

Kim Leanne Bailey, B.A

*Law 511- Legal Research
Paper*

LLB - Macquarie University.

Semester Two, 1996.

***“No Fault or No Rights? A Critical Consideration of the
The New South Wales Workers Compensation Journey
Provisions”.***

Introduction

“The provisions of section 10 (1A) of the *Workers Compensation Act 1987*, seem so contrary to ordinary notions of justice that the mind of all but the most hardened observer would be offended by its apparent operation. I cannot call to mind a provision in the legislation of this state which seems more unjust in its purport . It is all the more remarkable that the subsection was introduced into the Act as recently as 1989.” - Kirby P.¹

From the inception of Workers' Compensation in New South Wales in 1926, there has been provision made for compensating those workers who are injured on their way to or from work. The “journey claim”, has always been an extremely controversial entitlement, arousing both passionate support and ardent opposition from politicians, the judiciary, employers and unions. In 1989, under the Liberal Party, a worker's right to journey claims was significantly qualified by the insertion of “fault”. That is, the worker would be entitled to claim compensation for a commuting injury provided it was not proven that the accident was “partly or wholly” his/her fault.

The entire system of journey claims is predicated on the assumption that there are separate spheres of responsibility - the public or “work” sphere, in which employers are responsible for the well being and compensation of their workers, and the “private”, where this responsibility ends. The problem with journey claims is that these injuries straddle both spheres, and do not fall comfortably into one or the other. The decision to deem a journey as “within the employer's responsibility”, is therefore a policy choice - and it is a choice that goes to the heart of the question of who should shoulder the burden of injured workers in society.

In 1989 the Liberal Government of this state made such a decision, and enacted section 10 (1A)² to firmly demarcate the sphere of employer responsibility to the workplace, and to those journey

¹*Aardvark Security Services v Ruszkowski* (CA, unreported. 19.3.93) .

²I refer the reader to annexure one.

accidents that could be considered “an act of God”. In doing so the Government made a policy decision that was based firmly in liberal ideology, and firmly in favour of employers and the economic “bottom line”. Yet perhaps what Parliament has not accounted for is the way in which law, and indeed social policy, can be changed or softened through the powers of judicial interpretation and discretion. In what I can only describe as a “muted protest”, the judiciary of New South Wales has reacted violently to the inclusion of fault within a system of workers’ compensation, and through the adoption of the negligent standard, has circumvented the harshness of this legislation by enabling workers who are “at fault” to succeed in their claims for compensation.

The recent judicial history of section 10 (1A) raises questions that go to the very heart of social policy. The whole issue of fault and the artificial construction of “employer’s realm of responsibility” really asks us to consider what should our workers compensation legislation be attempting to achieve, and whose interests does the present system serve?

Historical Background on the Shaping of the Present Provisions

Throughout its legislative history, the New South Wales journey provisions in the Workers Compensation Acts (1926) (1951) (1987) have adopted and then abandoned “fault” as a disqualifying factor that entitled workers to claim. The legislative history can be seen to be very much a question of policy, which has vacillated between the competing ideals of social justice and “economic sustainability” - in balancing the economic bottom line. This has been largely reflected in successive conservative governments adopting fault provisions, and successive Labor Governments abandoning “fault” to cover workers on journeys.

The provision of cover for workers on journeys was first incorporated into New South Wales legislation in 1926 by the then Lang Government.³ This was largely done to follow English Common Law developments and the fact that the common law was not adequately providing

³I have drawn this historical account largely from the Butterworths Commentary that is provided with the loose leaf service of the New South Wales Workers Compensation Act (1987). Service 20, pp1392 - 1393.1.

for workers injured on journeys - it was difficult to prove that injury arose "out of the course of employment" - which was the only avenue of recourse available. Although workers were covered on journeys under this provision, the Act did stipulate that if the accident was due to the worker's "own personal default or wilful act", he/she would not be entitled to compensation. As the Act's commentary states, "this entitlement was a controversial matter then, and still is."

In 1929, the journey entitlements were removed altogether when the government changed, and the economy of Australia sank into decline with the Great Depression. With the onset of World War Two, and a commensurate rise in the amount of shift work, as well as travelling to and from work at night (and thus the increase risk of injury) ⁴the journey provisions were once again adopted - but only as a war time measure. This provision was only to apply for a "sunset period" of six months after the war. However due to yet another change in the Government, the "sunset clause" was repealed leaving the journey entitlements in the Act, again adopting the qualifier that a worker was entitled providing there had not been "gross misconduct or wilful act". Fault as a qualifying factor on the entitlement for compensation was incorporated in the Act from 1926 - 1929, and then again from 1942 - 1951.

Initially, the proposal was to abolish the Journey provisions altogether, which came from Premier Nick Greiner's cabinet.⁵ This was supposedly in response to the WorkCover Review Committee, which in 1989 had independently looked into the economic efficiency of the New South Wales Workers' Compensation system, with view to reform. The Committee had received a total of 128 submissions from interested groups, of which only 28 dealt with reform for journey claims. Whilst it was not disclosed who wrote these submissions or whether they were in favour or opposed, the Committee's findings did **not** recommend the abolition of journey claims. Yet it was precisely in response to this inquiry that the Government justified its actions in introducing the 1989 amendment to incorporate fault. The August bill, which was part of a package of reforms to the Workers Compensation Act (1987) New South Wales abolished journey claims as an entitlement altogether. They justified this both economically and in terms of good Liberal rhetoric - that journeys could not be considered to arise "in the course of employment", and that the employer

⁴This apparently was also due to the "brown outs" that used to occur during the war. The streets and houses were temporarily blackened with all lights out as a matter of emergency in the war. The logic was that this made journeys for workers more dangerous than usual. As a matter of public policy then, the state stepped in to permit compensation.

⁵Greiner's Parents were at that stage part owners of White River Timber Mills and had undoubtedly impacted on Greiner the employer's view of workers compensation.

should not have to “shoulder the cost” of workers who are injured “outside of the employers’ control”.⁶

At the time New South Wales was a hung Parliament in the Upper House, and the Liberals were not going to be able to get the Workers Compensation (Benefits) Amendment Act 1989 through unless they had the support of two independents - Fred Nile and Elisabeth Kirkby. Kirkby was especially vocal on the harshness of eradicating the journey provisions altogether, and consequently it became apparent that a deal would have to be struck.⁷ The Minister for Industrial Relations and Employment, John Fahey, gave an undertaking to the cross benchers in the Upper House that the journey provisions in the legislation would not be gazetted, providing the Bill was passed. An amendment was to be reformulated, and brought before the Parliament at a later date. This bargain was struck, and in December 1989, John Fahey returned with an amended version of the journey provisions - the present fault based provisions - as a compromise. The rhetoric was very reminiscent of the ‘Lang Beaters’, in that it was proclaimed that the new provisions represented a “fair deal for workers” and a “significant gain from the August position.” The two independents, on whose approval the bill was contingent, accepted the fault provisions as “a compromise” between the demands of employers to abolish the journey entitlement, and the demands of unions to preserve the entitlement. Frankly, it is not difficult to see any advance from the August bill as some sort of “victory” - after all, workers were bargaining from a position of absolutely no rights at all.

In May 1993, the Opposition (the Labour Party) introduced into Parliament the Workers Compensation (Journey Claims) Amendment Bill, (1993) New South Wales which aimed to abolish fault and restore the Act to a no - fault position. This bill was introduced by Barrie Unsworth, Labor member for Rockdale. The bill was formulated in response to the protest made by Kirby P against the blatant injustices he felt the Act was perpetrating in practice. Kirby P had made his position absolutely clear in *Aardvark Security Services v Ruszkowski* (1993) Court of Appeal (Unreported). However, this bill has never passed beyond a second reading stage.

⁶Hansard - Workers Compensation Amendment Bill 6 December 1989. Vol 212. pp14319 - 14329.

⁷The main concern of the independents was that workers would not be covered for “acts of God” under the original 1989 amendments. It was with this concern in mind that the Government redrafted the journey provisions to include fault.

As Johns J discusses in *Valentiner v Steel Services Pty Ltd* (1992) 8 NSW CCR, the reasons that fault was incorporated into the 1926 Act and the reasons it was incorporated into the 1989 amendment are very much the same. Ever since the inception of journey provisions employer groups have argued that they should not be held liable or responsible for the actions and injuries of employees who are "out of the control" of the employer - whether this be on the way to or from work, or in a break period. Such a view was well articulated by Street CJ in *Hobsons Pty Ltd v Thorne* (1954) WCR 59.

Undoubtedly it is somewhat strange that an employer should be called upon to answer, by payment of compensation, for an accident ...under the circumstances of which the employer can have no control and against which he can take no safeguards. The employer becomes an insurer .. of his employee during the lunchtime recess, even though the employee has left the premises and has engaged upon some journey or venture of his own.⁸

Such justifications raise questions of ideology and policy, which I will later refer to. Yet I do feel it is important to note the divided opinion on this position internationally. In the United Kingdom's Pearson Report, it was argued strongly that employers should not bear the responsibility of journey claims, as simply the journey could not be considered to be "in the course of employment". The Report went on to argue that employers have little or no control over where workers lived, the distance they travelled, and the means of transport they took. Therefore, why should the employer hold the responsibility? Against this both the Beveridge and Woodhouse Reports have argued that the costs of injured workers is cost to the community as a whole, and as employers benefit from the use of their employee's labour they are best disposed to insure against the loss of this labour through accident. After all, it is usually the employee's family and spouse who bears a disproportionate cost of caring for (or carrying on without) the worker's earning capacity - not to mention the emotional costs of caring for the disabled. On an international level, the ILO, in Recommendation 121 has a provision that states commuting injuries should be considered to be in

⁸Workers Compensation (Amendment) Act . New South Wales (1989) Butterworths looseleaf service - legislation. p 1389.

the scope of industrial law and the employer's responsibility, and several European states have legislated to bring this into effect.⁹

The 1989 amendment, which prevails as law today, was supposedly a 'fair deal for workers'. It compensated them strictly for those situations that were considered to be still within the area of the employers' control. If a worker can prove he/she is not at fault, they will be deemed to be 'injured' and are entitled to compensation under the Act. If they are at fault, a worker can then only obtain compensation if they can prove that the risk of accident was 'materially increased' by the nature of employment under Section 10 (1C). This section is theoretically aimed at covering workers who have to drive exceptionally long distances, are couriers and so forth. The onus is on the worker to prove material increase of risk and this section, like the fault provisions, is contingent on the fact that the worker does not deviate from his/her normal journey home as provided under section 10(2).

What is starkly evident by the incorporation of fault and the terms of definition in the journey provisions, is the highly artificial drawing of 'public/private' boundaries - the absolute separation of the home from work, and with this a separation of employers' from workers' responsibility. The assumptions behind such a construction, therefore, are that the worker has individual control over the circumstances of the accident and that the realm of 'work' is easily divisible from the realm of 'private'. It is my intention, through a study of the following cases, to explode such assumptions as being capital-serving liberalism. The facts of these cases and the issues they raise demonstrate how the liberal dichotomy of public/private falls down, and equally how such a model can be undermined through the interpretation of a negligent standard of 'fault'. The judicial reaction, through interpretation of the law, is evident in these cases. The questions that are raised are fundamentally ideological.

⁹ These include France, Germany, and Sweden. New Zealand also has limited cover for commuting injuries. - Royal Commission on Civil Liability and Compensation for Personal Injury. (1978). Vol 1. p185.

Judicial Reaction to the Fault Provisions - The Art of Creating Exceptions to the Rule.

In the face of the words of the second reading speech of the Minister, courts have no legitimacy to ignore the subsection or to frustrate its intended operation. Unjust though it may seem... courts must as wholeheartedly fulfil the legislative purpose in respect of section 10 (A) of the Act as they would if the provision were beneficial to the worker and the worker's dependants. Where the command of the Parliament is plain, the courts must give effect to it.¹⁰

How have the judiciary interpreted these provisions, and what has been the practical result of these provisions for workers who pursue a claim? The cases since 1989 can be understood largely in terms of the judiciary trying to grapple with common law ideas of fault and negligence, and how to reconcile such ideas within the ideology of the workers' compensation system. It is important to note that many of the judiciary were actually practicing or sitting in the days where no fault for journey claims existed - thus there are references in many cases to the stark contrast between the old Act and the present.

What is overwhelming in these cases, is the violent reaction of the judiciary to what they perceive to be blatantly unfair provisions. This is demonstrated both covertly, through the use of definitions and in overt calls on the Parliament to change the legislation. Overall, these cases can be seen to be a real reaction to the legislation, with many instances that demonstrate judicial frustration of legislative intent through extremely narrow interpretation of "fault". There have been a number of devices used in interpretation to achieve this.

¹⁰Kirby P. *Aardvark Security Services v Ruszkowski*. Court of Appeal unreported. Delivered 19.3.93. p7.

Mechanism One - The Explosion of the Test of “Mere Inadvertence”.

Section 10 (1A) (6) ¹¹ instructs the courts that “fault” in journey provisions is to be interpreted as -

“Fault includes:

- a) negligence or any other tort;
- b) any failure to take reasonable care for the worker’s own safety.”

Theoretically, the effect of this provision is to basically state that any contribution of fault by the worker - including those actions that would be equivalent to contributory negligence in tort - will exempt him/her from the right to claim compensation. By defining fault to mean “negligence”, the Parliament has in effect adopted the “reasonable man test” of tort to assess fault. This was reaffirmed in *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24, per Windeyer J, and *Valentiner v Steel Services Pty Ltd*. (1992) 8 NSW CCR. As much of tort law has demonstrated, the “reasonable man test” is far from definitive, and is open to wide degrees of interpretation and excuse based on fact. The ways in which the courts have used this test, I argue, is to consistently favour the worker - particularly in cases where the injuries are death or are so severe that the worker will never return to a full working life again.

Whilst existing in tort law, the use of “mere inadvertence” has been rigorously and generously applied by the compensation court to exclude the fault provisions of Section 10 (1A). In *Aardvark Security Services v Ruszkowski*, (1993) Court of Appeal, (Unreported) Kirby P outlined that there were two possible options that the courts were faced with in light of the “draconian measures” of subsection 10 (1A)-

The first, is to give meaning to “fault” in section 10 (1A) in such a way as to ensure that mere momentary inadvertence on the part of the worker is not encompassed within “fault” as there provided. There is a long line of authority, developed by the courts of the common law at a time when contributory negligence was a complete bar to recovery, upon which workers... can rely to diminish what would otherwise be

¹¹I refer the reader to annexure 1. - the legislation.

the most extreme cases of the application of the section.¹²

The second option, to which he referred was to frustrate the course of the trial and to skew the facts of the case to such an extent that the worker could not be deemed to be at fault. This he argued was an illegitimate abuse of the court's power.

As Kirby indicates, the use of "mere inadvertence" has been utilised extensively by the courts to circumvent fault provisions in only the most extreme cases - usually where the worker is severely maimed or dead. This test has been unable to be used for other cases of lesser injury, where undoubtedly the courts have felt bound to apply the letter of fault law more strictly, denying these claimants the use of "mere inadvertence"¹³. It is essentially a policy decision, but undoubtedly "mere inadvertence" has enabled the courts to allow cases of extreme hardship to be compensated, when in fact the legislature may never have intended this to be so.

In *Lunette Pty Ltd v Bull* (1992) 8NSW CCR, the worker collided with the rear of a vehicle in front of her on her way home from work. Under Motor Accidents legislation, the worker would have been undoubtedly to have been either wholly at fault, or found to have contributed to the accident through negligence. At first instance, the court held that that the worker's clear lack of attention could not be deemed "fault" under Section 10 (1A). Commissioner Ashford drew a clear distinction between "an act done inadvertently" and "an act that is done without regard for one's safety". In doing so she relied on Windeyer J in *Sungravure*. This was upheld on review by Moroney J, who agreed with this interpretation of fault.

Likewise, in *A & B Conlon Cleaning Services Pty Ltd. v Clavell* (CA Unreported, 17.8.95) a worker lost control of his motorcycle due to the sudden movement of another vehicle, and collided

¹²Kirby P *Aardvark Security Services v Ruszkowski*. *ibid*.

¹³Such cases include *Hawker De Havilland v Gallagher* (1993) 9NSW CCR., where a woman made an incorrect turn in busy traffic colliding with other vehicles. She argued "mere inadvertence" in the situation, but was denied compensation. It is important to note that her injuries were minor (little more than whiplash and two weeks lost wages). Another such case is *Cunningham v Sydney Electricity*. (Unreported, Compensation Court - delivered - 11.8.93). Here a worker tripped over and collided with a car when he was running to catch a bus. Again, mere inadvertence was argued, but the court found he was at fault. Again, the injuries were minor. It is also important to note that in both cases the applicant would have had some limited recourse under the N.S.W Motor Accidents Act. Contrast these cases to the other cases of "mere inadvertence", and I feel it becomes apparent that the facts of the case have little to do with whether the courts apply the test. What is a common thread is the severity of the injury and the other sources of recourse the worker has - clearly the application of "mere inadvertence" has become a policy decision.

with a parked car. He sustained serious leg injuries and was unable to find any “gainful employment” with his disabilities. The Court of Appeal held that at first instance, Moroney J was entitled to find on the facts that the worker’s conduct “amounted to a situation that was an “agony of the moment decision.” The worker’s “conduct amounted to inadvertence, which did not qualify for fault” according to the authority of Kirby P in *Aardvark*.

“In the agony of the moment” arose once again in *Medida Pty Ltd v Tobin* (1995) Court of Appeal (unreported) where a worker had stepped from her train at her usual station before the train had fully come to a stop. It had been announced on the platform that the train would not be stopping at Chatswood station, where the accident occurred. The train slowed when it came to the station, the door opened, but it failed to come to a complete stop. In stepping off the worker fell, losing all recollection of the accident (she lost consciousness) sustained serious injury. Due to her lack of recollection, it was not ascertainable whether it was announced on the train itself that it would not be stopping at Chatswood station. It was strongly argued by the employer that the worker had complete disregard for her own safety and should not have attempted to alight from a train that was still in motion. The Court of Appeal however found,

“She could not have reasonably apprehended the danger or any change in circumstances. Her mind may have been in neutral or perhaps she was thinking of any one of those thousand and one things that go through people’s minds while the world proceeds in its routineI am content to rest my decision upon the distinction, recognised and applied by the judge at first instance, between a negligent act, and an act done in the agony of the moment, and in reasonable response to unexpected danger ...[this] does not involve fault.”¹⁴

Such limited interpretation of “fault” was also sanctioned by Burke J, in *Smith v A.J. Bush and Sons Pty Ltd*. (1991) (unreported). Burke J set the standard of proof high by stating that in order to prove fault, the employer would need to prove -

¹⁴*Medida Pty Ltd v Tobin*. Court of Appeal Unreported, delivered - 20.12.95). p4.

An element of blameworthiness or culpability not mere momentary inadvertence or misjudgment. In the light of the principle that ambiguities in the Act should be interpreted in favour of the worker, it will be held that although there may have been mere momentary inadvertence this did not constitute a failure by the worker to take reasonable care.¹⁵

The Court of Appeal has also sanctioned the mere inadvertence test as a means of disqualifying fault. In *Aardvark Security Services Pty Ltd v Ruszkowski*, 1993 Court of Appeal (unreported) the worker was a shift worker who was killed in the early morning when his motorcycle collided with a street sweeper on the way home from work. Evidence was led by the employer that the worker more probably than not was speeding, and had also left his headlamp off. These factors, they argued, constituted a lack of care for his own safety and thus constituted "fault" under the Act. In the absence of any witnesses, the Court of Appeal ruled in favour of the worker's widow, surmising that the worker very probably was "confronted with a very perilous situation" in which he made "an agony of the moment" decision. The court of Appeal held that this did not constitute fault under the Act.

Again, a lack of evidence as to what occurred arose in *WorkCover Authority v Billpat Holdings* (1995)¹¹ NSW CCR. Here a shearer, driving between sheep stations, had sustained serious injury when his vehicle left the highway and overturned. Evidence was led that he was not wearing a seatbelt at the time (and this was confirmed by the ambulance report). The worker had become a quadriplegic. At first instance, O'Toole J found that the cause of the accident was "mere inadvertence", and the fact that he had not been wearing a seatbelt had not "materially caused" or contributed to his injuries. On appeal, the Court of Appeal found that (despite its comments about imputing fault) the trial judge was perfectly entitled to find that the employer had not discharged the onus of proving the causal nexus between not wearing a seatbelt and the accident that occurred. Thus "fault" again had not been proven.

¹⁵*Lunette Pty Ltd v Bull*. (1992) 8 N.S.W CCR. p326.

In *Valentiner v Steel Services Pty Ltd*, a worker was injured when he stepped from his employer's vehicle which was still moving, crushing his foot. Once again, the respondent employer argued that as a "reasonable man" the applicant was required to care for his own safety and was partly at fault in alighting from a moving vehicle. Johns J found, however,

In applying the standard of reasonable care as it is contained in those cases to the present circumstances, it would seem to me that if the car was slowly moving at three to four kilometres per hours when the door opened, it was reasonable for the applicant to expect, as was pre-arranged, that it would be brought to a stop. His conduct in this case is not in my view incompatible with the conduct of a reasonable and prudent man.¹⁶

As a means of avoiding fault, "mere inadvertance", "the agony of the moment" and the "reasonable man" have had spectacular success.

Mechanism Two- Raising the Onus of Proof of the Employer

In coming down in favour of the worker the courts have undoubtedly been assisted by the fact that the evidential burden of proving fault is on the employer. This standard of proof, however, has been set at an extremely high level. This has been commented on at length by Anthony Monaghan - a barrister working in these areas that has reported on a number of journey claim cases. Monaghan argues that whilst the Act provides that any contribution of fault (no matter how minute) will disentitle the worker, the legal reality is that proving fault by the employer has been made very difficult. A survey of the case law in both the Compensation Court and the Court of Appeal demonstrates this.

In *Tang v Yu & Anor* (1993) 10 NSW CCR, the worker's vehicle had crossed to the other side of a freeway, killing him in a "head-on" collision. There was little doubt, on the evidence of his son (who was a passenger) that the deceased had lost control of the vehicle. Counsel for the employer argued that the court should infer fault on the principle of *res ipsa loquitur*. Campbell CJ responded, saying -

¹⁶*Valentiner v Steel Services Pty Ltd*, (1992) 8N.S.W. CCR. p435.

On the evidence available, it is not possible to do more than speculate as to what occurred. That speculation does not discharge the onus upon the respondents of showing that, more probably than not, control of the car was lost and the death of the deceased was caused partly or wholly by the fault of the deceased.¹⁷

However, in the face of such scenarios, the courts are equally at the liberty to find that in the paucity of evidence an inference must be made that imputes fault. As Kirby P stated in *WorkCover Authority v Billpat Holdings* (1995) 11 NSW CCR at 597-

It is common experience of life that vehicles do not normally go off a highway, at least in the conditions described, without fault on the part of the driver. The drawing of inference of fault from such circumstances has been sanctioned by the High Court of Australia. Thus Barwick CJ in *Government Insurance Office (NSW) v Freidrichberg* (1968) 118 CLR 403 at 413 said

“...an inference of negligence may be drawn from the circumstances of the occurrence”

Thus it would be equally open to the courts on case law, to find that in such cases as *Aardvark, Tang and Medida*, where evidence is either lacking or there are elements of the worker's own carelessness established that the worker is at fault. This was clearly the intention of the Parliament in adopting fault, and yet the courts have continually found ways around finding fault.

The Compensation Court's reluctance to apply *res ipsa loquitur*, was not shared by the Court of Appeal in *Paul Perry horse Training Pty Ltd v Harker* (1996) Court of Appeal 12 N.S.W. CCR. This case raises a stark contradiction to the trend of decision that has preceded it. In this case, a very similar accident occurred, when a 19 year old stablehand was driving from work in the early morning. Without explanation, she went to overtake a vehicle in front of her and collided head on

¹⁷*Tang v Yu and Anor* (1994) 10 N.S.W CCR. p240.

with an oncoming vehicle. She sustained severe brain and spinal damage. From the facts it appeared that the worker was definitely speeding, and had either fallen asleep or had not been paying attention to oncoming traffic. In the Compensation Court, Burke CCJ had held this was “mere inadvertence” and not the worker’s fault, entitling her to claim under the Act. On appeal, however, counsel argued that because the vehicle had actually crossed to the wrong side of the road, the court should imply fault under *res ipsa loquitur*. The court found that the worker was at fault, despite the fact that this would disentitle her to compensation for horrific injuries.

Importantly, there are several distinguishing facts of this case that perhaps explain it as an aberration to the general trend. Firstly, it is one of the first journey claims considering fault since Kirby P has left the Court of Appeal. This decision could very much be seen as a reaction or a “tightening up” of the interpretation of the fault provisions. Secondly, this case can be distinguished from *Aardvark Security Services v Ruszkowski* (1993) Court of Appeal (unreported) in that there was an eye witness to the accident that testified the worker was not asleep but had taken a grave risk in overtaking. Thirdly, whilst deciding in favour of the worker, the court did leave the test of mere inadvertence open, stating that a finding of mere inadvertence would be dependent on the facts of each case-

Thus, if temporary inadvertence is being considered, such inadvertence will be inconsistent with negligence only where it is “excusable in the circumstances”it depends on the circumstances.¹⁸

None the less this case is a troubling result from the worker’s point of view - especially if this is a sign of things to come from the post - Kirby Court of Appeal.

What is interesting in the way the courts have interpreted the onus of proof, is the sharp contrast of these cases to the predictions of the Opposition in Parliament when this bill was debated. One of the main aspects of opposition to the bill was the difficulty it would place on workers in trying to prove that they were not at fault. One Minister argued in 1989 -

¹⁸*Paul Perry Horse Training Pty Ltd v Harker*, (1996) CA, N.S.W CCR, p698.

The onus will be on the workers to prove that they did not contribute to accidents. There will be areas of disputes and and the onus will be thrown on to persons travelling to and from work to prove that they did not contribute to the accidents.¹⁹

Likewise, the Mill's commentary to Section 10 (1A) and (1B) of the Act states -

At this point it becomes relevant to look to the object of the legislation. It is well recognised in workers compensation law, that on a doubtful point it is proper to adopt an interpretation beneficial to the worker, because the object of the statute is to provide benefits for injured workers. However, a different object can be detected in the 1989 journey amendments. The intention behind the Workers Compensation (Amendment) Act 1989 was to cut back the circumstances in which journey injury benefits would be available...the appropriate conclusion appears to be that it is for the worker to rebut the presumption imposed by the first part of the subsection in favour of the employer.²⁰

It would seem, therefore, that the legislative intent of this section would confer a duty to negative the assertions of fault on the worker - particularly with regard to the 1989 amendments. Certainly this was one aspect over which there was much out cry in parliament. Yet the courts have placed an exceptionally high standard of evidence and proof on the employer/respondent - to the point where traditional common law notions such as *res ipsa loquitur* are denied. Clearly this is at odds with the intent and purpose of the 1989 journey provisions.

¹⁹D. Rumble - member of Parliament. New South Wales Parliamentary Debates, 6th December 1982. Legislative Assembly. Hansard. Vol 215, p14323.

²⁰Workers Compensation (Amendment Act) 1989 New South Wales. Butterworths looseleaf edition. p1369.

Mechanism Three - Expanding the Definitions to Bring Journeys Under the Act.

Although perhaps not as obvious as other interpretations of fault, another means the courts have used to circumvent subsection 10 (1A), is to interpret a worker's 'journey' as being not a journey, but 'in the course of employment', and thus not excluded by fault provisions. This was demonstrated by *Fekonja v Lucsan Pty Ltd.* (1994) 10 NSW CCR. Here, a seasonal worker at the snowfields had a head-on collision on the way from work to his lodgings. The Compensation Court held that the evidence clearly established the worker had been on the wrong side of the road and was clearly at fault in causing the collision. Yet the court deemed the journey to not be a 'journey' for the purposes of Section 10, because the worker had been giving his co-workers a lift home, which the employer had encouraged him to do regularly. The court therefore found that the worker was actually 'in the course of his employment' when he had the accident, and thus was not precluded from claiming compensation by the fact he was at fault (he was also found not to have acted in 'gross misconduct' which may have excluded him from the Act). As Monaghan writes, this decision may have ramifications that extend cover to workers who are on call - out where their work requires them to drive between jobs. The effect of such a decision is to demonstrate how interpretation can deem a worker easily to be within the 'public' realm of work, instead of in the 'private' realm of personal responsibility.

In the area of journeys the court has also overcome the legislation's strict provisions about what technically constitutes a 'journey' and where the boundary of a worker's 'place of abode' (under section 10 (4)) commences and ends. Technically, Parliament has delineated the public from the private by defining the perimeter of the worker's home as the boundary from which a journey commences and ends. If a mishap occurs in this private realm, the worker is precluded from claiming compensation. Yet such distinctions are also being undermined by the courts. In *Civil and Civic Pty Ltd v Hughes* (1996) Court of Appeal(unreported), a union representative was descending the stairwell of his apartment when he was shot in the head. He was on his way to work, and was carrying the union dues - a substantial amount of money. Under Section 10 (4), this worker could not be considered to have commenced his journey, and thus was not entitled to compensation. The Court of Appeal held that the worker was entitled to claim compensation. Because he was carrying money associated with his employment, the Court said he was entitled to

claim that he was “in the course of his employment duties” and could therefore be considered to covered under section 12 of the Act - “an associated journey” in the course of employment. Once again, the whole edifice of a public /private delineation is undermined.

The New South Wales journey provisions and the question of fault are yet to be tested in the High Court. What has shed some light on a possible outcome if this were attempted is the Court’s decision in a Western Australian case - *Walker v Wilson* (1991) 99 ALR 1 (High Court of Australia). This case primarily dealt with the question of what deviations were acceptable for the claim to be considered an appropriate work - related “journey” under the Western Australian Act. The relevant point to note is as Hemery has pointed out -

Walker v Wilson, on the whole, represents a sympathetic reading of the journey provisions in the Western Australian legislation....This approach led to a decision in favour of an appellant whom it is assumed would have otherwise gone uncompensated. To this extent the changes will be applauded by workers..the liberal reading of the journey provisions in this case, and the reasonable expectation that the High Court will construe the journey provisions generously in other contexts may well galvanise latent employer opposition to such provisions...²¹

The legitimacy of the courts’ approach to section 10 (1A), is another issue of its own, and there is little room here for me to enter this argument. However, I do believe that judges can and do make law, and if they are able to make law they are equally able to change or modify existing law to accomodate a sense of fairness. This has controversially been declared by Justice Kirby recently in his Lionel Murphy Memorial Lecture. Kirby J argued that it is ignorant to simply perceive judges as declarers of the law, and that they are able to change the law or adapt it to social opinion. In so stating he referred to the bold approach taken by Lionel Muphy, arguing,

²¹ M. Hemery- “Journey Provisions in the Western Australian Workers Compensation Legislation”. Australian Journal of Labour Law. (1995). P58.

His ultimate judicial legacy lies in his contribution to breaking the spell of unquestioning acceptance of old rules where social circumstances and community attitudes have changed so much as to make those rules inappropriate or inapplicable...²²

Perhaps, therefore, we should see the creation and explosion of ‘mere inadvertence’ as the adaptation of the law to social and community attitudes. Alternatively, we can see it as a strong judicial reaction to the unfairness of this provision, and to the highly artificial division of employer/worker responsibility. The use of the ‘reasonable man’ as a tool of overcoming draconian ‘fault’ provisions simply demonstrates judicial power and the artificiality of the assumptions that underlie this section of the Act.

Some Critical Observations

It is overwhelmingly clear that many members of the Australian judiciary and politics, conceptualise ‘fault’ in a system of workers compensation as morally and ideologically problematic.

This has been so clearly expressed by the overwhelming number of case decisions on fault - which I have argued are effectively undermining the legislative intention of constituting clear domains of employer/worker responsibility. The judiciary are grappling with two competing notions - the legitimate entitlement as set down in the Act, as against the ‘legitimate need’ of the worker. The decisions in this area are not only a muted protest, but are a demonstration of the fact that social reality does not neatly fit into the highly artificial assumptions that are made in constituting such distinct and separate spheres of responsibility. Their protests are not only made through the frustration of legislative intent through the decisions, but in clear statements of judicial protest. Kirby P in, in a number of cases has made his opinion overwhelmingly clear. Likewise, Burke J has also expressed frustration with the present Act’s division of responsibility into ‘public and private’ - it has left the worker without any recourse at all in situations where they cannot bring their injury within ‘the course of employment’.

²²Kirby J. The Australian Financial Review. Tuesday, October 22nd, 1996. p5.

It is ridiculous, arbitrary and unfair result, if one regards the prior Act as the norm, but a result which I feel constrained to reach by the provisions of the statute. In the fond hope and aspiration that either the Court of Appeal will decry this flirtation with semantics, grammar and syntax and achieve a more fitting result or that Parliament will amend the ambiguous provision..²³

Despite the efforts of the judiciary to water down ‘fault’, I believe that true reform of these provisions will never be achieved through judicial ‘flirtations with semantics, grammar and syntax’. Definitions and redefinitions of tests for fault merely tinker at the edges of the law, and fail to achieve any meaningful reform. However, we cannot and should not expect the solution to lie here. Clearly the problem with a fault - based system lies not only in issues of interpretation but the very ideological assumptions it makes. What is required is a total deconstruction of the entire premise on which fault rests, and this means deconstructing the liberal assumptions behind such a system of law. As Hutchinson has argued, the debate over fault or no fault systems reflects deeper ideological assumptions about the nature of society and community responsibility itself. These assumptions are equally apparent in the Act’s treatment of journey claims.

The entire fault based system is premised on the ideas of individual control (and thus responsibility) for actions, and the clear separation of responsibility for the ‘public’(work) domain as against the ‘private’ (outside of work) domain.²⁴ The role of law is to reinforce these boundaries and the separate spheres of responsibility that go with this. This is well demonstrated in journey claims. The law, in defining what constitutes a ‘journey’, and where the limits of ‘home’

²³ *Armao v Ladue Holdings Pty Ltd* (1992) 8 N.S.W. CCR. p 457 -458. this was a case where the worker sustained a journey injury that exacerbated a pre existing back dieaese. Because the disease was not caused by her employment, and the injury also did not arise “in the course of employment”, she was unable to claim compensation. Burke J expressed his frustration with the arbitrariness of the Act’s provisions, saying if she had broken a leg in the journey she would have been better off. This case is an excellent demonstration of the Act’s delegation of responsibility strictly to the “sphere of employment” and also demonstrates its inability to provide cover for injured workers who do not fall in such arbitrary realms of “work/private”.

²⁴ I use the “pubilo/private” in the sense that Aristotle used this - the separation of our private lives from our public lives. Today, our “public life” really is constituted dominantly by work.

and “work” commence, implicitly reinforces the public/private distinction. In doing so a legal fiction is created, as the law demarcates a limited sphere of responsibility of the employer. At the same time the law creates a “legitimate entitlement” of the worker to compensation.

Yet the division of our lives into public and private is a highly artificial exercise, and reflects an “impoverished sense of community”²⁵. Injury, death and disability know no boundaries, and impact on both our working and private lives. The effect of such legislation and assumptions, therefore, is to “privatise” injury, disability and worker fatality - and to relegate the burdens of this to other family members, or social security. Few workers who are entitled to claim journey compensation can afford their own personal injury insurance.

The public/private division is most starkly demonstrated by the arguments of employer lobby groups against journey claims - “why should employers have to bear the costs of injured workers who are ‘out of their control’?” After all, the worker has stepped out of the domain of “work”, and into the domain of “private”, where he is responsible for his own actions. The lack of “control” of the employer over the worker’s actions is said to justify employers not paying compensation and the burden falling on the worker or society. In apportioning blame and responsibility, the Act assumes that the worker must thus have some sort of control or choice over the risk of having an accident on the way to/from work. Clearly, this assumption is false. Firstly, the idea of worker “control” over the risks of employment and journeying is fundamentally flawed. As Abel has argued, the very nature of the worker-capital relationship is one that is premised on the lack of choice. Few workers choose where they work or indeed the distance from home to work that they must travel. Demographics has shown that those workers who are at most risk of journey injuries, are logically those who have to travel the farthest, and those who have to travel are generally of lower socio - economic background.²⁶

Likewise, workers seldom “choose” the hours they must work (including if the job demands night shift work and the concurrent fatigue that this creates) nor the means of transportation that they must take. Commuting has become a necessity of life and rarely a choice of the modern workforce. The dangers of these journeys and the foresight of accidents is not within the control of the worker.

²⁵This idea expressed by A. Huthchinson, “Beyond No Fault”. 73 California Law Review. p757.

²⁶Refer to Claire James’ study of workers’ socio -economic correlation with injury.

Those without professional skills are limited to taking the terms of any job they can find, which will often mean working irregular hours, or physical labour which results in fatigue. Adding to this is the fact that a majority of lower income earning workers cannot afford to take out disability or life insurance. Indeed, the modern contract of employment is increasingly being consummated from a position of gross bargaining and power inequalities - capital sets the terms and the workforce has little choice but to comply.²⁷ (Consider also the present rates of unemployment and the cuts to funding for retraining.) Simply, the ideal of the rational, autonomous contracting individual does not translate into social reality so far as most workers are concerned, and yet this is the assumption that is implicit in the journey provisions. The very expression "employment contract" is in itself a liberal assumption that assumes worker / employer equality, and seeks to mask the lack of choice that is inherent in "choosing" the conditions of a job. Abel argues -

When the worker incurs risk by selling his labour power to the capitalist, the commodity that the transaction assumes becomes doubly mystifying. The worker has no choice whether to engage in that transaction; and the package of wages, benefit and risk this entails.²⁸

Accidents, Abel has argued, are "causally probabilistic, multiple, and continuous". Liability, however, is "dichotomous and particularistic." Accidents caused whilst commuting to work are causally problematic - they are unintended and undoubtedly related to a multiplicity of factors that is beyond individual control. If anything, the causes of accidents are able to be modified by employers through the contract of employment. Liability and fault, however, assumes individual control and cause. The goals of prevention of accidents, compensation and punishment are irreconcilable and cannot be achieved in the same legislative instrument. It is completely incongruous for a scheme of workers compensation to be apportioning individual fault. The goal should be efficient sharing of resources to rehabilitate and compensate. Yet we have shifted from a system that compensates collectively to a system that seeks to apportion individual blame. Does the legislature believe that by imposing fault on workers they will be deterred from having an accident on the way to or from work? This is the ridiculous assumption that is made in the journey

²⁷ Although labour is represented by unions, these unions have had significant defeat in lobbying against the journey provisions. Employer groups and the economic imperative of "balancing the state budget" and reducing the expenditure on workers compensation has dominated policy making for years.

²⁸ Abel, R. "A Socialist Approach to Risk". 41 Maryland Law Review. p696.

provisions. It is an assumption that fails to conceptualise that some risks are unavoidable, and thus should be born by those who are best able to pay- not by the worker.²⁹ It is precisely the lack of control over the “contract” of employment that must be considered here. Capital has brought the worker into the situation that has caused the injury, and thus capital logically should collectively compensate these injuries.

The whole question of journey claims has been justified in Parliament as a question of economics- a desire to keep “rising” benefits and insurance premiums to a minimum, to ensure that WorkCover stays “in the black”, and does not become bankrupt like its equivalent in Victoria. If journey claims were to be covered under a “no -fault” scheme, the costs of WorkCover and of insuring government employees would undoubtedly impact on the state budget. However if we move to a fault -based system, the costs of injured workers are transferred from state employers and state compensation schemes to Federal sickness benefits.³⁰ The Government, therefore, conceptualises the whole journey issue in little more than economic terms, and in terms of shifting the economic burden. Abel also comments on this aspect -

Increasingly, they [the Government] are held accountable to economic criteria and their regulations are overruled in the name of cost - benefit analysis. Their loyalties are divided between those they are directed to protect, and the industries and enterprises they must regulate.³¹

What we must never lose sight of is the fact that the state is not an impartial arbitrator between employer and worker interests. The state is also an employer, and undoubtedly has vested interests in the costs of workers compensation. The desire to “balance the budget” has unfortunately been carried on by the Carr Government also, to such a point that they have reneged on their promise to

²⁹ As Abel has argued, society is able to conceptualise the shring of risks in other areas, such as military service, or when natural disasters occur. The shift from individual to collective demonstrates society’s ability to conceptualise a better system of compensation.

³⁰ To argue, as many have, that the motor accidents scheme will act as a safety net is to ignore the problems of this system also. Motor accidents are also fault based, and have been continually reduced in benefits. This scheme does also not negate the need for lawyers, costs and delay.

³¹ Ibid, p700. It is interesting to note on this point, that Ex - Premier Nick Greiner is now a director on the boards of several companies. As Abel argues, the governmnet/capital nexus must be considered for its implications on policy making.

remove the fault provisions in coming to government. Yet how onerous is the cost of compensating injured workers in journey claims? On 30th June 1986, the Government introduced a scheme whereby journey claims were exempt from the individual assessment of employers' premiums for workers compensation. The costs of journey claims since this time have been spread equally across all employers, despite their record for injury and claims.³² It has also been revealed that -

The money involved for journey claims is even less than 9 per cent of the total involved. In the first year of the operation of WorkCover a surplus of \$160 million has been realised...However the Government has seen fit to abolish fewer than 9 per cent of the total of workers' compensation claims. That action is petty, miserly, miserable and callous...Since 1926 when the workers' compensation scheme was implemented it has always been a no-fault scheme...No argument or facts or figures have been presented to support the action of the Government. It cannot be because of money, because the scheme has always been profitable. Its action is based on an ideological binge...³³

In looking at the costs of journey claims I would also tend to agree that this is not just about economics, but is ideological. It is about the community we aspire to be, and it is about providing adequate redistribution of wealth so that workers and their families are properly compensated and rehabilitated. This is a community issue - not simply a question of "fault". The case law in this area demonstrates the struggle of decision makers to find a politically legitimate device that justifies taking from one individual's property to compensate another. "Fault" can be seen to be a very useful tool in legitimising this choice. The problem in so many of these journey claims is, as

³² This information I obtained from the WorkCover Authority. I was told that "they do not provide a breakdown of journey injuries, as these are calculated with other injuries and not as a separate component".

³³ J.D Garland - Member of Parliament. Parliamentary debates 3 December, 1989. Legislative Council. Hansard, vol 141, p 14229.

Hutchinson states, that many individuals lack a “legitimate entitlement” under the law, but they still have a “legitimate need” that transpires the law and the values it enshrines. Furthermore, these “needs” have arisen as a result of the failure of autonomy and control that the individual has over his/her own welfare, which is often exacerbated by the inequalities or conditions of the employment contract. What these cases demonstrate is that there are two competing and irreconcilable ideals present - the genuine needs of workers (and their dependants) as against legislation’s statement of “legitimate entitlement”. This “crisis” of irreconcilable goals is indicative of a greater crisis -

However, liberalism cannot fulfil its promise to provide neutral or objective algorithm by which to mediate the contradictory forces of individual interest and collective concern. Liberal theory is at a cross roads...Liberalism possesses “no rational criterion for deciding between claims based on legitimate entitlement against claims based on need”.³⁴

What we can conclude, therefore, is that this legislation is an “ideological binge”, and a binge that is premised on the whole liberal theory of individual autonomy and responsibility. In the ideal that workers compensation should provide a “safety net” for all the “wounded of industry”, this provision stands in stark contrast. We have moved from the collective to positing individual blame.

It is important to ask just who has benefited from the inclusion of fault in journey claims. Clearly, employers would have marginally gained by some reduction in the number of successful claims (although this is probably minimal considering the current trend of decision and the small proportion that journey claims constitute). Undoubtedly the Government’s budget has also benefited from the inclusion of fault with respect to Government employees. One group that really has gained here is undoubtedly the lawyers. As was predicted in Parliament at the time of debate, the creation of fault and the adoption of a negligence standard has only widened the need for

³⁴Hutchinson, A. - “Beyond No Fault”. 73 California Law Review . p760.

lawyers, and consequently increased the costs of claiming and the delays in courts. This concern was raised by the Opposition, and has been realised -

It concerns me that the Committee of review will throw another sop to the lawyers..[a worker] may receive compensation but only if he is able to prove that the injury suffered was not caused by his own negligence. It will be a lawyers' picnic. Claims will be delayed further. Costs will be incurred by lawyers, and the payment of compensation to injured workers will be delayed for many years....

The average worker injured on his way to work, who may be of ethnic background and only a resident of this country for a short time, will not have the resources to prove that he is not at fault. He will be thrown to the devil, and the Commonwealth Government will have to pick up the tab for his sickness benefits.³⁵

So far as questions of cost efficiency go, we cannot ignore the waste of costs that have gone into funding the legal development of case law in this area.

Workers compensation cannot be severed from an understanding of the entire law / capital nexus - law is being implicitly co-opted and used to reinforce the commodification of people's labour,³⁶ and to enshrine the liberal ideas of individualist rights and responsibilities. The fault debate is all about risk distribution, and as it is presently geared it is those who are least able to afford the consequences of injury that are bearing the cost. The goal we are sanctioning in such a system of law, therefore, is the "balancing of the bottom line" - economics is favoured over rehabilitation and the right to well being. Such critical theory is translated into fact when we look at the agonising of the judiciary in the case law. The fault based provisions are completely at odds with a

³⁵ B. Unsworth, Member for Rockdale. Parliamentary debates - 6 December 1983. Legislative Assembly. Hansard. Vol 215, p14224.

³⁶ The commodification of the worker's labour by the law is demonstrated by the fact that it was not until 1989 that compensation was available for bodily scarring of the worker. The only way of obtaining compensation prior to this was if the worker had actually lost the use of a part of the body as a consequence of the burning. What is being compensated, then, is the worker's ability to work - their labour, and not their person. The implicit assumption is then that workers compensation aims only to compensate the worker for his/her lost earning ability. This assumption in compensation I find extremely problematic and entirely incongruous with other notions such as the compensation of pain and suffering.

system that aims to be a redistributive safety net. I make my position clear in stating that I absolutely agree with Hutchinson's analysis of the present systems of compensation -

I do not think that there can be any real improvement unless there is a crucial shift in the way people think about themselves as members of a community. Individuals must comprehend that life in a community entails mutual obligations and interdependence. The liberal attitude toward health and misfortune reveals its impoverished sense of community ...The maldistribution of risk , injury and care is a necessary consequence of this.³⁷

Conclusion

In the New South Wales journey provisions, the Parliament's intention, very clearly, has been to constitute and reinforce a public and a private realm, of which the employer has the burden of responsibility only in the public realm. The effect of judicial interpretation of "fault" in peoples' accidents is to demonstrate that there really are no clear and separate spheres of responsibility - but simply that accidents do happen, and it is often more morally satisfying to make the employer pay. It is no accident that those cases which undermine the strict "public/private" divide are cases of severe hardship, and severe injury.

We are confronted in this area of regulation with a judiciary that is supposedly "apolitical" and morally neutral, and yet the decisions made are continually challenging the public intention of legislation. The consequence of this is the complete undermining of the liberal constitution of the public and private realms of responsibility.

In 1989 the journey provisions were a hot political issue that was at the forefront of political and legal debate. The stance of the Carr Government in relation to this issue - despite their promises to the contrary - have been to let this issue fade from the agenda - relegated to "review" on an

³⁷ Abel, R. "A Socialist Approach to Risk". 41 Maryland Law Review. p696.

“unspecified timetable”.³⁸ For New South Wales workers, fault will never be a “dead issue”, as long as we still have to travel to and from work each day, and as long as the labour/capital contract remains in a position of gross power inequality.

We really must ask how nine per cent of all workers compensation claims can be considered such a huge economic problem so as to justify the adoption of fault and to have been the subject of such vigorous lobbying and debate. Clearly, what is at stake here is more than ‘fault’. It is ideology itself. It is a debate that concerns the type of society we aspire to, and what we consider to be within the realm of social responsibility. It is about risk and cost allocation, and finally it is about the power of the law to both reinforce and undermine the fundamental tenets of liberal theory, on which we construct and then tear down “legitimate entitlement”.

³⁸I am directly quoting Mr Paul Knight of the WorkCover Authority, Policy and Legislation Department. I asked him why the current Minister has not kept to his party’s promise in 1989 to change this provision once they were elected. He responded that the Minister was still ideologically committed to the abolition of fault in journey claims, however, he was under tremendous pressure from cabinet not to pursue the issue and that it had been relegated to review on “an unspecified timetable”.

Bibilography

- *ABEL, R. - "A Socialist Approach to Risk". 41 Maryland Law Review. (1982). pp 695 - 754.
- *ATTORNEY GENERAL'S DEPARTMENT- Personal Compensation for Injury. Proceedings of a Seminar.(1985) Canberra, Australian Government Publishing Service, in conjunction with the Australian National University Faculty of Law.
- *BARTTRIP, P.W.J & BURMAN,S.B - The Wounded Soldiers Of Industry. Industrial Compensation Policy 1833 - 1897. (1983). Clarendon Press, Oxford.
- *BOULTER, M. - Workers Compensation Practice in New South Wales. (1966). The Law Book Company, Sydney.
- *DAVIS, R.- "Negotiating Personal Injury Cases : A Survey of the Attitudes and Beliefs of Personal Injury Lawyers." 68 The Australian Law Journal. (1994). pp734 - 750.
- *FOLEY, G. GALE, J. & GAVENLOCK, L . - "The Cost of Work - Related Injury and Disease." 11 Australian and New Zealand Journal of Occupational Health and Safety. No. 2. (1995) pp171 - 194.
- *HATTON, M (ed) - Work and Health Issues in Occupational Health. (1981). Canberra, Australian National University Press.
- *HEMERY, M -"Journey Provisions in Western Australian Workers' Compensation Legislation." 6 Australian Journal of Labour Law. (1995). Pp52 -58.
- *HUTCHINSON, A.C - "Beyond No Fault". 73 California Law Review. (1985). Part 1.pp755 - 751.
- *JAMES, C. - "Occupational Injury : Accidental or a Reflection of Conflict Between Capital and Labour?" 23 Australian and New Zealand Journal of Sociology. No.1.Pp 47 - 64.

*LOVE, J.C. - "Actions For Non - Physical Harm : The Relationship Between the Tort System and No - Fault Compensation. (With An Emphasis on Workers' Compensation)." 73 California Law Review. (1985). Pt. 1. pp857 - 897.

*LUNTZ, H. - "The Case For No - Fault Accident Compensation". 15 Queensland Law Society Journal. (1985). pp167 - 171.

*LUNTZ, H. - "Bulletin Contributor Faulted on No Fault." 8 Legal Service Bulletin. (1983).pp280 - 281.

*MILLS, C.P. - Workers Compensation (New South Wales). (1979). Second edition. Butterworths, Sydney.

*MONAGHAN, A. - "Fault and Journey Claims." Law Society Journal. April, (1996).p57.

*MONAGHAN, A.(ed) - Compensation Court Monthly Summaries. A monthly bulletin circulated to all subscribing workers compensation practitioners through the DX system. I have drawn on the entire series, dating from April, 1993, to the present.

*MURPHY, G.A. - "The Case Against No Fault Accident Compensation". 15 Queensland Law Journal. (1985) p317 - 323.

*PEARSON (LORD) (Chairman) - The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury. (1978). Volumes 1, 2 &3. Her Majesty's Printing Office, London.

*NEW SOUTH WALES PREMIER'S DEPARTMENT -N.S.W Workers' Compensation Scheme. Options for Reform. Discussion Paper. (September 1986).

*TREBILCOCK, M.J. - "Incentive Issues in the Design of "No -Fault" Compensation Schemes." 39 University of Toronto Law Journal. (1989). Pp19 - 54.

*TUBBS, M. - "N. S.W Accident Compensation Scheme, No Fault or No Rights ?" 8 Legal Service Bulletin. (1983) pp209 - 211.

*SACKVILLE, R. (Chairman) & NEW SOUTH WALES LAW REFORM COMMISSION - Accident Compensation : The Prospects for Reform. (1983). Sydney. University of New South Wales, Faculty of Law.

*WORKCOVER AUTHORITY OF NEW SOUTH WALES - New South Wales Workers Compensation Statistical Bulletin, 1994/1995. (1996). Statistics Branch of the New South Wales WorkCover Authority.

I have also relied on the following New South Wales Parliamentary debates (Hansard) -

*6 December 1989, Workers Compensation Amendment Bill (second reading). Assembly. Hansard. Vol. 212. pp14319 -14329.

*1 December 1989, Workers Compensation Amendment Bill (second reading). Assembly. Hansard. Vol 212 pp 4274 - 4279.

* 6 December 1989, Workers Compensation Amendment Bill (second reading). Council. Hansard. Vol 215. pp14219 - 14239.

* 20 May 1993, Workers Compensation (Journey Claims) Amendment Bill. (second reading). Assembly. Hansard. Vol 236. p2443.

Table Of Cases

* *A and B Conlon Cleaning Services Pty Ltd. v Clavell.* (1995) (Unreported). Court of Appeal No- 40760 of 1993. Heard - 17 August 1995 . Delivered 17 August, 1995.

* *Aardvark Security Services Pty Ltd v Ruszkowski.* (1993) (Unreported). Court of Appeal. No- 40353 of 1992. Heard - 11 November 1992. Delivered, 19 March ,1993.

**Armao v Ladue Holdings Pty Ltd t / as Pioneer Shirts and WorkCover Authority* (1992) Compensation Court. 8 New South Wales Compensation Court Reports.Pp440 - 458.

**Civil and Civic Pty Ltd v Hughes.* (1996) (Unreported). Court of Appeal. No 404104 of 1995. Heard - 13 June 1996. Delivered - 10 May 1996.

**Cunningham v Sydney Electricity.*(1993) (Unreported) Compensation Court of New South Wales No- 11260 of 1992. Delivered - 11 August, 1993.

**Fekonja v Lucsan Pty Ltd.* (1994). Compensation Court.10 New South Wales Compensation Court Reports.Pp339 - 349.

**Gibbons v Merimbulah RSL Club Ltd.* (1995) (Unreported). Court of Appeal. No 40270 of 1994. Heard -14 , 15 August 1995. Delivered - 12 September, 1995.

* *Hawker de Havilland Ltd v Gallagher* (1993) Compensation Court. 9 New South Wales Compensation Court Reports. Pp75 - 78.

* *Lunette Pty Ltd v Bull* (1992). Compensation Court. 8 New South Wales Compensation Court Reports. Pp 325 - 331.

**Minchinton v Homfray and Anor.* (1994) Court of Appeal. 10 New South Wales Compensation Court Reports. Pp778 - 789.

**Molloy v Hobday and Others* (1994). Court of Appeal. 10 New South Wales Compensation Court Reports. Pp733 - 739.

* *NRMA Smash Repairs v Hoy*. (1995). Court of Appeal. 11 New South Wales Compensation Court Reports. Pp326 - 344.

**Paul Perry Horse Training Pty Ltd v Harker* (1996) Court of Appeal. 12 New South Wales Compensation Court Reports. Pp689 - 699.

* *Sanders v Nadow Training Program Ltd*. (1995) Court of Appeal. 11 New South Wales Compensation Court Reports. Pp 394 - 401.

**Tang v Yu and Anor* (1994) Compensation Court. 10 New South Wales Compensation Court Reports. Pp240 - 250.

**Trindall v Birrelee Pre - School Aboriginal Corporation*. (1994). Compensation Court. 10 New South Wales Compensation Court Reports. Pp768 -777.

**Valentiner v Steel Services Pty Ltd*. (1992) Compensation Court. 8 New South Wales Compensation Court Reports. Pp 429 - 439.

* *Van Look v Blue Mountains City Council*. (1991). Compensation Court. 7 New South Wales Compensation Court Reports. Pp 37 - 43.

**Walker v Wilson* (1991) 99 Australian Law Reports. No 1.(High Court of Australia).

* *WorkCover Authority v Billpat Holdings Pty Ltd*. (1995). 11 New South Wales Compensation Court Reports. Pp 565 - 616.

Acknowledgments

I am heavily indebted to Pauline O'Dowd, assistant registrar of the New South Wales Compensation Court. Her experience in both WorkCover and in the courts has been an invaluable insight into the politics and ways of judicial thinking for me. She has assisted me greatly.

I also am appreciative of the access and help given by the New South Wales Compensation Court Library, without which I would never have gotten hold of the unreported cases, or the Compensation Court Reports. Considering this is a closed library, I am very grateful.

Annexure 1

Legislation

John Bagnell & Sons Ltd [1900] 2 QB 240 (CA)), although that estoppel will not cover a claim that a subsequent period of incapacity has resulted from the same injury: *Phillips v Vickers Son & Maxim* [1912] 1 KB 16. The consideration of this point in some of the early English cases was affected by a provision in the English Act for "recorded agreements": cf *Freeland v Summerlee Iron Co Ltd* [1913] AC 212 (HL); *Dutton v Sneyd Bycars Co Ltd* [1920] 1 KB 414; *Maloney v E & T Pink Ltd* (1923) 16 BWCC 217. The New South Wales Act of 1926 had not provided for recognition of agreements, but it did allow for an award by consent. If there was an award made with either an admission or a determination of liability, the principle of estoppel by judgment would establish the basic facts for all time: *Croft v Concrete Constructions Pty Ltd* [1960] WCR 22. In that case Rainbow J apparently did not regard the mere payment of compensation as creating an estoppel, although he had earlier made comments to the contrary: see *Bruton v Wunderlich Ltd* [1949] WCR 14.

For a time it was considered that the application of the estoppel rule would conflict with some of the provisions in the New South Wales 1926 Act: Could the rule be applied to questions which went to the jurisdiction of the statutory tribunal, such as "worker" or "injury"? Could the rule be used to deny the tribunal the opportunity of exercising its exclusive jurisdiction to determine all matters arising under the Act (cf 1987 Act, s 107(1))? Was the use of the rule contrary to the statutory prohibition of contracting out (cf 1987 Act, s 272)? See, for example, *Hocking v North Broken Hill Ltd* [1930] WCR 93.

These difficulties were largely resolved by the decision in *Ashenden v Stewarts & Lloyds (Aust) Ltd* [1972] 2 NSWLR 484. See also G Sawyer, 'Estoppel in Workmen's Compensation', (1962) 36 ALJ 91. Generally, the courts have been reluctant to treat the mere payment of compensation as more than evidence in support of the worker's case: *Nomeracsky v Canterbury Dressing Works* (1928) 21 BWCC 41 (CA); *Ley v Old Lodge Tinplate Co* (1939) BWCC 58 (CA); *SA Stevedoring Co Ltd v Gerai* [1965] SASR 212; *Lloyd v Amalgamated Stevedores Pty Ltd* [1965] WCR 190; *Huyse v Snowy Mountains Hydro-Electric Authority* [1975] 1 NSWLR 401. Even so, in *Way v Penrikyber Navigation Colliery Co Ltd* [1940] 1 KB 517, Goddard LJ thought it "very unusual" that an employer might pay compensation for 11 weeks as "a mere voluntary payment" without prejudice, and in *Katalinic v Utah Construction & Engineering Co Ltd* [1965] WCR 188, it was thought that facts accepted by the employer as the basis for paying compensation, being good enough for the employer, should be good enough for the tribunal. As Professor Sawyer remarked in the article noted above, although the matter will generally be within the discretion of the tribunal, the practice of the tribunals has been to be guided by the general policy behind the common law principle of estoppel.

The practice under the 1987 Act will have to take account of new provisions relating to the commencement of weekly payments: see ss 102-103.

[WCA 9.5] Subsection (2): **injury at or away from place of employment** The purpose of this subsection is obscure; s 7(1)(a) of the repealed Act had been in similar terms. The phrase does not appear to have attracted any judicial consideration since it appeared in the 1926 legislation. It seems to have been included in this Act to avoid an inference being drawn had it been omitted.

[WCA 10] Journey claims

s 7(1)(b)-(d), (f) (g)

10 (1) A personal injury received by a worker on any journey to which this section applies is, for the purposes of this Act, an injury arising out of or in the course of employment, and compensation is payable accordingly.

(1A) Subsection (1) does not apply if the personal injury was caused, partly or wholly, by the fault of the worker.

[subs (1A) insrt Act 214 of 1989 s 3 and Sch 1]

(1B) A personal injury received by a worker is to be taken to have been caused by the fault of the worker if the worker was at the time under the influence of

alcohol or other drug (within the meaning of the Traffic Act 1909), unless the alcohol or other drug did not contribute in any way to the injury or was not consumed or taken voluntarily.

[subs (1B) insrt Act 214 of 1989 s 3 and Sch 1]

(1C) If the risk of injury on a daily or other periodic journey to which this section applies, compared with the risk of injury on the worker's normal journey, is materially increased for a reason connected with the worker's employment (including the distance travelled, the time of day or night, the method of travel or the route of the journey), subsection (1) is not excluded merely because the injury was caused by the fault of the worker.

[subs (1C) insrt Act 214 of 1989 s 3 and Sch 1]

(1D) Subsection (1) does not apply if the personal injury resulted from the medical or other condition of the worker and the journey did not cause or contribute to the injury.

[subs (1D) insrt Act 214 of 1989 s 3 and Sch 1]

(2) Subsection (1) does not apply if —

- (a) the injury was received during or after any interruption of, or deviation from, any such journey; and
- (b) the interruption or deviation was made for a reason unconnected with the worker's employment or the purpose of the journey,

unless, in the circumstances of the case, the risk of injury was not materially increased because of the interruption or deviation.

(3) The journeys to which this section applies are as follows:

- (a) the daily or other periodic journeys between the worker's place of abode and place of employment;
- (b) the daily or other periodic journeys between the worker's place of abode, or place of employment, and any educational institution which the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to attend;
- (c) a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of obtaining a medical certificate or receiving medical, surgical or hospital advice, attention or treatment or of receiving payment of compensation in connection with any injury for which the worker is entitled to receive compensation;
- (d) a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of having, undergoing or obtaining any consultation, examination or prescription referred to in section 74(3);
- (e) a journey between any camp or place —
 - (i) where the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to reside temporarily; or
 - (ii) where it is reasonably necessary or convenient that the worker reside temporarily for any purpose of the worker's employment, and the worker's place of abode when not so residing;
- (f) a journey between the worker's place of abode and a place of pick-up referred to in clause 14 of Schedule 1;

- (g) a journey between the worker's place of abode and place of employment, where the journey is made for the purpose of receiving payment of any wages or other money –
 - (i) due to the worker under the terms of his or her employment; and
 - (ii) which, pursuant to the terms of his or her employment or any agreement or agreement between the worker and his or her employer, are available or are reasonably expected by the worker to be available for collection by the worker at the place of employment.

(4) For the purpose of this section, a journey from a worker's place of abode commences at, and a journey to a worker's place of abode ends at, the boundary of the land on which the place of abode is situated.

[subs (4) subst Act 214 of 1989 s 3 and Sch 1]

(5) For the purposes of this section, if a worker is journeying from the worker's place of employment with one employer to the worker's place of employment with another employer, the worker shall be deemed to be journeying from his or her place of abode to his or her place of employment with that other employer.

(5A) Nothing in this section prevents the payment of compensation for any personal injury which, apart from this section, is an injury within the meaning of this Act.

[subs (5A) insrt Act 214 of 1989 s 3 and Sch 1]

(6) In this section –

“educational institution” means –

- (a) a trade, technical or other training school; or
- (b) a university or other college or school providing secondary or tertiary education;

“fault” includes –

- (a) negligence or other tort; and
- (b) any failure to take reasonable care for the worker's own safety;

[def insrt Act 214 of 1989 s 3 and Sch 1]

“night”, in the case of a worker employed on shift work, night work or overtime, has a meaning appropriate to the circumstances of the worker's employment;

“place of abode” includes –

- (a) the place where the worker has spent the night preceding a journey and from which the worker is journeying; and
- (b) the place to which the worker is journeying with the intention of there spending the night following a journey.

[WCA 10.1] Attitudes to the journey entitlement An entitlement to compensation for injury received on a journey to or from work first appeared in New South Wales in the 1926 Act. Section 7(1) gave an entitlement to:

“A worker who receives personal injury –

- (a) ...
- (b) without his own personal default or wilful act, on the daily or other periodic journey between his place of abode and his place of employment ...”

The entitlement was a controversial matter in 1926, and it still is. It was removed from the Act in 1929, after a change of government, and it was restored in 1942, but then only as a wartime measure. The justification given was that the increase in the amount of shiftwork meant more travel to and from work in the night, with resulting increase in the risk of injury.

Hence, the journey provision was then expressed not to apply to any injury received later than 6 months after the end of the 1939 war, but this “sunset” clause was repealed, so that the journey entitlement was made permanent.

More than once the superior courts have remarked on the incongruity of the employer being made liable for injuries received by workers when they are out of the control of the employer. Thus, Street CJ in *Hobsons Pty Ltd v Thorne* [1954] WCR 59:

Undoubtedly, it is at first sight somewhat strange that an employer should be called upon to answer, by payment of compensation, for an accident which happens to an employee during a period when he is free from any obligation to attend to his employment, and under circumstances over which the employer can have no control whatever and against which he can take no safeguards. The employer becomes an insurer, subject to the provisions of the section, of his employee during the lunchtime recess, even though the employee has left the premises and has engaged upon some journey or venture of his own. But it is the legislature which has conferred this right upon the worker and imposed this obligation upon the employer, and the court must therefore approach the construction of this section without any preconceived ideas as to the fairness or otherwise of imposing such an obligation upon the employer, unusual as it may seem at first sight.

As against this, it can be argued that the inclusion of journey injuries is not entirely incongruous in a system of no-fault liability.

The continuing objections to the journey provisions led to a cut back in the entitlements. In the Workers Compensation (Benefits) Amendment Act 1989, Sch 5, the government of the day introduced an amendment which would have had the effect of restricting the section to injury on a journey where the risk of injury had been materially increased for a reason connected with the employment, although it was not required that the injury should have resulted from that particular risk. This amendment was never proclaimed to commence. Instead, another amendment was brought in by the Workers Compensation (Amendment) Act 1989 (commenced on 31 March 1990). The previous 1989 amendment of the section was repealed and replaced by provisions which excluded an injury caused partly or wholly by the worker's fault, and which limited the “journey” to one commencing (or terminating) at the boundary of the land on which the place of abode was situated, instead of the entrance to the building (as previously).

[WCA 10.2] Journey provisions: comparison with the repealed Act In the repealed Act, the journey provisions were contained in s 7(1)(b), (c), (d), (f) and (g). As to the former s 7(1)(e) and (h), see ss 11 and 12.

There are many points of difference between the old journey provisions and those in the present section. Some are only matters of form, while others are matters of substance. Some of the differences will be referred to in later notes to this section. Here, three of the most important differences are dealt with.

The first of these matters concerns the relationship between this section, on the one hand, and, on the other hand, ss 4 (definition of “injury”) and 9(1) (the general entitlement to compensation). So far as is relevant, s 7(1)(b) in the repealed Act provided: “Where a worker has received injury on any of the daily or other periodic journeys . . . the worker . . . shall receive compensation in accordance with this Act.” The form of the entitlement in the journey case ran parallel with the general entitlement provision (the old s 7(1)(a)). Hence, s 7(1)(b) was a source of entitlement separate and additional to that in the old s 7(1)(a). That gave rise to questions whether other provisions of the Act, clearly intended to govern the general right to compensation under s 7(1)(a), should govern also the separate right given by s 7(1)(b). Those questions cannot arise under the 1987 Act. The corresponding provisions — ss 9 and 10 — do not give separate rights which are susceptible of different treatment. An injury which is within s 10 is declared by the section to be an injury arising out of or in the course of the employment. It is therefore within the definition of injury in s 4, and so is caught by s 9, which declares the right of the worker who has received an injury to receive compensation. There is only one source of entitlement, not two as under the repealed Act. The sole source of entitlement to compensation, both for work injuries and for journey injuries, is now in s 9. Any other provisions affecting the entitlement to compensation will

apply to both cases. And the same is true for recess injuries (s 11), injuries received by union representatives (s 12) and injuries received outside the state (s 13).

The next matter is that the word "injury" in s 7(1)(b) of the repealed Act was interpreted in the sense of its statutory definition: *Slazengers (Aust) Pty Ltd v Burnett* [1951] AC 13 (PC). If the injury was "personal injury", then the connection to be shown was, arising out of or in the course of the employment. In practice, it was generally enough to show that the injury had been received while "on" the journey, and not subject to any of the disqualifying circumstances specified in s 7(1)(b). Then it could be said (although this was generally left unexpressed in the judgments) that the injury had been received "in the course of" the journey, which was treated as being an extension of the employment. Under the present s 10, if the injury has been received "on" the journey, and the disqualifying provisions of the section do not apply, then the section directly brings the injury within the definition in s 4, without the need for a fictional extension of the employment to include journeys to and fro.

The *Slazenger* decision also established that, in the definition of "injury", the two concepts, personal injury and disease contracted in the course of the employment, were mutually exclusive, and in the case of disease it had to be shown that the employment was a contributing factor to its contraction. It would have been possible (although it would have needed extremely unusual circumstances) to have brought a disease within the old journey provisions. It would have been necessary to show that the disease had been contracted in the course of the journey, and that the journey had been a contributing factor. A more likely case was that of aggravation of disease. In several of the leading cases, the worker had suffered a heart attack, said to have been brought on by the effect of the exertion of the journey on an existing disease. That was yet a third branch of the definition of "injury" (now s 4(b)(ii)) and was added after the High Court had ruled that such an aggravation of an existing disease was neither personal injury, nor the contraction of a disease, and therefore not within the definition of "injury" as it then stood: *Darling Island Stevedoring & Lighterage Co Ltd v Hussey* [1960] ALR 13. Under the aggravation arm of the definition, it had to be shown that the journey had been a "contributing factor" to the aggravation of the disease. The third arm was again separate and distinct from the other two: *Amalgamated Wireless (A'asia) Ltd v Philpott* [1962] ALR 34. The reported cases show that the evidence, and especially the medical opinions, often provided only an uncertain basis for a decision on the contributing factor question: see *Lamson Paragon Ltd v Edwards* (1968) 41 ALJR 325 (a case from Victoria); *Union Carbide Aust Ltd v McCubbin* [1968] WCR 117; *Park Royal Motor Hotels Pty Ltd v Sullivan* (1985) 61 ACTR 15 (reversed by Fed Ct, 27 September 1985, unreported), all journey, heart attack cases.

[The next page is 1821]

Several of the judgments in *Favelle Mort Ltd v Murray* (1976) 8 ALR 649, suggest a weakening of the strict separation of personal injury from the other arms of the definition, but on this point *Slazenger* has been reaffirmed by the High Court in *Hockey v Yelland* (1984) 56 ALR 215. Accordingly, we must take it that in 1987 the legislature, by repeating the definition of "injury" in the same structure as in the repealed Act, has intended that the phrase "personal injury" does not include the contraction of a disease nor the aggravation of an existing disease. Now, s 10 is in terms of "personal injury" received by a worker, and the conclusion seems irresistible that the phrase "personal injury" in s 10 was meant to bear the same meaning as it has in the definition of "injury" in s 4. That is to say, s 10 was meant to have no application to cases of disease or aggravation of disease. In *Armao v Ladue Holdings Pty Ltd* (1992) 8 NSWCCR 440, Burke J held that as s 10 refers to "personal injury", and since s 4 makes a clear distinction between personal injury and disease, that a journey injury which is the aggravation of a disease is not a "personal injury", and is excluded from benefit under s 10(1). In *Trindall v Birrellee Pre-School Aboriginal Corp* (1994) 10 NSWCCR 768, Moran J referred to *Armao's* case with apparent agreement, but found that the injury in question, a previous asymptomatic degenerative disease of the spine rendered symptomatic by a motor vehicle accident occurring while the worker was on his way to work, was a "personal injury", being "an injury caused by frank external trauma" (and thus within s 10). On the distinction between frank injury and disease, see *MGH Plastic Industries Pty Ltd v Zickar* (1994) 10 NSWCCR 543. The distinction between "personal injury", and contraction or aggravation of disease, is discussed at [WCA 4.24] **Disease and aggravation of disease: their place in the definition of "injury"** and following, above. However, it was still possible to treat as "personal injury" cases where the worker suffers some sudden physiological change (eg, a stroke) for which there is no identifiable external cause. Such a "personal injury", if it be received on a relevant journey, would be compensable under s 10(1): *O'Neill v Lumbey* (1987) 11 NSWLR 640; (a case under the 1926 Act, but equally applicable to s 10(1) of the 1987 Act. Since that decision, s 10(1D), inserted by the Workers Compensation (Amendment) Act 1989, has taken out of subs (1) any personal injury resulting from the worker's medical or other condition and not caused or contributed to by the journey: see [WCA 4.24] **Disease and aggravation of disease: their place in the definition of "injury"**, above.

The note under this heading has dealt with what may be regarded as basic structural differences between this section and the journey provision in the repealed Act. There are, as well, differences of detail. Where these are significant, they will be noted in the appropriate place in the notes which follow. All these differences have to be appreciated in applying cases on the old provision to the present section.

Below is a comparative table of the parts of this section and the corresponding parts of the journey provision in the repealed Act. It may be useful in reading the old cases.

1987 Act, s 10	repealed Act, s 7(1)
subs (1)	para (b)
subs (2)	para (b)
subs (3)(a)	para (c)(i)
subs (3)(b)	para (c)(ii)
subs (3)(c)	para (d)(i)
subs (3)(d)	para (d)(i)(a)
subs (3)(e)	para (d)(ii)
subs (3)(f)	para (d)(iii)
subs (3)(g)	para (d)(iv)
subs (4)	para (g)
subs (5)	para (f)
subs (6)	paras (c)(ii) and (f)

[WCA 10.3] **History of the section in the 1987 Act** The section was amended by the Workers Compensation (Amendment) Act 1989, with effect from 31 March 1990.

An injury of the class specified in s 10 as enacted in 1987, if received before 30 June 1987, was to be compensated in accordance with s 7(1) of the repealed (1926) Act: see Sch 6 Pt 2 cl 2(1).