THE CONCEPTS OF "INJURY" AND "DISEASE" IN WORKERS' COMPENSATION LAW – A RE-EXAMINATION IN THE LIGHT OF RECENT REFORMS

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I. INTRODUCTION

One of the major legal and political issues in New South Wales over the last year and a half has been the proposal and implementation of reform to the Workers' Compensation system. The 'Green Paper' of September 1986 put forward a series of options as to the shape that reform should take. There was almost complete agreement that the system was ripe for reform, but a wide disparity of opinion on how reform should be achieved. Much of the argument centred on the issue of the cost of the system. The Workers' Compensation Act of June 1987 represents an amalgam of the various options. It remains to be seen whether it will be successful in reducing costs. There are, however, reasons for doubt.

Put briefly, the thrust of the proposals and of the eventual legislation is to 'get lawyers out of the system'. Whether or not that is a worthy intention, it is likely to be abortive. There have been many previous attempts to get lawyers out of systems, and they have tended to be unsuccessful – witness the place that lawyers still occupy within the Conciliation and Arbitration system. The cold hard fact is that, while legislation can *get* lawyers out, it is very difficult to *keep* them out.

There is, however, another and more basic reason why the intention to restrict the place of lawyers in the Workers' Compensation system in this manner is ill-conceived. The provisions of the Workers' Compensation Act (both in its 1926 and 1987 forms) relating to entitlement to compensation are beset with difficulties which could be insuperable for non-lawyers. These

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provisions are legally drafted and their accepted meaning is the result of years of judicial interpretation. It is very difficult to see how a non-judicial tribunal could determine the applicability of the resulting principles to the claims which would come before it. A good example of these difficulties is the case law on the meaning of "injury" and "disease" within section 7(1)(a) and section 6 of the 1926 Act, reproduced as section 9(1) and section 4 of the 1987 Act. Since these concepts and their place in the system are not altered by the changes to the legislation, those cases will still apply. This is not affected by the extension of the jurisdiction of Commissioners, the extended provision for medical panels or the limitation of the jurisdiction of the Compensation Court to appeals and references on questions of law or misuse of statutory discretion. Thus the Commissioners, who are basically non-legal adjudicators, will be required to decide contested claims on the basis of the applicability of those legal concepts — a task which the highest courts have found taxing on many occasions.

This article examines the development of judicial interpretation of the concepts of "injury" and "disease" in Australia. The resultant obscurity and inaccessibility of these concepts to non-lawyers will be painfully apparent.

II. THE ENTITLEMENT PROVISIONS — "INJURY" AND "DISEASE"

Section 9(1) of the New South Wales Act provides that "[a] worker who has received an injury...shall receive compensation from the worker's employer". That entitlement is subject to the definition of injury in section 4, whereby:

> 'injury' -
> (a) means personal injury arising out of or in the course of employment;
> (b) includes -
> (i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor; and
> (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration;[1]

The wording as it now stands thus posits two categories of condition — "personal injury" and "disease" — both of which will be compensable as

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1 Reproducing s. 7(1)(a) and s. 6(1) 'injury', in the 1926 Act. In the 1926 Act, the definition was as follows.
'Injury' means personal injury arising out of or in the course of employment, and includes —
(a) a disease which is contracted by the worker in the course of his employment whether at or away from his place of employment and to which the employment was a contributing factor; and
(b) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to such aggravation, acceleration, exacerbation or deterioration; ...
In the 1987 Act, it reads as set out under II. References in the text are to the 1987 paragraph numbers, though references in quotations will, of course, be to the 1926 numbering.

"injury" within section 9(1). It has been generally accepted that this wording has extended the normal understanding of injury by including a further medical condition — disease. It should therefore be possible to describe or define "personal injury" in its normal sense, and to describe or define the additional category — "disease". Can this, however, be satisfactorily done?

What is "personal injury" in its normal sense? Is there a single 'normal' sense given to the word? I would suggest not. As a first point, "injury" has both an active and a passive connotation. In its active use, it is the occurrence; in its passive use, it is the resultant condition. I believe that, as used in the Act, the passive sense is intended, since some earlier versions of the phrase (as for example in the 1897 and 1906 United Kingdom Acts) referred to "injury by accident", where the passive condition is caused by the accident as injuring agent. Perhaps even clearer an indication of a passive sense is that the Act refers in section 9(1) to "[a] worker who has received an injury". In this version, the passive injury is visited on the worker by the active occurrence.

What then is an injury in the passive sense? The Macquarie Dictionary defines "injury" as "harm of any kind done or sustained...". The "harm...done" obviously relates to injury in its active sense; "harm...sustained" can be read in the passive sense. Thus, in relation to personal injury, the word means harm sustained by the body (and also the mind). In what way can such a meaning be seen as a category clearly distinct from "disease"? "Disease" is defined in the Macquarie Dictionary as "a morbid condition of the body or of some organ or part, illness, sickness, ailment...". This definition is rather circular, since "morbid" is defined as "affected by, proceeding from, or characteristic of disease". The definition of "disease" given by Windeyer J. in *Commissioner for Railways* v. *Bain* [2] is a little more informative: "[t]he word 'disease' seems to me apt to describe any abnormal physical or mental condition that is not purely transient". However, one could respond that a broken back, which would normally be regarded as an injury, is a physical condition that is scarcely transient.[3]

C.P. Mills, in his exhaustive annotation of the Workers' Compensation Act 1926 (N.S.W.), notes that "the grounds on which the two ["injury" and "disease"] are to be distinguished from each other have not yet emerged from the decided cases",[4] and that

> the cases so far do not enable a clear line of demarcation to be drawn between the three categories, personal injury, disease, and aggravation of disease; indeed a close analysis of the various concepts will probably reveal that there can be no hard and fast rules of demarcation.[5]

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2 (1965) Argus L R 880, 895.

3 Moreover, Windeyer J. had previously said that "the distinction [between injury and disease] seems to me to have no firm place in the law of New South Wales". *Bain's* case, *ibid.*

4 C.P. Mills, *Workers' Compensation (New South Wales)* (2nd ed. 1979) 100.

5 *Id.*, 101.

A consideration of the history of the word "injury" in Workers' Compensation statutes suggests this is inevitable, for, as indicated already, the earlier Acts spoke of "injury by accident" but made no reference to disease, yet many instances of disease were found to be compensable.[6] Thus, "injury" was apparently seen by the early legislators as a term covering disease. On the other hand, it could be said that, even then, the 'normal sense' of "injury" would have pointed to harm resulting from events such as cuts, burns, breaks etc. If so, the inclusion of diseases as compensable "injur[ies] by accident" was achieved by a somewhat artificial interpretation of "injury", and — now that diseases are separately covered — "injury" can be given its 'normal sense' again. It is comparatively simple to assign various conditions to either the "injury" or "disease" category in this allegedly 'normal' sense — cuts and burns are injuries, cancer and rheumatism are diseases; but it is still very difficult to state clearly what it is about a cut and a cancer that is essentially different.

It would of course be of little moment that we cannot successfully make a clear demarcation between "injury" and "disease" if the two — whatever they mean — were equally compensable. The problem is that they are not. The effect of section 9(1) when read with the definition in section 4 is that "injury" in its normal sense is compensable either if it arises out of the employment or if it arises in the course of employment. The contraction of a disease will be compensable only if it is contracted in the course of employment *and* the employment is a contributing factor to that contraction. The aggravation etc. of a disease will be compensable if the employment contributes to the aggravation etc. Thus, each of the three categories — injury proper, contraction of disease, and aggravation etc. of disease — has a different criterion for compensability, and a worker's rights to compensation will depend on the category of disaster into which the court is prepared to fit his/her condition. This has led to the attempt to fit certain cases of contraction of disease and certain cases of aggravation etc. of disease into the injury proper category. There are difficulties associated with each attempt.

III. CONTRACTION OF A DISEASE AS AN "INJURY"

Where a worker can show that a disease has been contracted in the course of employment (in itself a difficult task without an unusual fact situation) but cannot show that the employment contributed to the contraction, he/she will only be able to be compensated if the unfortunate event can be treated as an injury in its normal sense. Two problems arise: can the contraction of a disease ever be an injury in its normal sense; and — even if so — does the wording of the statute prevent its being so treated for the purposes of claiming compensation? As to the first, I suggest that in normal parlance one

6 *E.g. Brintons Ltd* v. *Turvey* [1905] AC 230.

cannot describe contraction of a disease as an injury. If I contract influenza or cancer, I would not speak of myself as having been injured. On the other hand, since "injury" is, as we saw, defined in the dictionary as "harm...sustained", and since influenza or cancer certainly results in harm to the body or some part thereof, it would seem to come within the dictionary definition. In fact, given that approach, any disease would seem to come within the dictionary definition of "injury", whatever the cause of the disease.

Early decisions in England held the contraction of certain diseases to be injuries — for example, *Brintons Ltd* v. *Turvey*[7] held that the contraction of anthrax as a result of the entry of the bacillus through the workman's eye was an injury, despite there being no abrasion to the eye through which the bacillus entered; and *Grant* v. *Kynnock*[8] held that blood poisoning as a result of the bacteria entering through an existing scratch (not suffered in the course of employment) was an injury. These cases and others led Barwick C.J. in *Favelle Mort Ltd* v. *Murray*[9] to conclude "that in its normal meaning the word 'injury' in the Act itself embraces an externally excited disease".[10]

Though I suggested earlier that, as all diseases constitute harm to the body, all could come within the dictionary definition of injury, the Chief Justice did not consider that the contraction of *any* disease would necessarily qualify as an injury. He said:

> [t]he word "disease" is itself a word of some difficulty in this context, particularly in the expression "contraction of a disease". Properly used, disease connotes a morbid condition of the body. It may be initiated by some external cause or be idiopathic or autogenous. Quite clearly, when such a condition is idiopathic or autogenous, it will not qualify as an injury in the normal use of language. The actual decision in *Slazengers (Aust) Pty Ltd* v. *Burnett*...was an affirmation of precisely that proposition, though the reasons given for it were not those I may venture to suggest. *Such a disease is not "received", to use the language of the Act, but it may be contracted in the sense of becoming manifest or being commenced as a morbid condition of the body.* [emphasis added][11]

With respect, there has been a slide of reasoning here from "the normal use of language" to "the language of the Act". Such a disease can, as I have argued, be an injury within the dictionary definition (if *that* is a normal use of language!). His Honour argued it is not compensable because the Act compensates a worker where he/she *receives* an injury, and an autogenous or idiopathic disease, while arguably an injury, is not "received" but "contracted". This distinction between reception and contraction seems to have little substance.

Even if this distinction is valid, the problems are not exhausted. Let us accept that externally excited diseases are injuries in the normal sense and that other diseases are not. There is still the second question: does the statute

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7 *Ibid.*
8 (1912) 12 BWCC 78.
9 (1976) 8 ALR 649.
10 *Id.*, 655.
11 *Ibid.*

allow externally excited diseases to be treated as injuries (normal) and thus compensable if contracted in the course of employment? Before examining that issue, we should note the classification of disease made by Barwick C.J. He divided diseases into (a) those initiated by some external cause and (b) those which are "idiopathic or autogenous". His Honour appeared to treat the words "idiopathic" and "autogenous" as being synonyms, and in subsequent cases judges have used sometimes the one word, sometimes the other. However, the two are *not* the same. An autogenous disease is one occurring spontaneously, the opposite of one externally excited. An idiopathic disease is one the cause of which has not yet been established. It may in truth be autogenous; it may prove to have an external cause. For absolute accuracy then, the distinction should be reworded as being between externally excited diseases on the one hand, and autogenous and as yet apparently autogenous diseases on the other.

The wording of the definition of injury in section 4 could therefore be interpreted so that "injury" means "personal injury arising out of or in the course of employment", covering externally excited diseases, and "includes an [autogenous or apparently autogenous] disease which is contracted in the course of employment and to the contraction of which the employment is a contributing factor". This was the interpretation which Barwick C.J. thought the statutory definition should bear. In taking that approach, he was rejecting the alternative view, expressed by the Privy Council in *Slazengers' (Australia) Pty Ltd* v. *Burnett* [12] and followed by the High Court in *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Hussey*,[13] that the specific reference in the statutory definition to "a disease..." has the effect that the contraction of a disease will come within the definition only if it complies with (what is now) paragraph (b)(i), and that a disease, however caused, cannot for the purposes of the Act be treated as a "personal injury" simpliciter.

His Honour did not attempt to justify his rejection of that approach, as Jacobs J. did, by arguing that the principle in *Slazengers'* case and *Hussey's* case was confined to autogenous diseases. He acknowledged that the Courts in those cases were intending to state a principle applicable to all diseases. However, he believed that their interpretation was wrong, there being no rule of construction requiring inclusive words to be read as exclusive of any things which would, of themselves, fall within the concept being defined.[14] He believed further that it was open to the High Court to decline to follow *Slazengers'* case and *Hussey's* case, but he was not prepared to recommend that course as a single voice, since to decline was "a question of judicial policy upon which the court as a whole should pronounce."[15]

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12 [1951] AC 13.
13 (1960) 102 CLR 482.
14 *Favelle Mort Ltd* v. *Murray*, note 9 *supra*, 656.
15 *Id.*, 658.

A recent decision of the High Court — *Hockey* v. *Yelland*[16] — appears to reaffirm the *Slazengers'/Hussey* principle. However, that reaffirmation was expressed in surprisingly hesitant terms. Gibbs C.J. reviewed the various authorities, including *Favelle Mort Ltd* v. *Murray*, and expressed his agreement with the conclusion of Stephen and Mason JJ. that *Slazengers'* case and *Hussey's* case had established that diseases could be compensable only under paragraphs (a) or (b) of the section 6 definition (now section 4(b)(i) and (ii)), and thus only if the employment was a contributing factor. But, while he saw:

> no reason to doubt the correctness of the construction placed upon the definition in those cases,... *even if, contrary to my present view, a disease which is not autogenous, but is caused or exacerbated by an external stimulus, can come within the description of injury simpliciter and so within the opening words of the definition*, it is clear that an autogenous disease which happens to manifest itself in the course of employment is only an "injury" if it comes within par. (a) or (b). [emphasis added][17]

Wilson J. was similarly restrained.

> There may remain a question as to whether *Slazengers'* case should be confined to cases of autogenous diseases or applied to all diseases, however induced; different opinions on that question were expressed in *Favelle Mort Ltd* v. *Murray*...[18]

However, he did not feel the need to resolve that question, since he was considering an autogenous disease, which, on any reading of *Slazengers'* case and *Hussey's* case could be compensable only under the inclusive paragraphs. The three remaining judges — Mason, Brennan and Dawson JJ. — agreed with the reasoning of the Chief Justice. Thus the upshot of the case is that all these judges favoured the *Slazengers'/Hussey* principle, but none were prepared to discount the possibility that it may be limited to autogenous diseases. The present state of play would therefore *seem* to be that externally excited diseases must be brought within paragraph (b)(i) of the definition of "injury".

The judgments of Barwick C.J. on Workers' Compensation matters are commendable for their tendency to give workers the widest possible avenues of achieving compensation. However commendable his intention in the *Favelle Mort* case, I would suggest that his interpretation of the statute was erroneous. I believe that the wording of the definition *does* make it necessary for all cases of the contraction of disease to be brought within what is now paragraph (b)(i) of the definition, not simply because *Slazengers'* case and *Hussey's* case said so, but because in saying so they were right. To adopt the interpretation of Barwick C.J. means that we must put a gloss on the statutory definition for which no authority exists, and must read it so that it says:

16 (1985) 59 ALJR 66.
17 *Id*, 71.
18 *Id*, 75.

> 'injury' –
> (a) means personal injury arising out of or in the course of employment;
> (b) includes –
> (i) a disease other than an externally excited disease which is contracted by the worker in the course of employment and to which the employment was a contributing factor...

or

> 'injury' –
> (a) means personal injury arising out of or in the course of employment;
> (b) includes –
> (i) an autogenous or apparently autogenous disease which is contracted by the worker in the course of employment and to which the employment was a contributing factor...

Such a rewording cannot be justified. Moreover, it would create a further problem in that it would have the effect that paragraph (b)(i) is meaningless. For, if a disease is autogenous – if it arises spontaneously – then how can we say that the employment contributes to its contraction? And what is the point of paragraph (b)(i) requiring that the only diseases covered by the paragraph meet criteria which in their very nature such diseases cannot meet? If, on the other hand, we accept that all contraction of disease must be brought within paragraph (b)(i), then that paragraph will allow compensation of externally excited diseases contracted in the course of employment where the employment is a factor contributing to that external excitation – by exposing the worker to the bacillus etc. This point has not yet been clearly acknowledged by the courts. They have denied compensation in particular cases of autogenous diseases on the grounds that the employment was not a contributing factor in the circumstances before them. It has therefore, strictly speaking, been unnecessary to go on to point out that, by definition, the employment could not have contributed to the contraction of the disease in question.

IV. AGGRAVATION ETC. OF A DISEASE AS AN "INJURY"

The difficulties that arise in relation to paragraph (b)(ii) of the definition of "injury" are the result of questions similar to those asked regarding paragraph (b)(i). Can the aggravation etc. of a disease ever be also an injury in the normal sense? If so, does the wording of the statute allow it to be so treated?

Paragraph (b)(ii) was added to the New South Wales Act in 1960 (as paragraph (b)) as a result of the decision in *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Hussey*.[19] But the history of the associated problems goes back much further, and centres around the issue of sudden physiological change occurring in the progress of a non-employment-related disease while

19 Note 13 *supra*.

a worker was in the course of employment or on an employment-related journey. Were these sudden changes compensable as injuries, and — if so — subject to what criteria? Until the 1960 extension of the definition, the only way such events could be compensated was by categorisation as personal injury in the normal sense, since they do not amount to the contraction of a disease, so as to come within the words of what is now paragraph (b)(i).[20] It would seem that, if the rupture of the oesophagus in *Kavanagh* v. *The Commonwealth*[21] could be an injury, so also could the collapse of an artery or a cerebral haemorrhage.

This was in fact the approach taken by the courts. For example, in *Hetherington* v. *Amalgamated Collieries of W.A. Ltd*,[22] the High Court held that a coronory occlusion was compensable under the Western Australian legislation, which referred to "personal injury by accident arising out of or in the course of employment", as being an injury by accident which arose in the course of employment.[23] But if the cause of the ruptured oesophagus in *Kavanagh's* case — the vomiting — did not have to be related to the employment, it would then seem to follow that the cause of the collapse of the artery or coronary occlusion — a pre-existing disease — could also have been unrelated to the employment. However, the courts were not always prepared to go as far as that. The view was taken that:

> a physiological injury or change occurring in the course of a man's employment by reason of the work in which he is engaged at or about that moment is an injury by accident arising out of his employment, and this is so even though the injury or change be occasioned partly, or even mainly, by the progress or development of an existing disease if the work he is doing at or about the moment of the occurrence of the physiological injury or change contributes in any material degree to its occurrence. Moreover, this is none the less true though there may be no evidence of any strain or similar cause other than that arising out of the man's ordinary work.[24]

This principle was adopted by the High Court in *Hetherington's* case[25] where the employment was found to have contributed to the occurrence of the physiological injury or change, in that the coronary occlusion was brought on by the effort of walking in the course of employment.

But why was it necessary that an injury in the ordinary sense had only to be in the course of employment even though its cause was unrelated to the employment, but an injury consisting of a sudden physiological change in the progress of a disease required a causal nexus — "occurring...by reason of the

20 The idea that it could be characterised as the contraction of the disabling stage of a disease, adopted by Jordan C.J. in *Kellaway* v. *Broken Hill South Ltd* (1944) 44 SR (NSW) 210, was effectively rejected by Dixon C.J. in *Hussey's* case note 13 *supra*, 495-6.

21 (1960) 103 CLR 547.

22 (1939) 62 CLR 317.

23 And also out of the employment — being brought on by the effort of walking in the course of the employment duties.

24 *Oates* v. *Earl Fitzwilliam's Collieries Co.* [1939] 2 All ER 498, 502. The passage quoted referring to "an injury by accident arising out of his employment" reflects the conjunctive wording of the U.K. statute where an injury was required to arise out of *and* in the course of employment.

25 Note 22 *supra*, 328 *per* Latham C.J., 334 *per* Dixon J., and referred to, 336 *per* Evatt J.

work in which [the worker] is engaged...."? Wall J. purported to explain that in *Crinion* v. *The Commissioner for Railways*.[26] After acknowledging that sudden physiological change as in *Hetherington's* case was generally accepted as injury by accident, he said:

> [b]ut the general conception of workers' compensation legislation was that industry was to pay for its own casualties. *Ex hypothesi* it was not to be responsible for pathological injury or change which was spontaneous idiopathic or not causally related to the employment.[27]

Yet cases such as *Kavanagh* accepted that industry pay for casualties not causally but only temporarily related to employment. Why should that be acceptable where the injury was (apparently) *not* in the course of a disease but unacceptable where it *was* in the course of a disease?

It is arguable, despite the ostensible adoption of the principle from *Oates* v. *Earl Fitzwilliam's Collieries Co*.[28] quoted above, that Australian courts had not definitively established that a sudden physiological change in the progress of a disease would be compensable only if the employment had contributed to its occurrence. In giving judgment in cases concerning such a sudden event, the Australian courts had understandably referred at length to decisions of the superior British courts. Those decisions had determined entitlement within the wording of a statute which required injury by accident arising out of *and* in the course of employment. The reference in cases such as *Oates* to the event being by reason of the work in which the claimant was engaged can be related to that requirement of "injury...arising out of the employment"; so that it would seem to follow that, where there was no requirement in the wording of the statute of a causal nexus in addition to a temporal one, the physiological change would still qualify as compensable even if it had not occurred "by reason of the work" but only *during* the work. The acceptance by Australian courts of the principles in cases such as *Oates* does not therefore mean necessarily that they adopted a requirement that the employment contribute to the sudden physiological change under the disjunctive wording of Australian statutes, but simply that they accepted the change as "injury by accident" which — under the legislation being considered in the British cases — had to be contributed to by the employment to fulfil the further requirement that it arise out of the employment. Where, as in *Hetherington's* case, they dealt with such a physiological change to which, on the evidence, the employment had contributed, there would be no doubt that it was compensable; but their justification of such a decision by reference to the *Oates* principle did not necessarily entail an implied statement that the sudden physiological change would not have been compensable had there not been contribution from the employment, but simply the view that, if it was compensable under British legislation because

26 [1961] WCR 58.
27 *Id*, 63.
28 Note 24 *supra*.

there was contribution, a fortiori it would be compensable under the disjunctively-worded Australian legislation.

That interpretation is clearly applicable to the decision of Evatt J. in *Hetherington's* case. His Honour noted that the Full Court of Western Australia had held that it had not been proved that the coronary occlusion arose out of the employment. He suggested that this defence was not raised in the Local Court or in the appeal to the Full Court, and went on:

> [m]oreover, as it was conceded that the injury arose "in the course" of the worker's employment, it does not seem to be material that it did not arise "out of" such employment...[29]

A little later, his Honour reiterated that, under the Western Australian legislation, an injury arising in the course of employment was compensable even if it had not arisen out of the employment.

> Obviously the disjunctive form of expression has been used by the legislature so that the area of compensation shall extend beyond that permitted by the English Act.[30]

However, another interpretation of the British cases such as *Oates* is that the contribution by the work in which the claimant was engaged was not simply required by the phrase "arising out of the employment", but was a necessary element of there being a "personal injury by accident", so that, even with a disjunctive phrasing of out of/in the course of, that contribution would have needed to be shown. There are three answers to this suggestion. One is that – even if true – it would no longer have involved the requirement of contribution once the legislation in the various Australian states dropped the reference to injury "by accident" and merely stipulated "personal injury". The second is that it is contrary to the definition of injury *by accident* in the British cases – as set out, for example, by Latham C.J. in *Hetherington*, where he stated that the House of Lords had established (in *Fenton* v. *Thorley and Co. Ltd*[31]) that "injury by accident" meant "accidental injury", an injury which was an unexpected or undesigned mishap.

> Accordingly, since this decision, it has not been necessary to show, first, that something to be described as an accident happened, and secondly, that something else, namely, an injury, was brought about or caused by that accident.[32]

The third answer is that it would have made the phrase "arises out of...the employment" superfluous, and, on accepted canons of construction, such a result must be rejected.

Nevertheless, some portions of the judgments in *Hetherington's* case suggest that such an interpretation was being applied – I refer to those passages where their Honours noted that there could be personal injury by accident without "any unusual effort or incident in the course of work" but when merely normal exertion had contributed to the sudden physiological

29 Note 22 *supra*, 336.
30 *Id.*, 337.
31 [1903] AC 443.
32 Note 22 *supra*, 325.

change.[33] Moreover, the concluding paragraph of the judgment of Latham C.J. appears to accept that contribution by the work was a necessary prerequisite of a "personal injury by accident". His Honour pointed to evidence that the circumstances of the employment had contributed to the death, and said that:

> *it follows* that the deceased suffered personal injury by accident, and, if this element is established, it is not disputed that the injury by accident arose in the course of his employment. [emphasis added][34]

On balance, however, I would suggest that these passages[35] were not intended to imply a requirement of work contribution as an element of "personal injury by accident" even in the absence of a conjunctive reference to the injury arising out of and in the course of employment, and that the comments of Evatt J., quoted earlier, more truly represent the implications of the case.

For that reason, the reference by Wall J. in *Crinion's* case[36] to the remarks of Evatt J. seems to understate the implication made. Wall J. stated that:

> as was *suggested* by Evatt J. in *Hetherington's* case, the disjunctive phrases combined with the idea of injury as propounded in the English decisions *might* make it logically necessary that certain pathological changes unassociated causally with employment were to be covered by the legislation. [emphasis added][37]

On my reading of *Hetherington's* case, Evatt J. was *stating*, not suggesting, that the disjunctive phrasing *would* make it logically necessary that sudden physiological changes would be compensable even if unassociated causally with the employment, provided the temporal nexus was satisfied.

Furthermore, that statement is, I would suggest, the only sensible interpretation to be given to the statute. Before the change to a disjunctive wording — arising out of *or* in the course of employment — personal injury by accident constituted by sudden physiological change in the progress of a disease would have been compensable if it arose out of (that is, was caused by) and arose in the course of employment. There would have been no need to require that the words "personal injury by accident" covered only sudden physiological change which was associated with or related to some incident in

33 *E.g. id.*, 335 *per* Dixon J.

34 *Id.*, 328.

35 *Id.*, 329. See also 329 *per* Rich J.: "the magistrate found that 'death was hastened or contributed to by the conditions encountered by the deceased immediately prior to his death and throughout the day ... the evidence ... supports this finding and conclusion and constitutes an accident within the meaning of the Western Australian Workers' Compensation Act'". And 338 *per* McTiernan J., quoting the magistrate: "I accept the evidence of Drs McCall and Hislop that death was hastened or contributed to by conditions encountered by the deceased, immediately prior to his death and throughout the day, and that death was not due to natural causes. Upon these findings of fact the magistrate, in my opinion, was correct in deciding that the appellant was liable to pay compensation on the ground that the cause of the worker's death was personal injury arising in the course of his employment."

36 Note 26 *supra*.

37 *Id.*, 64.

the course of the work, because the first limb of the "arising..." phrase specifically required that. Otherwise, the phrase would have impliedly read:

> "injury" means personal injury by accident which, in the case of a sudden physiological change in the development of a disease, is associated with or related to some incident of the employment, arising out of and in the course of the employment.

This is obvious nonsense, the middle clause being totally unnecessary. Clearly the change to a disjunctive phraseology was intended to remove the causal nexus indicated by "out of", a nexus which, while the phrase was conjunctive, arose sensibly *only* from those words. How then could the removal of that requirement of causality have had the effect of subsequently importing some (lesser) causal element into the earlier words "personal injury by accident", and how could it do so only where that personal injury by accident was a sudden physiological change in the development of a disease, and not where it was a cut, burn etc.?

It would appear, then, that certain events which could be described as the aggravation etc. of a disease could be injuries in the 'normal sense' which the courts have ascribed to that part of the definition now in section 4 of the New South Wales Act covered by the words "means personal injury".

Moreover, I would suggest that it is easier to accept these events as "injury in the normal sense" than it is to accept as such the contraction of externally excited diseases such as hepatitis, influenza or the viral meningeal encephalitis with which Barwick C.J. was concerned in *Favelle Mort Ltd* v. *Murray*.[38] The further question remains however — does the wording of the statute allow such sudden physiological changes to be treated as personal injury simpliciter? This question needs to be examined in relation to the wording of the statute before the insertion of paragraph (b)(ii), and the wording after paragraph (b)(ii) was included.

V. "SUDDEN PHYSIOLOGICAL CHANGE" BEFORE THE INSERTION OF PARAGRAPH (b)(ii)

In *Crinion's* case, Wall J. described the possibility of a sudden physiological change causally unrelated to the employment being compensable as "of course, repugnant to the notion that industry was to be responsible for its own casualties and no more."[39] He claimed that, as a result, it was sought in *Kellaway* v. *Broken Hill South Ltd*[40] to avoid such an outcome by:

> ruling that in New South Wales a special portion of the definition section relating to a disease contracted in the course of employment and "to which the employment is a contributing factor" [now paragraph (b)(i)] applied to all cases in which disease was involved.[41]

38 Note 14 *supra* and see above discussion accompanying notes 16-27.
39 Note 26 *supra*, 64.
40 Note 20 *supra*.
41 *Crinion's* case, note 26 *supra*, 64.

thus ensuring "by giving effect to the phrase 'to which the employment is a contributing factor' that there would be a causal relationship between the employment and the injury".[42]

It is clear that this was the thrust of the judgment of Jordan C.J. in *Kellaway.* He gave it as his opinion that a disease which was, neither in contraction nor in aggravation, contributed to nor caused by the employment was not an "injury" as defined in the Act.

> The portion of the definition of injury beginning with the words "and includes a disease" was inserted to indicate that injury is no longer, in the Act, to be read, by a somewhat forced construction, in a non-colloquial sense wide enough to include disease generally, but is to include it only when it is "contracted" in the conditions specified.[43]

However, it is just as clear that Roper J. expressly refused to hold definitively that the inclusive paragraphs covered the field of diseases compensable as injuries. It was unnecessary to do so, he argued, since under neither approach could the case before him qualify as an injury within the Act, and therefore "I think that I should not express any opinion as to the purpose or ambit of those words".[44] His Honour rejected the claim that there had been a compensable injury because the injury, "the diseased condition of the worker's heart and arteries", did not arise in the course of employment.[45]

It is difficult to identify clearly the reasoning behind the decision of the third member of the bench — Davidson J. — that the thrombosis was not a compensable injury. Certain passages of his judgment suggest that he considered, like Jordan C.J., that all cases where disease was involved had to be decided by reference to what is now paragraph (b)(i) of the definition. Other passages suggest that he was rejecting as compensable any stage in the progress of a disease which did not involve some occurrence constituting an accident, such as "the presence of circumstances of aggravation"[46] or:

> where the existing disease results in something in the nature of a fainting fit and is promptly succeeded by an injury, from striking in the fall portion of the industrial premises of the place of employment.[47]

These comments appear to be based on that interpretation referred to earlier in the discussion of *Hetherington's* case whereby a contribution to the injury by the employment was an inherent requirement of the phrase "personal injury by accident". This is borne out by the following passage:

> [t]he whole scheme of the legislation has always been directed to compensation for the contraction of industrial diseases and injuries. The overwhelming inference is that some other factor must be added than mere presence in the course of employment on the employer's premises to provide an industrial basis for injury or death caused by an existing disease...the true test appears to be that in the case of an injury depending upon

42 *Ibid.*
43 Note 20 *supra*, 216.
44 *Id.*, 227.
45 *Id.*, 216-217.
46 *Id.*, 221.
47 *Id.*, 222.

> the results succeeding an existing disease, the present statutory definition only permits the recovery of compensation for incapacity caused by injury arising in the course of employment, assuming that injury does not also arise out of the employment, if there has been some happening distinct from the existing disease itself, and extraneous to the employment, in the sense that the happening is inadequate to establish that the injury arose out of the employment, but nevertheless of such a nature that its effect on the existing disease in causing death or other incapacitating injury is only applicable to the worker because at the particular time his duties properly caused or permitted him to be at the spot where the injury resulted.[48]

If this is the basis of the judgment of Davidson J., it would seem to run counter to the implications of the High Court's decision in *Hetherington*,[49] though Davidson J. appeared to see no conflict, characterising *Hetherington*, *Oates*[50] and several other cases as being "really based on reasons directed not towards injury by the disease, but injury in the form of disease plus something else constituting an accident arising out of and in the course of the employment."[51] Jordan C.J. also gave a restrictive interpretation of *Hetherington's* case:

> I do not think that any light is thrown on this question by the case of *Hetherington* v. *Amalgamated Collieries of W.A. Ltd.*.There the question was whether death had been caused by personal injury by accident arising out of or in the course of employment...It was held, applying the principle stated in *Oates'* case, that the widow was entitled to compensation...I do not think that this decision goes beyond *Oates'* case upon which it was based.[52]

My earlier discussion of *Hetherington's* case[53] shows that I would consider the interpretation of that case by Jordan C.J. and Davidson J. to be untenable. Be that as it may, I do not think that *Kellaway's* case[54] can be taken as authority for holding that, on the pre-paragraph (b)(ii) wording, sudden physiological change in the progress of a disease had to be brought within the words "(b) includes (i) a disease which is contracted by the worker in the course of employment...and to which the employment was a contributing factor" to be compensable. Jordan C.J. clearly made such a statement, but I cannot find clear support from Davidson J., and Roper J. refused to make such a ruling.

Accepting for the moment, however, that Wall J. was correct in describing *Kellaway* as "ruling" to that effect, was such a ruling justified by the wording

48 *Id*, 223-224.

49 Note 22 *supra*. See above, discussion acompanying notes 28-38.

50 Note 24 *supra*.

51 Note 20 *supra*, 219-220.

52 *Id*, 214. Yet his Honour admitted that: "[t]he facts would have enabled a finding of personal injury by accident arising out of employment, and Starke J. ... and Dixon J. ... appear to have so found. Latham C.J. ..., Evatt J. ... and McTiernan J. ... appear to have based their decision on a finding of personal injury by accident arising in the course of employment ..." which would seem to infer that the majority *did* go further than *Oates'* case.

53 See above, discussion accompanying notes 24-38.

54 Note 20 *supra*, 210.

of the definition in 1944?[55] I do not believe that it was. The situation was quite different from that in *Slazengers' (Australia) Pty Ltd* v. *Burnett*.[56] When the statute says "injury" means "personal injury...[and] includes a disease which is contracted...", it seems logically to follow that "injury" cannot include a disease contracted in ways other than that specified. That is, the contraction of disease can only be compensated if it fulfils the words of inclusion. But the circumstance being considered in *Kellaway* was not the *contraction* of a disease. If sudden physiological change occurring in the progress of a disease were also to have been treated by application of the words of inclusion, an extensive gloss would have had to be placed on the words of the statute. It would have had to be read as saying: "injury" means "personal injury...and includes the contraction of *or any sudden physiological change in the progress of* a disease which is contracted by the worker in the course of his employment...and to which the employment was contributing factor". Such a gloss is, I believe, unjustified.

The effect ascribed by Wall J. to *Kellaway's* case was that the aggravation etc. of a disease could be compensated provided "the disabling stage of the disease is contracted in the course of employment and its occurrence is contributed to by the employment."[57] This conclusion, which was certainly made by Jordan C.J., was, however, ruled out by the decision of the High Court in *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Hussey*.[58] Dixon C.J. denied that the disabling stage could be separated from the disease itself. He found it:

> impossible to discover any new or separate condition attributable to the employment or the journey so that it can be said that there was "a disease" contracted in the course of the employment or journey. Further, I do not think that the journey can be regarded as a contributing factor to anything that can be regarded as "a disease".[59]

Two results appear to flow necessarily from this finding. The first is that, in conflict with my reading of the effect of the pre-paragraph (b) (ii) wording, no conditions associated with disease, neither initial contraction nor subsequent physiological changes, could be treated as personal injury simpliciter, and therefore compensable provided a purely temporal nexus could be shown. The second is that no aggravation etc. of a disease could be compensated even under the words of inclusion, because it would not amount to *contraction* of a disease.

In two cases after *Slazengers'* case, the High Court had continued to treat a sudden physiological change in the development of a progressive disease as being, or possibly being, a personal injury by accident. These were, however,

55 "[P]ersonal injury arising out of or in the course of the employment, and includes a disease which is contracted by the worker in the course of his employment ... and to which the employment was a contributing factor..."

56 Note 12 *supra*.

57 *Kellaway's* case note 20 *supra*, 216 *per* Jordan C.J.

58 Note 13 *supra*.

59 *Id*, 496.

cases under the Commonwealth Employees' Compensation Act (1930-1956), which did not deal specifically with disease, but merely defined injury as "personal injury by accident arising out of or in the course of employment"; and the distinction which that phraseology required was noted by Dixon C.J.[60] The first of these cases was *Commonwealth* v. *Ockenden*,[61] a decision handed down in 1958. The claimant in this case was suffering from aortic regurgitation resulting from incompetency of the aortic valve. The condition was not in any way causally related to the employment, being the result of an attack of rheumatic fever in childhood. The effect of the condition was that the aortic valve became incapable of excluding the return of blood to the left ventricle. In the course of cross-examination, medical evidence was given that "the process that produces it [the return of blood] is gradual but the actual failure to hold the blood must be sudden".[62]

The Court (Dixon C.J., Fullagar and Taylor JJ.) were at pains to point out that the case of *James Patrick and Co.* v. *Sharpe*,[63] on which the claimant relied, was based on a very different definition section, and, moreover, did not hold that a sudden physiological change was an "injury by accident arising in the course of employment" solely by virtue of the fact that it happened at the place of employment.[64] They stated 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*.[65]

They thus upheld the principle in *Oates'* case[66] as being referable to the position of sudden physiological change in the development of a disease under the formula in the Commonwealth Employees' Compensation Act (1930-1956).[67]

I have argued already that *Hetherington's* case[68] suggests otherwise. The High Court in *Ockenden* rejected that suggestion. They denied that the injury in *Hetherington's* case was found to be compensable because the rupture of the artery happened at the place of employment: "on the contrary, the decision turned upon the fact that there was evidence capable of associating the rupture with an incident of his employment."[69]

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60 *Commonwealth and Commonwealth Bank of Australia* v. *Hornsby* (1961) 34 ALJR 27, 28.
61 (1958) 99 CLR 215.
62 *Id.*, 220.
63 [1955] AC 1.
64 *Ockenden's* case note 61 *supra*, 222-223.
65 *Id.*, 223-224.
66 Note 24 *supra*.
67 Which was, for all purposes relevant to the discussion here, the same as the New South Wales formula.
68 Note 22 *supra*.
69 Note 61 *supra*, 222.

This requirement that the sudden physiological change in the progress of a disease be associated with an incident of the employment has recently been reiterated by the Full Court of the Federal Court. In *Ansett Transport Industries (Operations) Pty Ltd* v. *Srdic*,[70] the respondent had been totally incapacitated for work as a result of a spontaneous haemorrhage of a cerebral vessel. The Court held unanimously that this was an injury simpliciter, in that it was an internal physical injury. It was not the result of any pre-existing disease (though the respondent did suffer a pre-disposing physical condition, namely weakened blood vessels, as to which, the Court said, on the authority of *Commonwealth* v. *Hornsby*,[71] that the employer must take the worker as he/she finds him or her). They relied on *Kavanagh* v. *Commonwealth*[72] for their finding that such an internal physical injury was an injury simpliciter. In doing so, Gallop J. referred to the judgment of Fullagar J. in *Hornsby* as having set out three classes of case — disease contracted through exposure to infection etc. (as in *Favelle Mort Ltd* v. *Murray*),[73] actual internal physical injury (as in *Kavanagh*), and sudden physiological change in the development of a progressive disease. In stressing that events in the second class were compensable if they occurred in the course of employment, without more, because the requirement in *Ockenden* [74] of a contributing incident of employment was limited to events in the third class, the Full Court thus upheld that requirement where the sudden physiological change occurs in the progress of a pre-existing disease.[75]

In *Commonwealth and Commonwealth Bank of Australia* v. *Hornsby* [76] in 1960, the worker suffered a stroke while travelling to work. He was found to have an atheroma in the blood vessels of his brain, and the stroke had resulted in the development of a thrombus in the atheromatous cerebral vessel. The judges treated the case as being one of a sudden physiological change, which (Menzies J. dissenting) they held not compensable because no incident of employment or journey was associated or related. Dixon C.J. defended this way of treating the case, despite the view expressed in argument that *Slazengers'* case[77] and *Hussey's* case[78] governed the interpretation of the Commonwealth Employees' Compensation Act, because:

70 (1982) 66 FLR 41.
71 Note 60 *supra*.
72 Note 21 *supra*.
73 Note 9 *supra* and see above, discussion accompanying notes 7-18.
74 Note 61 *supra*.
75 Note 70 *supra*, 43-44 *per* Toohey J. and 50 *per* Gallop J.
76 Note 60 *supra*.
77 Note 12 *supra*.
78 Note 13 *supra*.

[t]he structure of these provisions and of the material definitions is unlike that of the sections of the Act of New South Wales and 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.[79]

It is not, however, completely clear that, where the statute does specifically refer to disease in the definition of injury, discussion of sudden physiological change as personal injury by accident is prevented by the decision in *Slazengers'* case. Admittedly, the Privy Council had said in that case that:

in the Act the word "injury" (unless the context or subject-matter otherwise indicates or requires) must bear a very artificial meaning in that it is to include a disease which satisfies certain conditions and must, therefore, according to ordinary rules of construction, exclude any other disease.[80]

That statement was taken up by Dixon C.J. in *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Hussey*[81] as showing clearly that the Privy Council had decided that:

s.7(1)(b) does not cover a case of disease unless, within the terms of the definition of the word "injury", it is a disease contracted by the worker in the course of his employment and to which the employment is a contributing factor.[82]

and that "the definition excludes from the meaning of "injury" any other disease than one which satisfies the conditions it expresses."[83] Fullagar J. interpreted the statement from *Slazengers'* case in similar vein, holding that, since *Slazengers'* case, it was "no longer permissible" to treat a physiological change in the course of a disease as an injury simpliciter if contributed to by some exertion by the worker. A death resulting from such physiological change was therefore, he argued, compensable only if the disease which culminated in the change fulfilled the requirements of the words of inclusion (now section 4(b)(i)).[84] Windeyer J. was equally emphatic that incapacity or death resulting from disease was compensable only if the contraction of the disease itself occurred in the course of employment and was contributed to by that employment. This, he said, was made clear by *Slazengers'* case.[85]

Further reading of *Hussey's* case shows, however, that the members of the Court were not totally unanimous on the subject of the effect of the Privy Council decision. Kitto J. referred to the coronary occlusion which caused Hussey's death as having developed on the worker's journey but "not in any way because of the journey". The resultant death might, he suggested, have been compensable under statutes containing no definition of "injury",

[b]ut under a statute which, in a definition of "injury", uses the expression "personal injury" with a context excluding disease from its denotation, such findings obviously do

79 Note 60 *supra*, 28.
80 Note 12 *supra*, 20.
81 Note 13 *supra*.
82 *Id*, 490.
83 *Id*, 492.
84 *Id*, 505.
85 *Id*, 518.

> not go far enough to support a similar conclusion. *Whether the conclusion would be warranted if the Commission were to find, on sufficient evidence, that exertion operating upon a diseased condition of the heart caused specific physiological damage*, and that that damage in its turn resulted in the death, *we have not here to consider.* [emphasis added][86]

Taylor J. argued that the Privy Council had refused compensation in *Slazengers'* case because, on the one hand, there had not been contraction of a disease on the journey which would have activated the second limb of the definition of injury, and, on the other hand, because the occlusion, being "unrelated to any incident of the journey", could not come within the first limb of the definition.[87] In other words, he considered the occlusion had been held not to be a personal injury by accident because it did not fulfil the requirement in *Oates'* case of relation to an incident of the employment (or, in that case, of the journey).

VI. "SUDDEN PHYSIOLOGICAL CHANGE" AFTER THE INSERTION OF PARAGRAPH (b)(ii)

In 1960, the legislation was amended to include what is now paragraph (b)(ii) of the definition of injury. In its 1960 form, it read:

> "injury" means personal injury arising out of or in the course of employment, and includes —
>
> ...
>
> (b) the aggravation, acceleration, exacerbation or deterioration of any disease where the employment was a contributing factor to such aggravation, acceleration, exacerbation or deterioration.

This amendment was in direct response to the decision in *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Hussey* [88] — that no conditions associated with disease could be treated as personal injury simpliciter (because of *Slazengers'* case,[89]) and that no aggravation etc. of a disease could be compensated under the words of inclusion because it would not be a *contraction* of disease.

I have suggested already[90] that I believe the first of these points was not correct, that it remained doubtful after *Slazengers'* case and was not adopted by two of the judges in *Hussey's* case. However, it *was* adopted by the majority of the High Court in *Hussey*, and amendment was therefore indicated.

I have suggested also that *Slazengers'* case was correct in holding that the words of what is now paragraph (b)(i) *do* make the treatment of the contraction of a disease as a personal injury simpliciter illegitimate, even if the disease is externally excited. If the statute says that injury includes a disease

86 *Id*, 509.
87 *Id*, 513.
88 Note 13 *supra*.
89 Note 12 *supra*.
90 See above, discussion accompanying notes 55-59.

contracted in certain circumstances, it must mean that it includes the contraction of a disease *only* if those circumstances exist. It would follow logically that, when the statute says that injury includes the aggravation etc. of a disease in certain circumstances, it includes such aggravation etc. *only* in those circumstances. Thus, it would no longer be possible to treat sudden physiological change in the development of a disease as a personal injury simpliciter unless there can be such a sudden physiological change which is *not* the aggravation etc. of the disease. While it may conceivably be possible that such a sudden physiological change could be said to be not necessarily an *aggravation* or *acceleration* of the disease, in that the condition is in essence no worse but the stage it has reached has merely become externally manifest, the decision of Kitto J. in *Federal Broom Co. Pty Ltd* v. *Semlitch*[91] would mean that such a change was an *exacerbation* of the disease, for his Honour held there, quoting Moffitt J. in the Court below:

> [t]here is an exacerbation of a disease where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms. The word is directed to the individual and the effect of the disease upon him rather than being concerned with the underlying mechanism.[92]

Sudden physiological change would therefore fall to be considered under paragraph (b)(ii) only.

Despite the logical necessity of such a view, it has not been uniformly acted upon by the courts. In *Crinion's* case,[93] the deceased worker suffered a heart attack, brought on by the exertions of his job. He had been suffering advanced disease of the coronary arteries. His widow claimed compensation on the grounds that there had been aggravation etc. of a disease, contributed to by the employment, within the then paragraph (b) (now (b)(ii)). Counsel for the respondent employer argued[94] that a sudden physiological change in the progress of a disease was not an injury even if associated with some incident of the employment, that it was not an injury if brought on by "normal activity at work", and that it was not an injury if the disease would, of itself, have eventually progressed to the same condition.[95] Wall J. noted that this argument was pressed "despite the terms of the recently added paragraph (b) in the definition of 'injury'" (now section 4(b)(ii)).[96] In discussing the claim and these arguments, his Honour made an exhaustive examination of the cases dealing with sudden physiological change in the progress of a disease. But it was only at the very end of his judgment that he gave any consideration to the effect of the insertion of the then paragraph (b)

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91 (1964) 110 CLR 626.

92 *Id*, 634.

93 Note 26 *supra*.

94 Though Wall J. described the argument as "containing thought processes which are inchoate". *Id*, 61.

95 *Ibid*.

96 *Ibid*.

or to the application to it of the principle in *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Hussey*.[97]

His Honour referred to a passage from the judgment of Kitto and Menzies JJ. in *Fisher* v. *Hebburn* [98] as being something which "[f]inally...should perhaps be pointed out".[99] That passage referred to "general propositions" that, in relation to the New South Wales legislation, a disease which did not fulfil the requirements of the inclusive paragraph — contraction in the course of employment to which the employment was a contributing factor — was not compensable.[100] Wall J. commented:

> [w]hether this means that the learned judges here adopted the full implications of *Slazengers'* case in the same manner as was done by Dixon C.J. and Fullagar, J. in *Hussey's* case is not clear; and a question may arise as to whether there is any significance in the absence of any mention of the recent amendment of the definition of injury.[101]

His Honour returned to the "purported requirement" of "specific physiological change" resulting, on his analysis, from resistance to compensating the effects "of so-called community diseases such as cardiac disease" and opined that:

> it is not clear whether this is confined to the necessity of proof of injury by accident or injury *simpliciter*. *Hussey's* case contains passages in the judgment of Kitto and Windeyer, JJ. suggesting that the development of disease to a critical incapacitating or mortal state even where effort contributes to its development may not be "injury"; and this even in the sense of the new definition added by the recent amendment.[102]

He denied that such specific change is impliedly required by the Act, and then made an award for the claimant, on the grounds that there had either been injury simpliciter or, at the least, an employment-contributed aggravation of a disease:

> [*e*]*ven if it is to be held that it is no longer possible in New South Wales to postulate that there was "injury" within the first part of the definition of injury*, it seems to me that the case is one in which the employment has brought on a worsening of the worker's cardiac condition which resulted in death and thus clearly comes within the definition of injury recently added by legislative amendment. [emphasis added][103]

The suggestion that it could conceivably be held, after *Hussey's* case and the passage of what is now paragraph (b)(ii), that it was still possible to postulate personal injury simpliciter in such circumstances is a little surprising, particularly given the demonstrated depth of the learned judge's grasp of the whole history of the matter.

Wall J. had been the judge of first instance in *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Hussey*,[104] and had found for the claimant. Perhaps he had a lingering attachment to the principles which led him to make that

97 Note 13 *supra*.
98 [1960] WCR 185.
99 *Crinion's* case note 26 *supra*, 80.
100 *Fisher's* case note 98 *supra*, 191.
101 *Crinion's* case note 26 *supra*, 80.
102 *Ibid.*
103 *Id.*, 81.
104 Note 13 *supra*.

award. But it is not only judges of the Compensation Commission[105] who have found it "possible to postulate" that sudden physiological change can still be treated as personal injury simpliciter. Judges of the High Court have done so too. In 1964, in the case of *Federal Broom Co. Pty Ltd* v. *Semlitch*,[106] two members of the Court, Taylor and Windeyer JJ., appear to have accepted that an event amounting to the aggravation etc. of a disease within paragraph (b)(ii) could, in appropriate circumstances, be treated also as a personal injury simpliciter. They were not in that case referring to a sudden physiological change in the course of a disease, for the claimant suffered from paranoid schizophrenia, and the particular injury to which the claim related was functional overlay in the form of a new delusion resulting from a physical injury at work. However, the doubts expressed as to the exclusivity of paragraph (b)(ii) have obvious relevance to the sudden physiological changes previously discussed. Taylor J. referred to the question whether the claim for compensation could be upheld on the basis of an injury simpliciter rather than on the basis of aggravation etc. of a disease. He suggested that the Workers' Compensation Commission had thought themselves precluded from treating the case as injury simpliciter by the decision in *Amalgamated Wireless (A/sia) Ltd* v. *Philpott*,[107] but that *Philpott's* case could have succeeded only, if at all, on the basis of aggravation etc.

> In the present case, however, there was evidence of a physical injury to the respondent and there was evidence capable of supporting the inference that it had resulted in incapacity...In these circumstances, it would have been open to the Commission to consider whether or not the respondent's present incapacity was, in fact, caused or contributed to in any material sense by such a physical injury...[108]

Windeyer J. was of the opinion that the new delusion could be seen as an aggravation of a functional mental disorder that was a disease within the meaning of the Act, and that the employment had contributed to that aggravation etc, and on that basis was prepared to dismiss the company's appeal. But he referred also to the suggestion, during the hearing of the appeal, that the claimant's incapacity resulted from the original physical injury. He acknowledged that it had been:

> common in workers' compensation cases to treat as an incapacity resulting from a physical injury the total disability that follows from it whether it be attributable only to the anatomical damage or to associated psychological and neurasthenic factors. The applicant's case might therefore have been put as follows. A minor bodily injury suffered by the applicant, a person of unstable mentality, had serious psychological consequences; and thus it resulted in incapacity for work. So put, the case would not depend upon the statutory provisions concerning disease but on the general word "injury".[109]

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105 As the relevant New South Wales tribunal was then known.
106 Note 91 *supra*.
107 (1963) 110 CLR 617.
108 Note 91 *supra*, 635.
109 *Id*, 642.

Windeyer J. concluded:

> [t]he condition of the applicant could be regarded as the morbid psychological consequence of a small physical hurt or as an aggravation, exacerbation or deterioration of a morbid psychological state resulting from a small physical hurt. *Either way was open.* [emphasis added][110]

Clearly the situation in this case was very different from that of sudden physiological changes such as coronary occlusions. In this case, there was a distinct physical injury, in its ordinary sense — muscular strain caused by manual handling of a teachest, and there was a psychological consequence which was capable of being presented as an exacerbation of a pre-existing mental disease. In the case of the sudden physiological change in the progress of a disease, that change is the only possible constituent of an injury in the normal sense. This distinction may have been the explanation of the comment by Taylor J. that the case was not covered by the decision in *Amalgamated Wireless (A/sia) Ltd* v. *Philpott*,[111] a case of a coronary occlusion contributed to by the employment. There is, however, another explanation for the statement of Taylor J. that the claim in *Philpott's* case was one which was supportable only with reference to the then paragraph (b) of the definition of the injury. His Honour may have been basing himself upon the purported requirement of a *specific* physiological change, referred to by Wall J. in *Crinion's* case.[112] However these cryptic judgments are to be interpreted, it is undeniable that these two judges were prepared to accept that a mental condition which was the direct consequence of a physical injury and therefore (at least part of) a personal injury simpliciter could be at the same time the aggravation etc. of a disease within paragraph (b)(ii). I would suggest that there is no relevant distinction between such a finding and the view that a sudden physiological change in the progress of a disease can be both a personal injury simpliciter and the aggravation etc. of the disease, nor did the High Court in either *Philpott* or *Semlitch* suggest there was.

The equivocal effect of paragraph (b)(ii), when read in the light of *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Hussey*,[113] is even more obvious in the judgments of the members of the High Court in *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Hankinson*.[114] Hankinson was suffering from a spinal infection which had severely weakened two vertebrae. The effort of lifting a bale of paper caused the two vertebrae to collapse. As a result, the infection spread and caused paralysis. There was evidence that, even without the work-related collapse of the two vertebrae, the infection would eventually have produced the same condition. Williams J., in the Workers' Compensation Commission, awarded compensation on the grounds that there had been aggravation etc. of a disease. The Court of

110 *Id*, 643.
111 Note 107 *supra*.
112 Note 26 *supra*, 80.
113 Note 13 *supra*.
114 (1967) 117 CLR 19.

Appeal upheld the award, but argued that the occurrence was capable of being regarded as an injury simpliciter *or* as an aggravation etc. of the spinal disease. The High Court also upheld the award. All members of the High Court said that the occurrence was properly classed as an injury simpliciter. C.P. Mills said of the High Court decision:

> that finding was enough to dispose of the case, but if the several judgments are read strictly, they seem to leave undecided the question whether the one occurrence and its sequelae can be classed at the one time as both injury, and aggravation etc. of a disease.[115]

The reason why the judgments leave that matter "undecided" is that it is not completely clear whether the members of the High Court were saying "it is *not* an aggravation at all, it is *simply* an injury simpliciter", or whether they were saying that it was *both* an injury simpliciter *and* an aggravation, and could be treated for the purposes of a compensation claim as one or the other.

Barwick C.J. seems to have been arguing the former point, referring to the facts as not having been "rightly analysed" as aggravation of a disease, but "rather" as having amounted to injury simpliciter,[116] and to the evidence not supporting the view that there was aggravation.

> [T]hough the respondent did not receive an injury, being the aggravation, acceleration, exacerbation or deterioration of a disease, he did receive an injury, namely, the collapse of the vertebrae of his spine, which caused total and permanent incapacity.[117]

The remarks of Menzies J. and Taylor and Owen JJ. (with whom Kitto J. agreed) are more ambiguous, and suggest that their Honours were accepting the possibility of alternative grounds of entitlement. Taylor J. said:

> [t]o my mind, this was not the *mere* aggravation, acceleration, exacerbation or deterioration of an existing disease; it was a personal injury of a physical nature...[emphasis added][118]

Menzies J. contrasted cases where "the only injury" was the aggravation etc. of a disease[119] with the case before him, where the worker's condition could be classified as an injury "in the ordinary sense *without resort* to the provisions" specifically bringing aggravation etc. of disease within the definition of injury [emphasis added].[120]

Owen was unable to understand:

> why the learned Commissioner *found it necessary to go to the extended meaning of the word "injury"*. The collapse of the vertebrae was *as much an injury* in the ordinary sense of the word as would have been the fracture of a bone in the respondent's leg, a bone which had been weakened or "honeycombed", as one doctor described it, by some infective process. But the fact that his Honour did apply the second limb of the definition does not, in the light of the evidence which he accepted, prevent the respondent from holding the award made in his favour. [emphasis added][121]

115 Note 4 *supra*, 101.
116 Note 114 *supra*, 23.
117 *Id*, 28.
118 *Id*, 31.
119 *Id*, 32.
120 *Id*, 33.
121 *Id*, 34.

The case of *Commonwealth of Australia* v. *Whillock*,[122] while apparently an authority against a sudden physical change being treated as injury simpliciter rather than as aggravation of the pre-existing disease, is in fact of more limited application, because of the wording of the statute under which the claim was made. The claimant was the widow of a member of the Royal Australian Navy, and the claim was therefore made under the Compensation (Commonwealth Government Employees) Act 1971. Section 27(1) of that Act obligates the Commonwealth to pay compensation in respect of an injury arising out of or in the course of employment. "Injury" is defined in section 5 as

> any physical or mental injury and includes the aggravation, acceleration or recurrence of any physical or mental injury, but subject to s.29 does not include a disease or the aggravation, acceleration or recurrence of a disease.

Section 29 is to the effect that where

> an employee contracts a disease or suffers an aggravation, acceleration or recurrence of a disease; and any employment of the employee by the Commonwealth was a contributing factor to the contraction, aggravation, acceleration or recurrence...whether or not the disease was contracted or the aggravation, acceleration or recurrence was suffered in the course of that employment...

and the contraction, or aggravation, acceleration or recurrence, causes death, then that contraction or aggravation etc. is deemed to be a compensable injury.

This formulation is thus very different from that in, for example, the New South Wales Act, where injury means personal injury *and includes* the contraction or aggravation etc. of disease, provided certain circumstances are established. To use the words of Barwick C.J. in *Favelle Mort Ltd* v. *Murray*,[123] in the New South Wales formulation, inclusive words could be argued to be not necessarily exclusive.[124] But in the Commonwealth formulation, the words are exclusive only — injury *does not include* the contraction or aggravation etc. of disease, *unless* the contraction or aggravation etc. fulfils the condition, in section 29, of contribution by the employment.

In the absence of a clear and binding pronouncement that an aggravation etc. of a disease *must* be treated by the application of paragraph (b)(ii), even where it amounts to personal injury simpliciter, it therefore remains open to the courts to deal with sudden physiological change in the development of a progressive disease under paragraph (a) of the definition. But it has been demonstrated already that the criteria to be applied in such a case are uncertain. Is it sufficient to show that there was a sudden physiological change which occurred in the course of employment, or does the phrase "personal injury" require that the change be associated with or related to some incident of the employment? I argued earlier that, before 1960, the requirement of such an association could be upheld only by a nonsensical gloss on the words

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122 (1983) 48 ALR 433.

123 Note 9 *supra*, 656.

124 See above, discussion accompanying notes 14-18.

of the statute. That remains true, but — at the same time — to allow recovery without association with the employment, now that paragraph (b)(ii) is in place, would create a new anomaly. Aggravation of a disease which is in the nature of a sudden physiological change in the development of the disease would be compensable where there is a temporal nexus only with the employment. Aggravation that does not involve sudden physiological change would be compensable only where there is a causal nexus.

VII. IMPLICATIONS FOR THE OPERATION OF THE 'REFORMED' ACT

The purpose of the discussion above is not to settle what the definition section of the New South Wales Act really means, nor to determine whether the courts have reached the 'right' or 'wrong' decisions. The point which emerges most clearly is that the statutory definitions and the judicial interpretations thereof are a minefield, where even the judges of the Privy Council and the High Court may sometimes make the wrong step. How then could a tribunal without extensive legal experience be expected to make coherent and *consistent*[125] decisions? Admittedly, section 132(1) of the new Act provides that Compensation Commissioners may refer medical disputes to a medical panel, and section 131(4) and (5) provide that the medical panel shall give a certificate as to the worker's condition or the worker's fitness for employment, such certificate to be conclusive evidence of the worker's condition (though not of the fitness of the worker for employment). But a certificate as to a worker's condition is not a decision that the condition certified falls within paragraphs (a), (b)(i) or (b)(ii) of the definition in section 4.

The issues discussed in Parts II to VI above are not simply medical issues. They concern legal categories created and defined in terms of the *legal* version of medical conditions. 'Injury', 'disease' and 'aggravation etc. of disease', as dealt with in these cases, are not medical concepts but legal ones. Obviously, medically qualified persons can establish whether a worker has a disabling physical or mental condition. Even under the 1926 Act, that issue was decided by medical evidence. What such persons cannot do is to determine to what legal categories the statutes and the cases require those disabling conditions to be assigned, and what criteria they must fulfil in order to be compensable within those various legal categories.

It is for the Commissioner hearing the claim to decide these issues. But the scheme of the 1987 Act and its philosophy involves the use of non-legal personnel as Commissioners. There is no requirement that Commissioners have legal training. Persons are, by section 240(2) (reproducing section 42J

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125 For, however "just" an individual decision may be on its particular facts, our judicial system requires consistency between decisions as a further requirement of "justice", a view which, I believe, accords with the basic notions of "fairness" in our society.

of the 1926 Act), qualified to be appointed as Commissioners if they have had "experience at a high level in industry, commerce, industrial relations or the service of a government or an authority of a government" or if they have

> not less than 5 years previously, obtained a degree of a university or an educational qualification of a similar standard, after studies in the field of law, economics or industrial relations or some other field of study considered by the Governor to have substantial relevance to the duties of a commissioner.

Not even the Senior Workers' Compensation Commissioner need have legal training. By section 241, the Governor may select *any* one of the persons appointed as Commissioners to be the Senior Commissioner. It seems doubtful that persons without legal training, let alone extensive legal experience, would be able to decide legal issues of the complexity and uncertainty demonstrated in the discussion above.

Fortunately, decision of these matters by the Commisioners is not conclusive, since they are questions *of law*, and thus may be appealed to the Compensation Court under section 110(1), or referred for the opinion of the Compensation Court under section 111(1). But if one aim of the reforms is to streamline the system by 'delegalising' the hearing of contested claims for compensation, that aim is unlikely to be achieved while the Act still rests so heavily on complex legalities, which will inevitably result in constant appeals and references to the Compensation Court.

In order to be able to replace a claims procedure based on court hearings with a procedure administered by non-legal personnel, the essential prerequisite is a statute which can be applied by non-legal personnel. Arguably, that is impossible — 'plain language' insurance policies, for example, have been a wonderful source of work for lawyers. But without such a change to the entitlement provisions of Workers' Compensation legislation, change to the court structure will be pointless.

If an attempt to simplify entitlement were to be made, I would suggest that one of two alternative approaches must be taken. The first possibility is to return to the conjunctive requirement that *all* injury — whether personal injury simpliciter, contraction of a disease, or aggravation etc. of a disease — must both arise in the course of employment and be contributed to by the employment. I do not think the stronger causal nexus of 'arising out of the employment' is necessary. What *is* essential to this approach is that the same criteria apply in all cases. The second possibility is the mirror image of the first: all injury — personal injury simpliciter, contraction of disease, aggravation etc. of disease — is compensable if it either arises in the course of or is contributed to by the employment. Again the essential characteristic is uniformity of criteria. The obvious point behind these suggestions is that the infinite and intricate variety of situations with differing criteria for compensability which exist under the current legislation must be eliminated before non-legal adjudication is feasible.

Clearly, the decision as to which of these two approaches should be taken would be informed by considerations of social and political philosophy. There are weighty arguments which can be made in favour of either, but it is not the

purpose of this paper to canvass them. The process of decision should be undertaken, however, in that spirit of benevolent honesty which was so evident in the judgment of Jordan C.J. in *Salisbury* v. *Australian Iron and Steel* where His Honour said:

> [t]he object of the Act is to benefit the community by preventing workers and their dependants, who constitute the great majority of the community, from suffering destitution through the breadwinner becoming incapacitated for work ... Since ... when a worker is incapacitated, his needs and those of his dependants are just as imperative whether the incapacity arises from his employment or not, it is natural that there should be a constant struggle on the part of workers to obtain and retain sorely needed relief in cases in which incapacity is not, or is no longer, associated with an employment injury, and equally natural that there should be a struggle on the part of employers to dissociate incapacity from employment wherever possible. The tendency of recent authorities has been to uphold the claims of workers to the furthest limits that the language of the Acts will permit.[126]

Subordinately, the philosophical choice of standards of entitlement is affected by questions of cost — the cost of the whole system, and the cost of various aspects, such as the nature of the tribunal structure. Reform of aspects of the system such as the nature of tribunals in the interest of cost benefit through reduced premiums and so on, the interest motivating the 1987 reform, cannot sensibly be undertaken without reform of the basic provisions relating to entitlement, and this more basic reform requires a review of, and decisions concerning, the fundamental philosophical premises on which the system is to be based.

126 (1944) 44 SR (NSW) 157, 160-161.