DAVID JAMES COCHRANE

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WITH REGARD TO THE ACCIDENT COMPENSATION ACT, 1972

LEGAL WRITING FOR

LL.B HONOURS DEGREE

1973

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BACHELOR OF LAWS WITH HONOURS.

Victoria University of Wellington,
Wellington,
New Zealand.

3rd September, 1973.

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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. On February 9,1973 only eight months before the Act was due to come into force the Minister of Labour (Mr. Watt) announced a further six months delay so that cover could be extended to non-earners, including housewives, 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) acknowledged 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

(1) Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand.

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 (S68) was adopted. The problems of classification were acknowledged in the 1969 White Paper (3) but no firm recommendation was made. The Gair Report (1970) (4) only considered the matter of definition as a side issue to the relationship of Social Security to Accident Compensation, and made no positive recommendation.

IMPORTANCE OF DEFINITION.

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 wishes to sue his doctor for negligent treatment and would want to show that the injury suffered at the hands of the doctor was not personal injury by accident.

(2) para.289 Manual of the International Statistical Classification of Diseases, Injuries and Causes of Death.W.H.O. Geneva (1957) (p. 243
(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.

It is interesting here to note that the scope of cover under the Act in any matter before the Court is not a matter for the Court, but falls within the exclusive jurisdiction of the Commission - S.5 (4) (5) That section assumes that whether or not there has been personal injury by accident can be decided by the Court, but whether that injury is covered by the Act is a matter for the Commission to decide. The Commission is given "exclusive jurisdiction" by S.5 (4). However, its decision is itself appealable to the Administrative Division of the Supreme Court under S.168 (1). The aim of this somewhat complex system is to ensure that there is some balance between the Commission and the 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 adversery 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.

Even S.5 (4) 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 (2) (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) (a) ? Arguably, an action based on contract is not strictly an 'action ..... for damages in respect of the injury' - S.5 (1) (a), but is an action in

(5) Inserted between the first and second readings of the Bill.

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 insofaras 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 whom need be an experienced barrister or solicitor),(6) and bound to carry out the Government's policies or directed by the Minister.(7) 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.

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 or 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

(6) For appointment and qualifications of Commissioners see SS6-9.
(7) S.20(1) Precedent for such a provision, however inappropriate it may be, can be found in the Broadcasting Corporation Act 1961 S.11, and State Advances Corporation Act1965 S.17.

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 Legislative 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 nor 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 -

> 'Continuous cover and work accident cover shall extend to occupational 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 Section 2 presupposes that the term was already adequately defined but for that addition. It is my contention that this is not so.

There have been statutory attempts to define "personal injury by accident" in other jurisdictions, ranging from Australia to Prince Edward Island. These are of no great assistance, but some are discussed later in "Proposals for Reform".

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.

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 addition to adopting the language of the Workers Compensation Act, it would seem that prima facie the interpretation given that language will also be adopted.

This view is strengthened by the traditional approach to statutory interpretation given by Lord Herschell in Bank of England v Vagliano Bros.(8) where His Lordship said that in general a statute should not be interpretated by recourse to previous law. However, an important exception to this general rule is that where a word or phrase has acquired a technical or precise legal meaning the legislature is presumed to be aware of the meaning ascribed to that word or phrase and to endorse it where that same word or phrase is subsequently re-enacted. The words "personal injury by accident" occur extensively in both the Accident Compensation Act and the Workers Compensation Act, and in the absence of any new definition or direction from the Legislature, it is reasonable to assume that the Legislature intended the judicial interpretation given that language under the Workers Compensation Act to remain.

This view is borne out by a statement over a hundred years old by Blackburn J. in Mersey Docks and Harbour Board Trustees v Cameron: (9)

> "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."

(8) (1891) AC. 107, 145
(9) (1864) II H.L. Cas 443 at 480

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 in a sense 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 the Courts 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: (10)

> "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 CLR 215"

An example of confusion of these issues arose in New Zealand in Mihi Anaru v Richardson and Co.Ltd. (11) 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 of pneumonia had developed too quickly to have arisen out of or in the course of employment. (12)

(10) The Commonwealth v Hornby (1960) 103 CLR.558,597.
(11) (1927) GLR. 575
(12) Note that in appropriate cases pneumonia has been held to be injury by accident.

The distinction between the injury and the accident must also always be maintained. Lord Atkin emphasised this in Fife Coal Co. v Young (13) 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 a 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. (14) 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 (15)

> "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, of employers and of workmen."

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

(13) (1940) AC. 479, 488, 489
(14) (1903) AC. 433, 453
(15) Ibid 452.

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.

ACCELERATION OF PRE-EXISTING DISEASE.

It is clearly established that an employer must take his employee as he finds him. In McCarthy v Union Steam Ship Co.(N.Z) Ltd. (16) Stringer J. said:

> "It is clear that if a man's physical condition is such as to render him particularly susceptible to grave consequences from an accident, which in a normal healthy person would have no such consequences, that will not affect the right to compensation for the more serious results."

Cozens-Hardy MR. in Dotzauer v Strand Palace Hotel (17) stated the proposition succinctly:

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

In Belcher v Timaru Borough Council (18) the plaintiff was injured while cranking an engine, and, although there would

(16) (1916) N.Z.L.R. 1154, 1158
(17) (1910) 3 B.W.CC. 387, 389
(18) (1937) GLR. 372.

have been no injury had his arm not already been tubercular, he was awarded compensation.

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, notably government departments, 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 disease outside hospitals.

It is important to these persons, their dependents 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

(19) 1972 New Zealand Yearbook.
(20) By comparison the much publicised road toll for 1970 was 649 deaths.
(21) (1910) AC 242

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,(22)

"It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which happened would not have happened, and if the accident is one of the contributing causes without which the injury which actually followed would not have followed." He then said,(23) "I do not think we should 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 (24) "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 while 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. (25) a similar fact situation where Fraser J. said p.252 "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'sCase applied the test as laid down by the House of Lords in Clover Clayton and in McFarlane v Hutton Bros.Ltd. (26) 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.

(22) Ibid, 245
(23) Ibid, 246
(24) Ibid. 247
(25) (1929) NZLR. 249
(26) 20 BWCC.222.

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 those acts were done within the scope of employment they would have been compensated and where the continuous cover scheme applies there is no provision for making a distinction between work and non-work accidents. 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. Under Workers Compensation legislation the courts seem to have accepted that so long as there was some strain relating to the employment, such that it could conceivably be a contributing cause of the accident, then the worker was entitled to compensation. Under the Accident Compensation Act, with the employment requirement removed, it would seem that if anyone entitled to continuous cover can show some strain that at some time was a contributing factor, he will be entled to cover under the Act.

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 found dead in the process of his allotted

task.

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.(27) 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

(27) (1936) 3 AII. E.R. 292

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.(28)

The problems in this area fall into two major types. They are:-

(i) The problems caused by the contraction of traumatic disease, e.g. anthrox, 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 continuous cover 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,

(28) (1916) 2 AC.I, 9.

including attacks by tiny 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. Indeed the Explanatory Note accompanying the Accident Compensation Bill acknowledges this. 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 <u>if the disease is a personal injury by accident within the meaning of this Act</u>."

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.(29)

In Brintons v Turvey (30) the Earl of Halsbury, LC. said of the phrase "personal injury by accident":

> "..... it excludes and was intended to exclude idiopathic 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."

The case involved the alighting of anthrax bacilli on the worker's eye, undoubtedly within the course of the employment. The House of Lords held this was injury by accident, Lord Lindley noting,(31) "The fact that an accident causes injury in the shape of disease does not render the cause not an accident". However, he held very firmly that not all diseases caught by a workman in his employment are 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 (32) 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

(29) S.149
(30) (1905) AC 230,231.
(31) Ibid 238
(32) (1919) 12 BWCC.78 (H.L.)

interesting observation on Brintons Case.[33] His Lordship said:

> "When Brintons Case was decided the area conceded by contemporary science to idiopathic 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 Grants Case the observations of Lord Birkenhead have become even more significant with medical research having established that many more diseases 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:[34] "It is a partial and perhaps a complete answer to this objection that in proceedings under the Workmens 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 invaded his system under such circumstances that 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 applicamt 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".

(33) Ibid 82
(34) Ibid 83

There are abvious and immediate problems in applying this to a continuous cover situation. 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 with coverage under S.56 (a) need show no more than that his injury arose from bacillus infection rather than the natural progression of idiopathic disease.

Thus, if the case of Donohue v Otago Hospital Board (35) 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 that simple. 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 (36), in which the Court of Appeal considered the earlier English authorities Myers C.J. said (37)

(35) (1933) GLR.438 Frazer J.
(36) (1932) NZLR. 1553
(37) Ibid 1559

"The difficulty is that in Brintons v Turvey and Grant v Kynoch there would appear to be dicta by some of the learned Lords from which it may be inferred that the mere impinging of bacilli upon a persons 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 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' (38).

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 learned Chief Justice, which is objectionable today for a variety of policy, if not legal, reasons.

(38) Ibid 1565.

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 [39] cites the passage quoted previously from Lord Birkenhead in Grants 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 or assault, as it is called, of the bacilli."

Then follow remarks on the need to show an accident and the comment that, [40]

'Thus diseases incidental to the employment which arise by a gradual and natural process from the effects of the 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.[41]

" '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 Grants Case. Indeed, Kennedy J. seemed reluctant to accept this statement at face value for he continues:

"Nevertheless as Atkin L.J. pointed out in Cole v London and North Eastern Railway Co.[42] 'Now the legal definition

(39) Ibid 1570
(40) Ibid 1571
(41) (1926) 20 BWCC.637: Kennedy J. in Storey
(42) (1928) 21 BWCC 87

> of an accident seems to me to be the gradual approximating to the conception of a disease and it is only necessary to refer to cases where it has been held that the various diseases caused by the employment amount to injury by accident, and, ...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."

At this point Kennedy J. has reached 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. (43) 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."

Kennedy 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.

(43) (1926) 1 KB.279, 291

Lord Wrenbury had based his dicta on Broderick v London County Council,(44) 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 base their finding that there had been an accident on the fact that the great majority of nurses do not contract the disease. Broderick's Case involved a workman who suffered from enteritis after inhaling sewer gas in the course 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. (45), a lead poisoning case, in which Matthew L.J. said, (46)

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

The Master of the Rolls then cited his own judgement in Steel's Case . " 'It is not enough to say that the injury arises out of and in the course of the employment. Injury by disease alone, not accompanied by an accident, is expressly excluded, as pointed out by Lord Macnaughton in Fenton v Thorley & Co. It must be made out not merely that there is injury arising out of and in the course of the employment, but injury by accident arising out of and in the course of employment". The argument for the appellant, when traced to the very bottom, would undoubtedly mean holding that every man who in the course of and arising out of his employment contracts a disease is entitled to compensation under the Act.'

(44) (1908) 2 KB 807
(45) (1905) 2 KB 232
(46) Ibid 237.

Returning to Storey's Case, Kennedy J. apparently took a contrary view for in his concluding remarks he said [47] 'On the facts of the case, I think the mere impingement 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 of Brintons Ltd. 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 Macnaughton's opinion was based. The accident would have been more common, but it would still have been an accident." '

The above cases show the confusion in this area of the law, and the difficulties faced by the Court of Appeal, which was itself not assisted by the refusal of some of the judges to admit to there being any inconsistency. As further proof of the difficulties in this particular field, if any be necessary, reference could be made to Katsos v General Motors N.Z.Ltd. [48] 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'.

(47) Storey 1573
(48) (1958) NZLR.1113

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 relates to work accident cover only. Section 89 is a mutatis mutandis acoption 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. There is no similar provision for the continuous cover scheme, presumably because such events are covered whether or not they arise out of the employment.

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.

The lengths to which this problem has forced the courts to go can be illustrated by but a few cases. In Barbeary v Chugg (49) the Court of Appeal, Cozens-Hardy M.R., Swinfen-Eady and Phillimore L.J.J. were agreed that where a harbour pilot jumped from one small boat to another and received a ducking while doing so, there had been no accident, so that when acute sciatica developed he was able to show injury by accident. The Court was quite definite that it was the particular nature of the particular incident which rendered it an injury by accident. The pilot had jumped onto the bow of his dinghy, partly submersing it and wetting himself up to the thighs. Cozens-Hardy M.R. said (50)

> "I certainly do not intend to affirm that because a pilot merely gets very wet in rough weather and suffers from it, that that is an accident or injury arising out of and in the course of employment."

(49) 1915 8 BWCC. 37
(50) Ibid 40

Phillimore L.J. was prepared to make a very fine distinction. By way of example he said,(51)

> "If he had not missed his footing, but had got in in such a way as to cause the boat to rock and the water to come in, though he might have had to bale it out or sit in the water, it would not, I think, be an accident."

Such reasoning is quite unacceptable to any social welfare scheme. Whether he is wet by missing his footing or by rocking the boat so that water sloshed in is irrelevant to the effect on himself and his family. It is these kinds of spirious 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 Barbeary's Case and the others discussed below. This requires actual statutory provisions, not the optimistic adoption of terms from legislation whose shortcomings the new Act professes to remove.

Two New Zealand cases further illustrate the complexity in this area. In Bresand v Northern Steamship Co.Ltd.(52) it was accepted that the plaintiff suffered from muscular rheumatism as a result of two soakings he received while scraping down ships in dry dock. Frazer J. reviewed several authorities, including Barbeary's Case, but declined

(51) Ibid 42
(52) (1928) NZLR.461

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, Frazer J. was applying the reasoning of Fletcher-Moulton L.J. in Warner v Couchman (53) as cited with approval in the House of Lords by Earl Loreburn L.C.(54) "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, Frazer J. has indulged in the practice referred to by Fullagar J. in The Commonwealth v Hornsby (55) of by-passing the issue of 'accident' by finding that anyway it did not arise from employment. Further, the Warner test is totally inappropriate when considering a continuous cover scheme.

(53) (1911)1KB . 357
(54) (1912) AC 35, 37
(55) Supra n.10

Under the continuous cover 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 a continuous cover scheme.

Public Trustee v Waitaki County(56) is a case where Frazer J. commented on his decision:- Bresand's Case and distinguished it. He said of Bresand's Case :

> "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 the Waitaki County Case Frazer J. also considered Whale v New Zealand Refrigerating Co.(57) 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 workers 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.

(56) (1932) NZLR.1496
(57) (1931) GLR. 542

This is indeed a welcome step for it reintroduces the necessity to consider the unexpected or untoward event subjectively from the workers point of view, but it hardly seems consistent with some of the decisions considered earlier. (58)

The worker in the Waitaki County Case was working in a 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: (58a)

> "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 he 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.

(58) e.g. Broderick's Case n.44
(58a) (1932) NZLR. 1496, 1501

> The present case presents some features similar to those described in Barbeary v Chugg, 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 unpremeditated 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's Case could not be regarded as a fortuitous and unpremeditated happening, leading directly to the contraction of the muscular rheumatism. It would seem that the worker in the Waitaki County Case was exposed to no more risk than anyone who chooses or has to work in wet or swampy conditions, as the worker in Bresand's Case did on another occasion, when he worked on a different ship in the wet and in mud.

The Commission is likely to be faced with many claims involving injury such as pneumonia and frostbite from sportsmen and others who contract them and are eligible for continuous cover. It is felt that there should be some guideline for the Commission provided by the legislation itself to avoid the confusing and conflicting legacies of Workers Compensation Legislation. To this end some amendments are suggested and considered later in the Article.

INJURIES RESULTING FROM CRIMINAL ASSAULT.

In Trim Joint District School Board v Kelly (59) 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. This 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 Case situation.

In New Zealand, in Smith v New Zealand Express Co.(60) Stringer J. held, following Kelly's Case, 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 etc: (61) 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 requirement removed under the continuous cover scheme, it would seem that the victim of any assault could claim coverage. Interesting issues could be raised as to just how much the accident was untoward or unexpected if the claimant had issued a challenge or provoked the fight.

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

(59) (1914) AC.667
(60) (1914) 16 GLR. 602
(61) (1934) NZLR. s.78

33 were paid out, the total amount of awards being $14,552[62] 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 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.

(62) 1972 N.Z. Yearbook p. 253-4

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[63] though not perhaps without Government supervision.[64] 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.[65] 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 able 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 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, and the only source of definition

(63) s.5(4)
(64) s.20
(65) s.168 - discussed infra p. 3,4.

is the cases under Workers Compensation legislation.

The removal of the "arising out of and in the course of employment" requirement will greatly extend 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, insofaras disease is concerned. Government policy, and indeed the statements in the Woodhouse Report (66) and Gair Report (67) 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 my submission 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.

(66) paras. 17, 290
(67) para 18.

PROPOSALS FOR REFORM

At time of writing, August 1973, there are some twenty-five reports circulating within the Commission on aspects of the Act in need of reform. There is also a sub-committee discussing the need to define terms used in the Act, including "personal injury by accident". However, the Commission's solicitor declined to make any of the reports available or discuss their contents.

It has been suggested (68) that there should be a presumption expressed in the Act that the benefit of any doubt should be exercised in favour of the applicant. This was considered by the Commission last year, but rejected on the gounds that any such provision would unduly restrict the Commission's operations. The Commissions present attitude that it will maintain a "fair, large and liberal" attitude to the Act and applications made thereunder, although it concedes that with changes of personnel and the experience of time this attitude could change.

Any attempt to define "injury by accident" is immediately faced with the problem that this involves a medical as well as legal terminology. It would be futile to attempt to list fact situations the effects of which are to be treated as "injury by accident." This is what has occurred under the adversary system. When coupled with the Common Lawyer's desire to rationalise cases and follow precedents, it leads to legal gymnastics such as those indulged in by Kennedy J. in Storey's Case (supra) and Frazer J. in the Waitaki County Case (supra) and to statements such as that cited earlier from Barbeary's Case.(69)

(68) Infra p. 14
(69) Infra p. 26

For reasons stated earlier I feel it is not sufficient to merely adopt Workers Compensation terms into the more comprehensive scheme. It is necessary to give the Commission some more positive guidelines although these must, due to the nature of the field, be little more than generalizations themselves.

Furthermore, it is often considered a major step to get medical men to agree on terminology, let alone diagnosis.(70) Coupled with the medical problems there is the consideration, which must not be overlooked, that the scheme must be seen to be operating in fairness to all claimants.

Definitive problems are not likely to be solved without drastic changes, which will not occur until the Accident Compensation and Social Security Schemes are merged into one truly comprehensive social welfare system. Until this happens perhaps the best that can be hoped for is an approximate equation of the payments under both schemes to reduce the incentive for claimants to attempt to gain coverage under the Accident Compensation Scheme. Any attempted reform should be viewed merely as a temporary matter to provide broad delineations until the schemes are merged.

However, with the new Commission being an administrative rather than judicial body(71) the opportunity is present to give a definition which the Commission could apply with wide discretion.

(70) For a clear example of this see the reports of the medical evidence in Hume Steel Ltd. v Peat (1947) 75 CLR.242

(71) There will usually be three hearings before any Court hearing.

SUBJECTIVITY

Whether or not the injury occurred "by accident" is to be judged from the injured person's point of view. This was made clear by the House of Lords in the Trim Joint School Board Case but has from time to time been overlooked.(72)

It is proposed that the word "accident" be defined so as to include, as well as other fortuitous happenings,

> "any wilful or intentional act not being the act of the injured person."(73)

Any such amendment would have to be read in conjunction with S.137 which excludes cover for self-inflicted injuries.

Some further provision may be necessary to ensure that injuries suffered as the result of the carelessness or gross negligence of the injured person are not to be regarded as injuries wilfully inflicted on oneself within the meaning of S.137. The only injuries by accident which do not deserve coverage are those self-inflicted with the intention of gaining compensation and even these should be subject to the proviso in S.137 (1) regarding dependants.

NATURAL PROGRESSION OF DISEASE.

There is some need for clarification in this area. Difficulties are likely to arise concerning just what must be proved and by whom, particularly when the current law contains statements such as that made by Lord Loreburn in Clover Clayton v Hughes(74)

> "I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary."

(72) Eg. Brodericks Case, Steel v Cammel Laird, Infra p. 23
(73) Taken, in part, from Workers Compensation Act1951, Prince Edward Island.
(74) Infra, p.12, The case of the heart attack while turning a spanner.

It is proposed that the only way existing rights could be protected would be to express some condition in favour of the injured party along the following lines:

> New s.2(9) "For the purposes of this Act an injury 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 the Workers Compensation Scheme.(75)

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

> Addition to s.2 (1) " "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.

(75) See discussion Infra p. 11-15.

There are three possible solutions:

(1) To attempt a definition of disease which would include influenza and the common cold. Such a definition should not include the heart cases or pneumonia which are at present, and should continue to be, compensatable. It is my view that such a definition could not be done effectively.

(2) To make all disease compensatable if it is sustained during employment. This situation is covered by s.67 of the Act. However, it does not assist in deciding what meaning is to be given to s.67 (8). The position of the person contracting pneumonia by falling from his yacht on Saturday afternoon would remain unclear.

(3) An attempt could be made to draw up a schedule of traumatic diseases which are to be compensatable under a 24 hour scheme. I would envisage that this would include primarily diseases which are felt to have close connections with community activity, for example, hepatitis, typhoid, tuberculosis, food poisoning and poliomyelitis. A possible source for this schedule might be the Department of Health's schedule of notifiable diseases. This will also contain an indication of the number of persons likely to be involved.

The common cold, influenza, measles and other similar diseases would be excluded unless it was shown that they were due to the nature of employment and so came within s.67

Coronary attacks precipitated by strain could be included in the schedule, but the natural progression of heart disease excluded. This highlights the unfortunate feature of the continued existence of two separate schemes for the effect on the injured person and his dependants is the same in both cases, but some distinction is inevitable until Parliament is prepared to merge the two schemes.

Pneumonia remains a problem case but it probably should be compensated only if it arises due to the nature of employment. This places it in the same position as at present. If pneumonia per se was treated as injury by accident it would render distinctions between accident and sickness even more difficult. Because of the nature of pneumonia and its similarity in many respects with serious influenza and colds, and because of the difficulty of ascertaining any precise cause, there should be coverage only where it can be shown to have arisen out of the nature of employment. Alternatively, pneumonia could be made compensatable only where the applicant could prove it was incurred by accident. This would be an exception to what is proposed should be the general rule, namely that there should be no onus of proof on the applicant in a genuine comprehensive scheme. The only justification for this exception is the difficulty of ascribing any particular cause to pneumonia, particularly when a person can suffer it for a long time before diagnosis.

SUMMARY OF PROPOSALS

These suggestions for reform, are not intended as comprehensive definitions but are given as concrete proposals to remedy what the writer sees as significant defects in the scheme as it stands at present.

"Subject to S.137 an injury shall be deemed to be a personal injury by accident where:

(i) There is any physical or mental change involving injury having external or visible cause or causes.

OR (ii) There is any sudden change in the course of a disease contributed to or accelerated by a particular occurrence.

OR (iii) There is any internal physical or mental change other than the natural progression of a disease.

OR (iv) The injury or incapacity results from any infection or disease listed in the 4th Schedule to this Act."

(This refers to the schedule of diseases contracted largely as the result of community activity as discussed earlier.)

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."

Due	Borrower's Name '78
31/5/78	S. Watson
31/5/79	L-I Gaunt ob
2/6/78.	S. Watson
15/6.	M. Bowers.
23/6	S watson
10-8	D. P. PARAS
5/11	S. Shields
8/5.	[illegible]
	McDonald '80
8/10	[illegible] '81
14/5.	A Cooke
2/5	D Robertson
18/7	J Brooke Jnr

COCHRANE, D.J.

PERSONAL INJURY BY ACCIDENT