather hazy picture of what was an accident in this regard. There was a virtual sub-category headed by the deplorable decision in *Broderick*[66] which infected to a degree

66. [1908] 2 K.B. 807.

decisions such as *Storey*[67] and ruled that an employee was expected to run the risks of his employment; if it was inevitable that some employees would be injured, those who were injured could not say they had been injured by accident. Injuries and deaths from assaults by other persons also remain compensatable under the scheme for the reasons discussed earlier.

The proposed definition should be read in conjunction with s. 137 which specifically provides that no compensation is payable where any person wilfully injures himself or commits suicide unless the state of mind resulting in the suicide was the result of a compensatable accident. However, compensation may nevertheless be paid by the Commission in its discretion if a dependant of the injured or deceased person is in special need of assistance.

It is suggested that s. 137 (1) (a) should be rephrased as to exclude only wilfully inflicted personal injury, where this was done with the purpose or intention of gaining compensation. Judging from the publicity put out by the Commission it intends to apply the Act as liberally as possible and it has stated repeatedly that those who are injured in sporting events or while sailing or mountain climbing will be eligible for compensation even where they have recklessly or foolishly refused to heed the advice of others.

It should be noted that mere miscalculation on his part did not bar an employee under Workers' Compensation and will not do so for the claimant under the Accident Compensation scheme, but this situation will likely be limited considerably by clause 3 (2) (d). Clause 3 (2) (d) is a difficult clause to interpret because of the words "special exposure" and "particular occasion". The *particular* occasion may not present too many problems, but if 5% (say 1,000) of the crowd at Athletic Park need time off work to recover from influenza or pneumonia would they be entitled to compensation? Clearly there is something more involved than normal physiological change but is there *special* exposure under clause 3 (2) (d) to enable them to claim compensation? Would a player in the middle of the field be in any stronger position to claim? In other words what meaning is to be given to *special* exposure over and above particular occasion? Can there be special exposure to normal weather conditions due to failing to allow for the conditions and so being drenched with rain?

NATURAL PROGRESSION OF DISEASE

The proposed definition may be narrower than the Workers' Compensation law in that the *Clover Clayton*[69] situation may be excluded by clause 2 (2) (l). On the other hand, what Lord Loreburn actually held was that there need not be any *strain* out of the ordinary so it may be arguable that that type of situation is still covered. However, since what happened could have happened at any time

67. [1932] N.B.L.R. 1583.
68. Discussed at text to n. 21.
69. See earlier discussion at text above n. 27, et. seq.

and was bound to happen sometime, it might be considered to be disqualified from compensation by clause 3 (2) (c) (l).

It is legitimate to ask whether there was any real benefit obtained for workers in the *Clover Clayton* situation and just how many persons who had heart attacks at work actually received compensation, but in order to protect whatever existing rights there may be, and as a matter of desirable policy, it is suggested that a condition in favour of the injured party along the following lines should be introduced.

> For the purposes of this Act an injury shall not be regarded as the natural progression of a disease unless the appropriate authority, after hearing such evidence, medical or otherwise, as may be adduced, is of the opinion that the acts, events or causes alleged to constitute the injury by accident did not contribute to that accident.

This may be tantamount to a presumption in favour of the applicant, but anything less than this would place an earner in the *Clover Clayton* situation in a worse position than if he were under Workers Compensation.

In conjunction with this, a definition of "injury" similar to that in the Commonwealth Employees Compensation Act (Aust.) 1964 s. 4 may be desirable:

> "Injury" shall include any physical or mental injury and includes the aggravation, acceleration or recurrence of a pre-existing injury but does not include any stage in the natural progression of any disease.

DISEASE CONTRACTED BY ACCIDENT

There is an urgent need for some reform in this area. In the past the courts have held that the invasion by bacilli constitutes an accident but have been able to resist many claims by finding that the applicant has not proved that it arose out of and in the course of employment. However, in the comprehensive scheme, proof of personal injury by accident is sufficient.

The clause leaves this in a curious position. Disease generally is excluded by clause 3 (2) (iii). However, that clause refers to damage which is the result of disease, and it is left open by clause 3 (2) (d) to argue that where the disease is traumatic, the damage to the human system is caused not by the disease but by the mishap or untoward event whereby the bacilli attacked the body.[70] This makes the interpretation of the terms "particular occasion" and "special exposure" in clause 3 (2) (d) even more crucial.

CRIMINAL INJURIES

The only reform needed here is the removal of the words "Workers' Compensation Act 1956" from s. 19 (7) (c) of the Criminal Injuries Compensation Act 1963 and the insertion of the words "Accident Compensation Act 1972".

D. J. COCHRANE*

* LL.B.(Hons.).