STATUTORY AMENDMENT TO THE WORKERS' COMPENSATION ACT OF WESTERN AUSTRALIA.

Section 7 (1) of the Workers' Compensation Act of Western Australia has statutory equivalents in all Australian States, and is as follows:—

> "If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions, is caused to a worker, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule."

The Western Australian Act was assented to in December 1912, and it came into operation in the following February. The legislature was quick to amend the Act during the early years of its operation, and as early as 1924 it incorporated into the phrase "arising out of and in the course of the employment" the disjunctive form of expression "or". Attention was drawn to the change in *Hetherington v. Amalgamated Collieries of W.A. Ltd.*,[1] in particular by Evatt J. who said:—[2]

> "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. Where it is necessary, this important distinction will require further consideration. . ."

Strangely enough, it was not until the decision in *Kavanagh v. The Commonwealth*[3] that recognition was given to the extension of the area of compensation so early appreciated by Evatt J.

As Windeyer J. has pointed out in a number of recent decisions[4] successive statutory amendments and a changing emphasis in judicial decisions have altered the assumptions on which the law of workers' compensation was originally based.

Statutory amendments to the Workers' Compensation Act have however been less frequent in Western Australia in recent years than in the other Australian States, and it was not until December 1964 that an amendment to section 7 (1) of the Western Australian Act extended the area of compensation to allow compensation to be paid

1 (1939) 62 C.L.R. 317.
2 *Ibid.*, at 337.
3 (1959-60) 103 C.L.R. 547.
4 See *e.g.*, Landers v. Dawson, (1964) 38 A.L.J.R. 61.

to workmen who suffer personal injury whilst travelling to and from work.

One would have thought that to extend the area of compensation to such cases the legislature need only have enacted that an injury to a worker should be deemed to have arisen out of or in the course of his employment if the injury occurred while the worker was travelling between his place of residence and place of work.[5] The decision in *The Commonwealth v. Hornsby*[6] clearly precludes any claims by dependants of a deceased worker who dies going to or from work as a result solely of the natural progression of a pre-existing morbid condition, and it would seem quite unnecessary to attempt to legislate to the same effect.

The Western Australian legislature apparently thought otherwise however and in the 1964 amendment to the Workers' Compensation Act the legislature seems, amongst other things, to have attempted to express in statutory form the decision reached in *Hornsby's Case*. The section reads as follows:—

> (1a) Without limiting the generality of [section 7 (1)], but subject to the succeeding provisions, of this section, a worker is deemed to have suffered personal injury by accident arising out of or in the course of his employment, where—
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> (a) the worker suffers a personal injury without any substantial default or wilful act, on his part, while he is travelling on any regular, daily or periodic journey—
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> (i) between his place of residence and place of employment or place of pick-up; or
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> (ii) between his place of residence or place of employment and any trade, technical or other training school that he is required, by the terms of his employment or as an apprentice, to attend; and
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> (b) the injury arises out of, and in the course of the journey, unless the injury is incurred during, or after, any substantial interruption of, or substantial deviation from, the journey, made for any reason un-connected with his employment or with his attendance at the trade, technical or other training school.
>
> (1b) For the purposes of subsection (1a) of this section and notwithstanding any other provision of this Act, any injury to which a disease is a contributing factor, and any aggrava-

[5] *Cf.* s. 8 (2) of the Workers' Compensation Act (Vic.).
[6] (1959-60) 103 C.L.R. 588.

tion, acceleration, exacerbation, recurrence or recrudescence of any such injury or of any pre-existing disease, is not, whether of sudden occurrence or of gradual development, a personal injury by accident.

Although the amendment occupies a page and a half of the statute book, it is difficult to see what benefits are to be derived by workmen who travel on a regular journey to and from work. It would certainly be incorrect to say as a general statement that the area of workers' compensation in Western Australia has been extended to cover personal injury suffered by a worker travelling to and from work.

The first barrier to a claim made under the new provision is that the personal injury suffered must have been without any substantial default or wilful act on the part of the worker. It is of course reasonable to assume that compensation will not extend to a worker who has caused his injury by his own wilful act, but this is in any event covered in section 7 (2) (c) of the Western Australian Act, which provides that "if it is proved that the injury to a worker is attributable to the serious and wilful misconduct of that worker, any compensation claimed in respect of that injury shall be disallowed."

More restrictive from the worker's point of view is the requirement that the injury be caused without any "substantial default" on his part. Presumably a worker who drives his own vehicle to or from work and who is involved in a motor accident during such a journey must ensure that he has not been contributorily negligent to any greater extent than fifty per cent (or perhaps less) if he is to make a successful claim under the Act. The realities of the situation are of course that a motorist will normally pursue a claim for damages at common law regardless of whether the accident occurred on the way to or home from work. But what of the (perhaps untypical) motorist who has suffered only minor bodily injuries but incurred considerable loss of earnings, hospital and medical expenses and who feels that his contributory negligence will preclude the recovering of a large proportion of his special damages at common law.

What is a "substantial default" such as to preclude this motorist-worker from recovering compensation under the Workers' Compensation Act? Is it more than fifty per cent contributory negligence, or is it perhaps less than fifty per cent?

The second limitation on recovery is that paragraph (b) of subsection (1a) requires the injury to have arisen *out of and in the course of the journey*. The use of the conjunctive form of expression clearly

imports the necessity of a causal connection between the injury and the journey.[7] This in turn means that some external event has to happen during the course of the journey which causes the injury: compensation is clearly irrecoverable where a worker simply collapses after work on a home bound bus, whether the collapse is a result solely of the natural progression of a pre-existing morbid condition[8] or whether it is caused by a sudden physiological change of the type suffered by the worker in *Kavanagh's Case.*

If on the other hand the worker collapsed with shock as a result of a particularly hair-raising piece of driving on the part of the bus driver, compensation would presumably be recoverable on the basis that the collapse was an injury which arose out of and in the course of the journey. Inconsistencies and anomalies have been introduced into workers' compensation law from time to time very largely because of the changes in policy and purpose which led originally to the system of workers' compensation.[9] The 1964 amendment to the Western Australian Act purports on the one hand to extend the area of compensation to allow recovery for incapacity resulting from injury suffered whilst going to or from work, but it is subject to such extraordinary qualifications that some odd and incongruous results can be seen to follow from it.

The decision in *Kavanagh's Case* might broadly be said to be that a worker will recover compensation whenever he suffers injury at work which is not a result solely of the natural progression of a pre-existing morbid condition. Thus in the particular circumstances of *Kavanagh's Case* the worker's dependants were able to recover compensation for his death which was brought about by broncho-pneumonia and heart failure supervening upon a ruptured oesophagus. Kavanagh had merely been standing in the vicinity of his work-desk when he ruptured his oesophagus due to a sudden and unexpected fit of vomiting. The vomiting itself was not contributed to by anything Kavanagh did at work; "It might have occurred just as well at any other time, at any other place and in any other immediate external conditions."[10]

Given the decision in *Kavanagh's Case* it is odd that the Western Australian legislature should at once extend the area of workers' com-

7 See Kavanagh v. The Commonwealth, (1959-60) 103 C.L.R. 547.
8 As in The Commonwealth v. Hornsby, (1959-60) 103 C.L.R. 588.
9 See Weston v. Great Boulder Gold Mines, (1964) 38 A.L.J.R. 208, at 209 *per* Windeyer J.
10 Kavanagh v. The Commonwealth, (1969-60) 103 C.L.R. 547, at 554 *per* Dixon C.J.

pensation to cover injuries suffered whilst travelling to and from work and yet at the same time so severely limit the circumstances of recovery as to require injury received in the course of a daily journey to or from work to arise out of *and* in the course of the journey. Had Kavanagh suffered his unexpected and inexplicable fit of vomiting whilst travelling to or from work in Western Australia after December 1964 his dependents would have been unable to recover compensation because of the impossibility of showing that the injury suffered arose out of the journey.

Subsection (1b) provides a further substantial qualification to the general policy of the 1964 amendment. Whereas *Hornsby's Case* decided that compensation should not be recovered by the dependants of a deceased worker who died going to or from work solely as a result of the natural progression of a pre-existing morbid condition, subsection (1b) of the 1964 amendment precludes recovery not only in this case, but also where a worker suffers an injury "to which a disease is a contributory factor". The subsection also provides that any aggravation, acceleration, exacerbation, recurrence or recrudescence of any such injury or of any pre-existing disease, is not, whether of sudden occurrences or of gradual development, a personal injury by accident."

It has been a well settled principle of Workers' Compensation law since the decision in *Clover, Clayton & Co. v. Hughes*[11] that once it is proved an injury was caused as a result of some incident of work the injury is no less accidental by virtue of the fact that at the time of the occurrence the worker was suffering from a bodily condition making him more susceptible to injury. The decision in *Clover, Clayton & Co. v. Hughes* was given at a time when it was necessary to show some causal connection between the work done and the injury suffered, but even with the amendment to the wording of section 7 (1) it is clear that the employer is bound to take the worker as he finds him, so that the existence of a pre-existing disease will not prevent recovery of compensation as long as the injury suffered is not the sole and inevitable consequence of the ravages of the disease. The 1964 amendment has cut through this principle however to produce a result that a worker travelling to or from work will not recover compensation where he suffers an injury which is an aggravation of a pre-existing disease, notwithstanding that the injury might have arisen out of the journey itself.

11 [1910] A.C. 242.

In *Kavanagh v. The Commonwealth,* Windeyer J. complained of the majority view in that case that it would lead to a position which was not "compensation for the injuries that befall men because they are workers in industry, but rather an incomplete and erratic form of general health, accident and life insurance".[12] A more accurate description of the Western Australian Act as it now stands could hardly be given.

G. P. MILLER.*

12 (1959-60) 103 C.L.R. 547, at 586.

* *LL.B. (Western Australia); Barrister and Solicitor of the Supreme Court of Western Australia.*