THE CONCEPT OF "INJURY" IN COMMONWEALTH EMPLOYEES' COMPENSATION LEGISLATION

"Modern law seems unable to adopt tests of liability that consist in simple external occurrences, plain and objective; the law persistently turns to criteria involving causation."[1]

It will be submitted here, that however inelegant the drafting of Commonwealth Workers Compensation legislation, the amendment to the act[2] which substituted the disjunctive "or" for the conjunctive "and" ('arising out of *or* in the course of') had the effect of removing all causal connexion with the employment. Henceforth any worker who suffered an injury by accident during working hours and at a place where he was pursuant to his employment became entitled to compensation. In other words the act now required only a temporal and spatial concept.

The inability of "modern law" to adopt an objective test of liability divorced from causation springs partly from an inability or unwillingness to cut the Gordian knot which ties a responsibility positivi juris arising out of the relationship of Master and Servant to concepts ex delicto, and partly from the unnatural love of the determinists for the scholastic theories of causation, which conditions them into resolving, automatically, any given event into its preceding causes. The very idea that "in the course of" could actually mean "in the course of" was heresy. Although the great battle in 1960 of *Kavanagh v. The Commonwealth*[3] saw the defeat of this school, the victory was narrow [3 : 2] and the result confusing. "Modern law" won but it did not triumph.

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The inherent difficulty of defining "injury" becomes at once apparent when we realize that no single draftsman has yet succeeded in defining it without including the term to be defined. Indeed the draftsman of the Commonwealth Act ventures no further than declaring "injury" to mean "any physical or mental injury and includes the aggravation, acceleration or recurrence of a pre-existing injury". (s. 4). Neither "accident" nor the composite "injury by accident" is separately defined.

It had for long been assumed that the inclusion of "accident" constituted a qualification on the meaning of "injury" in that it

1. Per Dixon J. *Hetherington v. Amalgamated Collieries of W.A.* 62 C.L.R. 317 at 332, a case dealing with Workers Compensation.
2. No. 61, 1948, s. 4.
3. 103 C.L.R. 547.

required the presence of something accidental, fortuitous or unexpected. Thus in *Hensey v. White*[4] for example, the deceased whilst attempting to turn a wheel which had become stuck, suffered a fatal rupture of the small blood vessels due to excessive straining. His widow's claim was dismissed on the ground that, as the deceased had deliberately turned the wheel, there was no fortuitous event; hence no injury by "accident".

In *Fenton v. Thorley*[5] however, it was held that "accident" wherever occurring in the Act was used in its ordinary and popular sense, meaning no more than an unlooked for mishap or untoward event which was not expected or designed.

"A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that that is right. I do think that if such were held to be the true construction of the Act, the result would not be for the good of the men, nor for the good of the employers either, in the long run. Certainly it would not conduce to honesty or thoroughness in work, it would lead men to shirk and hang back, and try to shift a burden which might possibly prove too heavy for them on to the shoulders of their comrades."[6]

Subsequently, in *Clover Clayton & Co. Ltd. v. Hughes*[7] the majority of the House of Lords held that a workman, who was previously suffering from an aneurism in so advanced a state that it was liable to burst at any time, nevertheless suffered injury by accident when his aneurism burst due to the ordinary strain of tightening a nut with a spanner. Yet, as late as 1940 it was still possible to submit that a seaman while serving on his employer's ship which called at West African ports where he was exposed to infection from yellow fever from which he died, did not suffer "injury by accident" since the risk was one of the area and not the employment.[8] This argument however was firmly rejected, it being held that though the risk may be common to the entire local population, it does not disentitle a worker to compensation if in the particular case it arises out of the employment. This has also been succinctly expressed by Dixon C.J.

"Had it not been for the employment the injury by accident would not or might not have been sustained, or negatively by saying

4. [1900] 1 Q.B. 481.
5. [1903] A.C. 443.
6. Per Lord Macnaughten at p. 447.
7. [1910] A.C. 242
8. *Dover Navigation Co. Ltd. v. Isabella Craig* [1940] A.C. 190.

that the injury by accident must not be one which occurred independently of the employment and its incidents."[9]

It was only after the semantic facade had been stripped away from "accident", removing from it the "abnormal", the "unexpected", and the "unlooked for" that the deep inner significance of the word "in" was revealed.

One might perhaps have been forgiven for thinking that if a worker sustained personal injury by accident whilst at his place of employment and during working hours on an ordinary working day it was sustained in the course of his employment. Indeed in *Dover Navigation Co. Ltd. v. Isabella Craig* Lord Wright[10] said: "Nothing could be simpler than the words 'arising out of and in the course of the employment'. It is clear that there are two conditions to be fulfilled. What arises 'in the course' of employment is to be distinguished from what arises 'out of the employment'. The former words relate to time conditioned by reference to the man's service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment, that is directly or indirectly engaged on what he is employed to do, gives a claim to compensation unless it also arises out of the employment. Hence the section imports a distinction which it does not define".

When the cumulative test was thus converted into the alternative so that only one condition became a necessary element in the worker's right to compensation, nothing, one would have felt, stood in the way of attributing liability to the employer for all injuries by accident which occurred during and at the man's employment. However, in *Ockenden's case*[11] the above passage received the following gloss. "But it cannot be thought that his Lordship intended to suggest in the earlier part of this passage that all accidental injuries sustained by a worker at his place of employment must, by virtue of that fact alone, be taken to be sustained 'in the course of his employment'. Still less did he mean that a sudden physiological change produced by the inevitable course of a progressive disease and in no way related to any incident of the employment, could be so regarded".

It is not proposed to examine in detail the historical development of "injury by accident" and "arising out of and in" under the English acts mainly because in the writer's view these cases have little, if any, bearing in the Australian scene in view of the radical amendments which the States and the Commonwealth have seen fit

9. *Kavanagh v. The Commonwealth* 103 C.L.R. 557.
10. [1940] A.C. 190 at 199.
11. *The Commonwealth v. Ockenden* 99 C.L.R. 215; at pp. 221-2.

to pass.[12] It is the writer's contention that *all* English decisions were decided on the unquestionable assumption that the Act predicated a causal connexion between the injury and the employment. No other sort of injury was ever discussed for the simple reason that it was wholly and entirely irrelevant. "In our view" said Scott L.J. in *Wilson v. Chatterton*[13] "it is dangerous and misleading to break that substantive provision up into bits, then to attempt to ascertain the meaning of each bit, and finally to add—or fail to add—the bits together in order to get the meaning of the whole". It is doubly dangerous to engage in this judicial jig-saw when the bits are taken from a different puzzle and applied to a new framework where they do not fit. Having said this, it is proposed to launch into an examination of the Australian Cases.

The first time the High Court had to consider the effect of the alternative condition was in *Pearson v. Fremantle Harbour Trust*,[14] a case arising under the West Australian Workers' Compensation Act which for present purposes was identical with the Commonwealth Act. The facts, taken from the headnote, are as follows:—

"Following a practice or custom known to his employer, a worker left the job upon which he was working to go from one part of his employer's premises to another during his employer's time, in order to procure hot water for tea for the midday meal for himself and his fellow-workers; he was doing this for the purpose of more conveniently supplying them with the hot water which the employer habitually provided, generally as a matter of statutory obligation, sometimes without that compulsion but in like case. Whilst on the way to the employer's boiler containing the hot water, he was injured by a motor-car on a road on the employer's premises".

The Supreme Court of Western Australia, on appeal, dismissed the worker's claim on the basis that the obtaining of hot water was not incidental to an obligation to his master pursuant to his contract of employment and did not arise "in" the course of it. The High Court, after an extensive review of English cases, came to a different conclusion, stating that the authorities show that the words 'arising' in the course of the employment describe a condition which is satisfied if the accident happens while the workman is doing something in the exercise of his functions although it is no more than an adjunct to or an incident of his service.

In passing, it is interesting to note that neither counsel (as reported) nor the court adverted to the possibility that the amendments to the West Australian Act may have removed the element of causation from the requirements of the Act.

12. This has been done with great scholarship by H. A. J. Ford "Injury by Accident" 1949 Res Judicatae 160.
13. [1946] K.B. 360 at p. 367.
14. 42 C.L.R. 320.

This case was followed by *Wittingham v. The Commissioner for Railways (W.A.)*.[15] Here the worker was strolling in his luncheon break through a recreation ground owned by the employer. He was hit by a cricket ball and lost an eye. He was held not entitled to succeed. Per Rich and Starke JJ. since the luncheon hour constituted a break in the employment. Per Dixon J. because the injury occurred at a place where the employee was not "doing something which is part of or incidental to his service".[16] "But all that can be said of his presence in the yard at the place where he was struck is that, if he had not been an employee, he would probably have been elsewhere. . . . In fact his presence there contributed nothing towards and was in no way involved in the performance of his duties."[17] Evatt J. (dissenting) adverted for the first time to the possibility that English cases may not provide the entire answer. "Now the obvious purpose of the Western Australian Act is to extend the class of occasions in which compensation is to be available to an injured worker. The disjunctive form of expression used in sec. 6(1) necessarily postulates that there are cases in which the injury is sustained "out of" the employment although not "in the course of" it. It follows that English cases, where the definitions of the words "out of" and "in the course of" have been attempted in the light reflected from the existence of the double condition must be used with nice discrimination."[18]

In the result his Honour concluded that the extension of liability under the Western Australian Act embraced risks incurred during luncheon breaks of the instant kind, hence the injury arose "out" of the employment. McTiernan J. (dissenting) held that the employment was not broken during the recess, that the worker when walking in the yard was doing something "adjunctive or incidental to his employment".[19] Hence the injury arose "in" the course of his employment.

It is the judgment of Dixon J. which is of the greatest interest since he felt that there was insufficient connection between the work of an iron machinist being hit by a cricket ball whilst walking in a yard during a luncheon break, to render it incidental to his services.

His Honour relied on a single decision of the House of Lords—*Charles R. Davidson & Co. v. M'Robb or Officer*.[20] [In this case, a ship's officer, whilst returning from shore leave, fell from the quay into the water and was drowned just before attempting to board his ship. The majority held that his widow was not entitled to succeed.]

"It has been said that in *Charles R. Davidson v. M'Robb* a decision was given upon the words 'in the course of the employment'

15. 46 C.L.R. 22.
16. 46 C.L.R. 29.
17. 46 C.L.R. 31.
18. 46 C.L.R. 33.
19. 46 C.L.R. 40.
20. [1918] A.C. 304.

which is final and that it only remains to apply it in other cases. Its application, however, has not proved simple. There can no longer be any doubt that the accident must happen while the employee is doing something which is part of or is incidental to his service. It is another matter to be sure what is included within this conception."[21]

Whilst it is true that Lord Dunedin said "In my view 'in the course of employment' is a different thing from 'during the period of employment'. It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master".[22] Similarly Lord Atkinson stated "The words 'arising out of' suggest the idea of cause and effect. The words 'in the course of his employment' mean I think, while the workman is doing something he is employed to do".[23] Yet it is submitted again, this case can have no relevance to an examination of our local statutes. This is borne out by Viscount Haldane who stated that "in order to come within the statute, an accident must not only occur 'in the course of', that is to say during actual employment, but in addition must arise 'out of' it. In other words, there is required to be shown something in the nature of a causal relation between accident and an order expressed or implied, given by the employer.[24] . . . It is not necessary . . . to consider whether the accident in the present case can properly be said to have arisen in the course of the employment as required by the second branch of the condition which the statute imposes. (Since it was held not to have arisen out of it). . . . At some time this question will need consideration when it arises in a definite form."

It may therefore be doubted whether this case gave a definitive and final decision on the meaning of the words 'in the course of the employment'. This is further emphasized by the statement of Lord Dunedin (which is never cited in Australian Cases) to the effect that "the addition of the words 'and in the course of' are meant in some way either to qualify or further explain the words 'out of'. My own view is that they do the latter. It is in one sense difficult to imagine that there could be any injury held as arising out of the employment which would not also be in the course of the employment. But it may well be that the determination of the question whether at the moment of the injury the workman was in the course of his employment may go to solve the question of whether the injury arose out of the employment."[25]

His Lordship arrived at the above conclusion after analysing a hypothetical example which he posed as follows:

21. 46 C.L.R. 29.
22. [1918] A.C. 321.
23. [1918] A.C. 327.
24. [1918] A.C. 317.
25. [1918] A.C. 321.

"Let me instance the case of the domestic servant who is run over in the street. Given but the two facts that the man is, e.g., a butler, and that he is run over in the street, you would not be able to decide whether the injury arose out of the employment or not. The facts are consistent with either supposition. But given the further fact that either (1) he has been sent by the master on a message, or (2) that he is enjoying an evening out, then you can determine whether he is in the course of his employment or not, and from that, if being run over is one of the inherent dangers of the street, you will be able to determine whether the injury arose out of the employment or not".

It will be seen that Lord Dunedin was prepared (obiter) to accept that a servant, sent out into a street in the course of his employment and there injured, was injured in the course of his employment, because he was temporally and spatially at a place pursuant to his employment. He had thus passed the first hurdle of, what could be described for want of a better expression, the inchoate right to compensation, which became complete on proof that "being run over is one of the inherent dangers of the street".

It was this second hurdle, and only this second hurdle, which qualified this injury as arising 'out' of the employment. In so far as this case is authority for the meaning of 'in the course of', it would seem to show that it is enough for the injury to occur in the employment referrable to time and place. The question, whether the employee was injured 'in' his employment is satisfied if the answer is in the affirmative to the two questions (a) Was he injured in working hours? (b) Was he injured at a place where he was pursuant to his employment? Put in terms of the hypothetical example posed by Lord Dunedin.

(1) The servant was run over in the street.

(2) The servant was in the street pursuant to his employment.

(3) He was therefore injured 'in' the course of his employment.

To be entitled to compensation (under the English Act) he must prove in addition

(4) The risk of being run over was one of the inherent dangers of the street.

(5) Hence the injury arose 'out' of his employment.

Having satisfied (3) and (5) the worker becomes entitled to compensation.

Thus 'in' the course of is satisfied by any conjunction of circumstances which occur while the worker is discharging his duties. Thus the question can be put in this form:

Was the "injury associated with, though not necessarily caused by, some external incident and (was) the incident, in turn, associated

with the duties which the employee was required to perform or with an activity thought to be incidental to his employment"?[26]

It is submitted that however true this may be of the English requirement which commenced, as indeed it had to, with a search for a causal bridge to link the injury with the Act, it introduces an unessential causal element into the Australian Act which has eliminated such requirement by amendment. It follows that the writer, with the greatest respect, is unable to accept the reasoning of Dixon J. in *Wittingham's Case* and a number of subsequent observations of the High Court which in reliance on *Charles R. Davidson v. M'Robb or Officer* looked for some natural incident connected with the class of work in which the injured workman was engaged.[27]

[In parenthesis, it may be added that the majority of the High Court in a recent decision[28] took a more liberal view of what was and was not within the scope of employment and held—on indistinguishable facts—that injury by a cricket ball during a luncheon break was sufficiently 'incidental' or 'ancillary' to the employment to come within the Act.]

Next came the case of *Hetherington v. Amalgamated Collieries of W.A. Ltd.*[29] Here the facts, taken from the headnote, were as follows:—

"The body of a worker who followed the occupation of a miner was found dead during his working hours in a roadway between the coal-face where he had been working and the surface of his employer's mine. The worker was in the act of returning to the surface, and immediately prior to his death had ascended a series of steps sixty yards in length and walked along an incline thereafter for about one-quarter of a mile to the place where his body was found. Post-mortem examination disclosed that his coronary artery was in an advanced state of arterio-sclerosis and that an occlusion or obliteration of that artery caused his death. On a claim by the worker's widow for compensation under the Workers Compensation Act 1912-1934 (W.A.) the magistrate found on the medical evidence that the worker was likely to die at any time as a consequence of the disease but that the exertion which he had undertaken and the condition in which he had been immediately prior to his death had contributed to or accelerated his death."

The Western Australian Act, it will be recalled, had already been amended to the alternative form. The local court found that,

26. Per Taylor J. *Kavanagh v. The Commonwealth* 103 C.L.R. 567.
27. See e.g. *South Maitland Railways Pty. Ltd. v. James* 67 C.L.R. 496, *Humphrey Earl Ltd. v. Speechley* 84 C.L.R. 126.
28. *The Commonwealth v. Oliver* 107 C.L.R. 353.
29. 62 C.L.R. 317.

though there was no unusual or specific strain on the day the deceased met his death, nevertheless the ordinary incidents of his employment did in fact contribute to the worker's death. This finding was attacked on appeal to the Supreme Court of Western Australia, and, it was argued (successfully) that even accepting such finding it did not disclose 'injury by accident'. On appeal to the High Court, the original determination of the magistrate was restored, the High Court concluding, after an extensive review of the English authorities, that a physiological injury of the instant kind and on the instant facts constituted "injury by accident" and, as it was conceded that the injury arose 'in the course of' the employment, the Applicant succeeded on this finding. It is submitted that this case raised little, if any, novel ground save and except perhaps that a coronary occlusion was held to constitute an 'injury by accident'. However, in view of the finding of the primary tribunal that the exertion of the deceased in his employment had precipitated his death, it is, in the writer's opinion impossible to say that the High Court's finding was made independently of that determination; though it should be noted that the Privy Council, in a case to be discussed next[30] when referring to *Hetherington's* Case stated:

"But the judges of the High Court made an elaborate examination of the authorities, and it was pointed out for the appellant that if they had thought that an external event was unnecessary and that a sudden physiological change by itself could be an injury by accident it would have been much easier to decide the case on this ground. That may be true, but their Lordships cannot infer from it that any of the judges had formed a definite opinion that a sudden physiological change by itself could not be injury by accident."[31]

It is submitted with respect, that, however true the above may be of the other judges, it is clearly wrong if applied to the judgment of Dixon J. Nor does this finding attain any added stature when it is remembered that the Western Australian Act contains no independent definition of the term "injury", so that *Hetherington's Case* may have little bearing on the interpretation of an act, which not only purports to define "injury" but, by separate and express definition of the term "disease" has impliedly excluded disease from the ambit of the term "injury by accident", or, as in New South Wales, where disease is included in the definition "injury" with the qualification that the disease must be contracted by the worker in the course of his employment and to which the employment must be a contributing factor.[32]

30. *James Patrick & Co. Pty. Ltd. v. Sharpe* [1955] A.C. 1.
31. [1955] A.C. 18-19.
32. See *Slazengers (Aust.) Pty. Ltd. v. Burnett* [1951] A.C. 13; *Darling Island Stevedoring and Lighterage Co. Ltd. v. Hussey* 102 C.L.R. 482.

This then brings me to *James Patrick & Co. Pty. Ltd. v. Sharpe*[33] a decision of the Privy Council on the Victorian Act which provided inter alia that

> "An injury shall be deemed to arise out of or in the course of the employment if the injury occurs—while the worker
> (i) is present at his place of employment; or
> (ii) is travelling between his place of residence and place of employment.
>
> 'Injury' means any physical or mental injury or disease and includes the aggravation acceleration or recurrence of any pre-existing injury or disease as aforesaid."

The Judicial Committee held that death due to auricular fibrillation (a condition in which the auricles of the heart cease to contract rhythmically resulting in irregular and inco-ordinate heart beats both in force and frequency. The cause is obscure.) on a protected journey, although in no other way referrable to the employment was nevertheless 'injury by accident'.

It is customary to dismiss this decision as having no relevance to the Commonwealth Act since "in that case the Judicial Committee was concerned with legislation which contained an unusual definition of 'injury' ".[34]

This view overlooks one important aspect of the Privy Council's decision. Thus it is of considerable significance that their Lordships refused to accept the alternative submission of counsel for the Employer to the effect that, though the Act may have semantically changed the cumulative 'out of and in' to the purely temporal relationship between injury and employment, nevertheless the retention of the term 'injury by accident' indicated that it was intended to retain the common law meaning of that term.

"It is not easy to determine from the authorities whether any precise meaning had become attached to the words 'injury by accident' taken by themselves because it was never necessary to consider those words in isolation from the whole phrase 'injury by accident arising out of and in the course of the employment'. In a number of passages cited by counsel for the appellant the words 'injury' or 'accident' or 'injury by accident' may appear to be interpreted in the sense for which the appellant contends, but in at least most of those passages it appears to their Lordships that there was no intention to consider these words in isolation and that what was really being considered was the meaning of the whole phrase."[35]

33. [1955] A.C. 1.
34. *Commonwealth v. Ockenden* 99 C.L.R. 221. See also per Fullagar J. 103 C.L.R. 588 at 596.
35. [1955] A.C. 15-16.

Their Lordships attitude on this question was further underlined when, in referring to *Hetherington's Case*[36] they stated, as previously noted, that they could not infer that the High Court "had formed a definite opinion that a sudden physiological change by itself could not be an injury by accident".[37]

Thus, it is submitted that, whilst Sharpe's Case is restricted, in terms of precedent, to the interpretation of the special provisions of the Victorian Act, it is nevertheless highly persuasive for the proposition that a physiological injury internal to the worker and due solely to autogenous causes may nevertheless be "injury by accident" in all cases where such injury need no longer arise out of *and* in the course of the employment.

And so, at long last, we come to the leading case of *Ockenden v. The Commonwealth*.[38] Here, a worker who had been engaged in the Australian Navy as a naval airman, was, during a routine medical examination, found to be suffering from heart disease, viz. a mitral murmur due to aortic regurgitation and thickening of the heart muscle and enlargement of the left ventricle. It was held that the worker's condition "was the result at the time, of cardiac damage initially sustained in the course of an attack of rheumatic fever during . . . childhood or early adolescence".[39]

The Court, after referring to *Sharpe's Case*[40] said:

"But the decision does not justify acceptance of the same view in cases where it must be established that the so-called injury by accident arose in the course of the worker's employment. In such cases the traditional view must still prevail that a physiological change, sudden or otherwise, is not an injury by accident arising in the course of the employment unless it is associated with some incident of the employment. Indeed to hold otherwise would be to strip the word "accident" of all meaning by treating as such any distinct physiological change which is nothing more than the sole and inevitable result of the ravages of a disease. Such changes, even if they can be called accidents, occur not in the course of the employment, but, it may, perhaps be said, *in the course of the disease*. Accordingly, for the purposes of the Commonwealth Employees' Compensation Act it is still true that a worker does not suffer personal injury by accident arising in the course of his employment where he suffers, at his place of employment, a sudden and distinct physiological change as the product of the inevitable development of a progressive disease from which he is suffering and where such change can in no way be attributable to or associated with some incident of his employment."[41]

36. 62 C.L.R. 317.
37. [1955] A.C. 19.
38. 99 C.L.R. 215.
39. 99 C.L.R. 220.
40. [1955] A.C. 1.
41. 99 C.L.R. 223-4.

In giving judgment for the employer, the High Court held, or appeared to have held, not only that a sudden physiological change occurring during—but not associated with some incident of—the employment was not an 'injury by accident', but in addition denied that "all accidental injuries sustained by a worker at his place of employment must, by virtue of that fact alone, be taken to be sustained in the course of his employment".[42]

For the reasons advanced before, the writer contends that both these propositions are unsound.

Dealing with the first proposition; it is submitted, with respect, that the statement is far wider than necessary on the facts of that case. The claim was doomed ab initio since the applicant was unable to point to any physiological change occurring on a particular day in the course of his employment which was capable of being marked out as a separate definable step in the progress of his disease, so as to qualify as 'injury' within the meaning of the Act, which includes the aggravation, acceleration or recurrence of a pre-existing injury. In other words, on the evidence, nothing dramatic occurred in the employment. Furthermore, the worker's claim that his rheumatic heart condition "developed" during his term of service was not supported by the evidence.

If the High Court intended to suggest that in all claims one must look for some 'incident' of the employment which is causally related to the injury ["indeed to hold otherwise would be to strip the word 'accident' of all meaning"] it is submitted that this is, with respect, an attempt to resuscitate the old and discredited concept raised in *Hensey v. White*[43] which required the presence of something accidental, fortuitous or unexpected. This view is neither consistent with *Clover Clayton & Co. Ltd. v. Hughes*[44] nor with a number of decisions of the House of Lords which have held that a definite physiological change for the worse can constitute 'injury by accident'. These include *Falmouth Docks and Engineering Co. v. Treloar*[45] —sudden death from heart disease; *Partridge Jones and John Paton Ltd. v. James*[46]—death from heart failure; *Walker v. Bairds and Dalmellington*[47]—death from a sudden chill; *Walkinshaw v. Lochgelly Iron and Coal Co. Ltd.*[48]—death from sudden cardiac insufficiency; *Fife Coal Co. Ltd. v. Young*[49]—muscular paralysis. Per Lord Atkin "What happened to him on 27th April transformed him from a man who was not suffering from a 'dropped' foot to a man who was."[50] (adopting Lord Fleming's words). Per Viscount Caldecote L.C. After

42. 99 C.L.R. 222.
43. [1900] 1 Q.B. 481.
44. [1910] A.C. 242.
45. [1933] A.C. 481.
46. [1933] A.C. 501.
47. 1935 S.C. (H.L.) 28.
48. 1935 S.C. (H.L.) 36.
49. [1940] A.C. 479.
50. [1940] A.C. 488.

referring to several prior decisions said "In all of them the facts were such as to make it impossible to identify any event which could, however loosely, be called an accident. In these cases the workmen failed, not because a disease was outside the purview of the Workmen's Compensation Act altogether, but because the burden of proof that there had been an accident was not discharged.

When the workman's claim is in respect of a progressive disease the difficulty of pointing to a definite physiological change which took place on a particular day is, in general, likely to be almost insuperable, and in 1906 Parliament, in the case of certain diseases and later by an enlargement of the schedule of industrial diseases, relieved the workmen in the specified cases of this obligation. But if the circumstances of any claim in respect of incapacity due to disease are such as to make it possible to discharge this burden, I see no reason for thinking that what is called a disease is different in principle from a ruptured aneurism as in *Clover, Clayton & Co., Ltd. v. Hughes,*[51] or heart failure as in *Falmouth Docks and Engineering Co. Ltd. v. Treloar.*[52]"[53]

The second proposition inherent in *Ockenden's Case*[54] viz. that all injuries by accident sustained by a worker at his place of employment do not necessarily occur 'in' the course of it unless there is some causal relation with the employment is, with the greatest respect, even more questionable. It was unnecessary on the facts in that case and runs counter to the decisions previously analysed. All that can be said for *Ockenden's Case*[55] is that Dixon C.J., Menzies and Fullagar JJ. renounced this view in *Kavanagh v. The Commonwealth.*[56]

"The contention for the respondent is that a personal injury though accidental, which is thus unconnected with the employment, cannot be an injury arising in the course of the employment by reason of its occurring while the employee is performing his duties or doing something incidental to the actual performance of his duties[57] . . . Repeatedly the contrast had been made between the effect of the words 'out of' and the effect of the words 'in the course of'. Whatever language was chosen to institute the contrast the first expression was treated as requiring a causal connection between the employment or its incidents and the second as requiring that the pursuit of the employment should be an accompanying condition. I have seen nothing to suggest that within the expression 'in the course of the employment' there had been discovered any element

51. [1910] A.C. 242.
52. [1933] A.C. 481.
53. [1940] A.C. 484-5.
54. 99 C.L.R. 215.
55. 99 C.L.R. 215.
56. 103 C.L.R. 557.
57. 103 C.L.R. 554.

of causal relation with the employment and its incidents. To prescribe that element was considered to be the work of the words 'arising out of'. It was thus natural for this Court to say after the word 'or' had been substituted for 'and' in the Western Australian provision that the result of English authority was "to show that the words 'arising in the course of the employment' describe a condition which is satisfied if the accident happens *while* the workman is doing something in the exercise of his functions although it is no more than an adjunct to or an incident of his service"[58] . . . I am of course fully alive to the fact that no direct immediate decisive positive or dominant causal connexion between the employment and the injury or accident is proposed as an element necessary to satisfy the conception of an injury by accident arising in the course of the employment but only an association which may perhaps be best expressed by saying that had it not been for the employment the injury by accident would not or might not have been sustained, or negatively by saying that the injury by accident must not be one which occurred independently of the employment and its incidents. It is not a conception which it is altogether easy to apprehend and it may be doubted whether in practice it could easily be applied. However, it may be said it would contradict past experience if that were treated as a valid objection to a conception which may be yielded by a provision of a workmen's compensation statute and in particular of the statute under present consideration.

But for myself I think that the words 'arising in the course of the employment' do not connote or imply even so slender a causal connexion. It is possible that those who substituted 'or' for 'and' were not alive to the consequences of the change and in particular to the manner in which the alternative 'or in the course of the employment' might operate to compensate sufferers from injuries unconnected with industry if and only if the injuries occurred during working hours. All that can be said as to this is to cite Lord *Buckmaster's* statement in *St. Helen's Colliery Co. Ltd. v. Hewitson*[59] with reference to the cumulative phrase: 'It is useless to lament the obscurity of these words and wrong to inquire what was the intention behind the Act except so far as such intention is disclosed in the language of the statute construed in accordance with certain fixed and well-known principles'.[60]"[61]

In this case, one Kavanagh, shortly after commencing work, went to the toilet. When he returned he complained of feeling ill and suddenly vomited for no apparent cause. The sudden and unexpected force of the vomitus ruptured his oesophagus and Kavanagh died some days later of supervening broncho-pneumonia

58. 103 C.L.R. 556.
59. [1924] A.C. 59.
60. [1924] A.C. at p. 65.
61. [1924] A.C. at p. 557.

and heart failure. There was thus nothing 'incidental' to his work save that it happened at his place of employment.

The majority (Dixon C.J., Fullagar and Menzies JJ.), in reliance on the English cases, had no difficulty in holding that a rupture of the gullet was 'personal injury by accident'. The vital problem was thus squarely raised: did it arise 'in the course of' the employment. On this point the views of Dixon C.J., hereinbefore cited, are clearly, with respect, correct. Fullagar J. held as a result of the amendment that if "the injury occurred in the course of the employment, it was to be compensable even though no causal connexion could be found between it and the employment. And it necessarily follows, I think, that the words 'arising in the course of his employment' ought not to be regarded as meaning anything more or less than 'arising while the worker is engaged in his employment'. For I can find no tenable half-way house between this view and the view that the words in question have the same meaning as the words 'arising out of his employment'."[62]

Referring to *Ockenden's Case*,[54] His Honour held that that decision was not inconsistent with the views he had stated before but "if that judgment did contain anything inconsistent with what I have written, I do not think that I should feel bound to adhere to it for it is obvious that the decision itself has no bearing on the present case."[63]

Menzies J., after concluding that neither the words 'arising' nor 'is caused' require any causal connection between personal injury and the employment, stated, after an exhaustive review of the authorities, "My review of these cases leads to the conclusion that if a worker is injured while doing something incidental to what he was employed to do, that is sufficient and no other association between the injury and his work is necessary; he is to be in the same position as if the injury arose while he was doing what he was employed to do. So far then from these cases indicating any causal element covered by the phrase 'in the course of', they seem to me to accept a temporal relationship as sufficient, and to extend the time from working time to the time of doing what is incidental to work."[64]

Taylor J. (dissenting) found for the employer as he was unable to see any link whatever between the injury and the duties the deceased was required to perform "for the occurrence had not the remotest connexion or association either with the work which he was called upon to do or with any activity incidental to that work, or with the place where he was employed or with any other employ-

62. 103 C.L.R. at p. 558.
63. 103 C.L.R. at p. 559.
64. 103 C.L.R. at p. 572.

ment factor. That being so it is, I think, impossible to say that the deceased's injury arose in the course of his employment".[65]

Windeyer J. (dissenting) approached the problems semantically "it is not unimportant to remember what the expression 'in the course of' taken by itself ordinarily means. It does not necessarily have a purely temporal sense. It does so only when it is used in conjunction with a word that has a temporal meaning, or which is, in the context, used to limit or measure time, for example, in the course of the year or of a lifetime. When used in conjunction with words which are not themselves used to measure time 'in the course of' often signifies a relationship which is not purely, or even primarily temporal".[66]

His Honour after stating that law may at times flounder on questions of causation "professing to avoid philosophic consideration of what is essentially a problem of philosophy" thought that "The question then comes back to this: it being possible, without usurping the meaning of the phrase 'arising out of', to read 'arising in the course of the employment' as requiring an association beyond a mere temporal coincidence between the employment and the accident—should the phrase be read as requiring such an association? I think it should."[67]

His Honour concluded that "if the accident relied upon as causing the injury could have happened without the injured man having been employed, it does not arise either out of or in the course of his employment[68] . . . To construe this Act as meaning that a man who was injured because he vomited or coughed at work, as a result of some malady or seizure unrelated to his work, is in a different position than he would be if he vomited or coughed at home gives it a capricious effect. I do not think Parliament intended the Act to have an operation so irrational."[69]

It is submitted that the majority view in *Kavanagh v. The Commonwealth* constituted a monumental milestone in the development of compensation law in that the majority of the High Court determined for the first time that 'in the course of' had a purely temporal connotation. It is therefore surprising that this decision has passed entirely unnoticed by reviewers. What is the practical effect of this decision? In its immediate result it would appear to differentiate between physiological incidents of unknown origin—which qualify as 'injury by accident'—and physiological incidents which occur as a definable step in the course of an autogenous disease. If this is the ethos of the Act, one can only echo Windeyer

65. 103 C.L.R. at p. 569.
66. 103 C.L.R. at p. 579.
67. 103 C.L.R. at p. 584.
68. 103 C.L.R. at p. 586.
69. 103 C.L.R. at p. 586-7.

J's. dictum questioning whether "Parliament intended the Act to have an operation so irrational".[70]

This issue was again squarely raised in *The Commonwealth v. Hornsby*,[71] a case in which judgment was given immediately after *Kavanagh's Case*.[3] Here the worker suffered a stroke on a journey between his home and his place of employment. The operative provision s. 9A(1) rendered the Commonwealth liable if the injury by accident occurred to the worker "while" he was travelling to or from his place of employment as if the accident were an accident arising out of or in the course of his employment. It was submitted for the Commonwealth that despite the use of the word 'while', the injury must be occasioned by the journey or its incidents as otherwise it would be out of harmony with s. 9 which required the injury to be occasioned by or be incidental to the employment. This view was rejected out of hand by Dixon C.J. "I do not think that s. 9(1) has this meaning or implication but I would remark that it would be more natural to tieat the use of the word 'while' in s. 9A(1) as a reason for rejecting such an interpretation of the words 'arising in the course of the employment' than to mould the plain word 'while' in s. 9A(1) to conform with the meaning ascribed to s. 9."[72]

The Commonwealth further argued that, in view of s. 10 which provided for compensation in respect of death or incapacity from 'disease' due to the nature of the employment, s. 9 and s. 10 were water tight compartments, so to speak, so that no occurrence which is the outcome of 'disease' can be characterized as 'injury by accident'. This submission was also rejected by the learned Chief Justice: "in my opinion there is no sufficient ground for excluding from the operation of s. 9 what would otherwise be an injury by accident simply because it is the outcome or the attendant consequence of disease or of physiological degeneration or deterioration."

In the result however, the majority found in favour of the Commonwealth. Dixon C.J. "whose mind fluctuated upon the question" decided that an occurrence which was entirely an internal matter, i.e. "an internal occurrence that can be clearly distinguished from the pathological conditions leading up to it, one consisting in a definite impairment of a centre of control of bodily movement"[73] was not an 'injury be accident'.

Fullagar J. postulated three classes of 'disease' cases where attempts have been made to bring them into the ambit of 'injury by accident'. Firstly, those cases where the actual source of infection was due to an exposure or other risk attributable to the employment; for example, lung diseases in the case of miners, or infectious

70. 103 C.L.R. 586.
71. 103 C.L.R. 588.
72. At p. 592.
73. At p. 594.

diseases in the case of hospital employees. Secondly, those cases "where there is an actual internal physical injury such as the rupture of an aneurism or of an oesophagus [*Clover Clayton & Co. Ltd. v. Hughes*,[7] *Kavanagh v. The Commonwealth*[3]]. It has been said, naturally enough, that the breaking of an artery cannot be distinguished from the breaking of a leg".[74] The third class put forward consisted of cases where "death or incapacity results not from an actual physical injury, external or internal, but from the development or culmination of a pre-existing and progressive morbid physical condition. In these cases the final occurrence which results in death or incapacity is commonly referred to as a 'sudden physiological change'. Examples are found in *Hetherington's Case*[1] (coronary occlusion) and *Sharpe's Case*[33] (auricular fibrillation). In the heart cases it is common to find that the morbid condition (usually arterial atheroma or sclerosis) has existed for a substantial number of years and would inevitably have caused early death or incapacity apart altogether from any employment in which the worker was engaged."[75]

This class Fullagar J. felt himself unable to bring into the category of 'injury by accident' if the final catastrophy was merely the end result of an underlying disease and no particular incident or activity of the claimant had accelerated or contributed to it.

Taylor J. held, following *Ockenden's Case*,[11] that the stroke in the instant case was neither 'injury by accident' nor injury by accident 'in the course of the employment'.

Menzies J. (dissenting) took the bolder view and found that "proof of the occurrence of a definite physiological change for the worse at a particular (compensable) time" constituted injury by accident'. Thus His Honour refused to speculate on such hair-line distinctions inherent in Classes (2) and (3) postulated by Fullagar J. In truth, it is extraordinarily difficult to see why a thrombosis or cerebral vascular accident (stroke) should be differently regarded from a ruptured oesophagus or a broken limb. Nowhere has this been put more succinctly than by Latham C.J. "It appears to me to be difficult to draw any satisfactory distinction between the breaking of a limb and the breaking of an artery or of the lining of an artery. One is as much an injury to the body, that is, something which involves a harmful effect on the body, as the other. Each is a disturbance of the normal physiological state which may produce physical incapacity and suffering or death. Accordingly, in my opinion the detachment of a piece of the lining of the artery in the present case should be held to be an injury."[76]

74. At p. 596. 75. At p. 597.
76. Per Latham C.J. *Hume Steel Limited v. Peart* 75 C.L.R. 242 at p. 252-3.

In the writer's view *Kavanagh v. The Commonwealth*[3] and the majority view in *Hornsby's Case*[71] are irreconcilable and it is respectfully suggested that the attempted reconciliation by the majority in the latter case is unconvincing.

Conclusion

The former existence of the double condition which required a compensable injury to arise both out of and in the course of the employment necessarily implied an examination into the very nature of the employment, its incidents, and associations, and a search for some antecedent condition incidental to it with which the injury could be linked. This approach had become so much part of the judicial instinct that a change from 'and' to 'or' took nearly half a century before receiving some vague recognition.[77]

It is too early yet to predict how successfully this instinct has been conquered. Lower courts are, of course, bound to follow *Kavanagh's Case*[3] which has completely removed the notion that injury by accident must be in some measure related to or occasioned by the employment so as to come within the concept 'in the course of'.

The major problem remains: How much of *Ockenden's Case* is still good law? Menzies J. was clearly prepared to hold that *Kavanagh's Case*[3] had now entirely covered the prior inconsistent field, and it is respectfully urged that it is ludicrous that a stroke at work is not 'injury by accident' unless preceded by vomitus. If this is the law, the law is not only an ass but in need of radical amendment.

On present indications however, a physiological disaster occurring to an employee whose rights are governed by the Commonwealth Employees' Compensation Acts during a compensable period is nevertheless not compensable if its occurrence was due entirely to an autogenous disease not referable to any incident of or association with the employment.

> " 'When I use a word' Humpty Dumpty said in rather a scornful tone 'it means just what I choose it to mean, neither more nor less.' 'The question is' said Alice, 'whether you can make words mean so many different things.' 'The question is', said Humpty Dumpty, 'which is to be master—that's all.' "[78]*

77. See for example per Dixon C.J. *The Commonwealth v. Oliver* 107 C.L.R. at 355-6.
78. 'Through the Looking Glass' Ch. VI.

*P. Gerber LL.B. Barrister-at-Law; Senior Lecturer in Law in the University of Queensland.