SOME ASPECTS OF WORKERS' COMPENSATION LEGISLATION

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A General Meeting of the Medico-Legal Society of Victoria was held on Saturday, May 25, 1940, at 8.30 p.m., at the British Medical Society Hall, Albert Street, East Melbourne. His Honour Mr. Justice Lowe presided.

Mr. P. D. Phillips delivered an address on "Some Aspects of Workers' Compensation Legislation."

Mr. Phillips: Mr. Chairman and gentlemen, I begin with a preliminary explanation that I have not written out this paper because it represents the preliminary subject matter of a rather more extensive investigation which I hope, principally through enforced leisure during the next few months, to complete. This represents a kind of preliminary sketch of some of the early material.

My attention was directed to this problem by some casual remarks of Mr. Justice Dixon on the problem of cause, particularly in relation to the court's attempt to dissect scientific evidence and to consider scientific facts in legal categories. There are some gentlemen present who will remember what His Honour said about that matter. I began to direct my attention to one limited aspect of the problem of causation, and that was the aspect of causes which arise in a variety of cases in workmen's compensation law. The problem of causation itself is one about which lawyers have got to a state of mind of disinterest. They feel that their own analysis has been unsatisfactory and that a lot of question-begging epithets have been used and are used, and that the problem in itself is insoluble in its ultimate significance; that it is a problem for philosophers or scientists and not lawyers, and that lawyers have to find some formula to achieve their own purpose.

So they have found a formula, though no lawyer feels

that it is a satisfactory one. When you hear lawyers talk of problems of causation there is a kind of ill-will or dissatisfaction and disappointment with what the law has done, and with the feeling "Anyhow we will get along with causation and we do not want anybody to stop to closely analyse anything we are doing." I am reminded of Herbert's statement that there is no problem which an English judge cannot solve, no question which an English judge cannot determine by the simple process of asking himself what would a reasonable man do, and then leaving it to an honest British jury to tell him the answer!

There is that sort of posing a difficult question and running away from the answer, and it runs right through a good deal of our law of causation. However, it does seem to me that the frontal attack on the problem of causation as it arises in the law will have to be made sooner or later. I am not proposing to make it, but rather to select a very small sector of the law and to analyse the aspect of causation that arises in that and see what the results are in an entirely deductive way, and to see what conclusions one can draw as to what the law really means by "cause."

Perhaps it will be convenient, if I do not presume upon the ignorance of the medical members, if I illustrate what this troublesome problem of causation is in more concrete terms. If a man is knocked down at a road intersection by a motorist, in a very simple sense the question arises whether the particular motorist caused his injuries.

It is obvious that many other things could be said to cause his injuries—the manufacturer who made the motor car caused his injuries in the sense that if he had not made the motor car it would not have run him down; the last man with whom the pedestrian was speaking caused his injuries because if he had ceased his conversation with him earlier the pedestrian might have passed the point of impact. And so you can go back to many years before when his father and mother caused him to be there at all. The causation obviously from that point of view is infinite and some process of limitation for practical purposes has

to be made by any scientific provision, and it is made by each kind of scientific enquiry.

The medical man who is asking himself what is the cause of a particular disease limits his enquiry in the light of the purpose for which it is made; and the lawyer has to limit his enquiry into causation in the light of the purpose for which he is making it. So far we are on clear and simple ground. Then the lawyer has attempted to solve the problem by saying, "I know my purpose, generally. It is to ascertain legal liability. I am asking who caused or what caused something for the purpose of determining who is going to be liable in litigation, and that fixes some limit to my enquiry." Then we think we have found the answer by saying, "We will look for the direct cause or the immediate cause or the substantial cause or, illusive and the least illuminating of all, we will look for the proximate cause." We do not really mean the "proximate cause" that we are looking for. However, let us agree on the expression "substantial cause." There is a good deal to be said for this simple practical solution of the law; and so a judge will tell a jury, "Gentlemen, if you think defendant's action was the substantial cause of the accident, then hold him liable," and leave it to the jury to say whether it was the substantial cause. It is no more difficult perhaps to give a rigidity or precision to that idea of "substantial cause" than it is to give it to an expression like "reasonable doubt" in a question of criminal law.

If the matter did rest there and if all you were concerned about was the relative imprecision of a term like "substantial cause" to be applied by a jury, I think the law would work along satisfactorily enough. After all, as Justice Holmes said, the life of the law is not logic but experience. The trouble is that inevitably another question has grown into this question of causation, and that is a quite different question which is inevitable in solving problems of liability in the law, which is being met with in the process of litigation, and which has introduced most of the complications into this problem of cause. Over and over again

courts, when they think they are solving a problem of whether the defendant's act is the substantial cause of what happened to the plaintiff, are not really asking themselves that question at all. They are asking themselves whether that which the plaintiff complains about, for which he is seeking redress, is the infringement of a right the immunity of which is guaranteed. As a matter of policy does the law guarantee protection from the kind of hazard or risk from which the plaintiff has suffered? This of course is not really a question of whether defendant's act has caused the damage which plaintiff has suffered at all.

There is probably in such cases no doubt in the ordinary sense that the defendant's act was the substantial cause of what the plaintiff suffered; but the question of policy grows into the matter. And then what the law begins to ask itself is, "Ought the law as a matter of policy protect the plaintiff's interest from this kind of hazard, this kind of risk?"

In one of the classical cases which comes from the American courts and which has been very much discussed by modern legal literature the situation is very well disclosed. A woman was standing on a railway platform, and some 20 yards away a porter was carrying a brown paper parcel, about the contents of which he knew nothing. He dropped it negligently, carelessly. It contained, in fact, explosives and the parcel exploded. The result of the explosion was to displace a weighing machine standing on the platform some 20 yards away from where the parcel was dropped, and quite close to where the woman was standing. The weighing machine fell over and injured her. The question was whether the railway company was liable to the woman for damages. The porter had been negligent and there was in one sense no doubt that his negligence was a substantial cause of the plaintiff's injuries. There was an unmistakable and unbroken chain of causation between what the porter had done and the injury the plaintiff had suffered. All the same, the law began to hesitate about allowing the plaintiff to recover damages from the railway company because of the porter dropping that parcel. The

real question at the back of that issue was not a question of causation, was not a question whether the porter's act had caused the woman damage, but whether that woman's right to immunity from injury in the eyes of the law was protected from that kind of hazard, the hazard of being injured by a weighing machine being knocked over, caused by the explosion of something negligently handled 20 yards away.

The real question, concealed but substantial, was "What kind of hazard is the physical immunity of the plaintiff protected from?" We might conveniently say that is a problem of false causation. It is not really a problem of causation at all, but it is a problem of the kind of risk against which the law intends or as a matter of policy does not protect the various rights of the plaintiff. My own opinion is that a vast number of difficult cases of causation are only difficult because the real problem is not disclosed or established. Though the talk is of causation, the question really is whether, as a matter of policy, the law in reference to a particular right of the plaintiff—it may be business immunity or profit or some other right—protects it against the particular kind of risk or hazard which in the case in question has occurred. Nobody has any doubt that there is an interest and that it is protected, but just what is it protected against? That issue is discussed in terms of a problem of causation. My thesis is to examine some supposed causal relationships in workers' compensation law to see how far they are really "causal" and how far they are of a different character. More particularly I want to see if this character is disclosed as time goes on and as decisions evolve one after the other, and the pseudo problems are eliminated.

The classical words of the workers' compensation law provide that a man is entitled to recover compensation from his employers for injury by accident arising out of and in the course of the employment.

There are in a loose sense three causal connections involved in every claim for compensation. There is the

causal connection, clear and to be proved, a real causal connection, between the injury and either the death or incapacity which the worker suffers. The injury must result in death or incapacity total or partial. There is no doubt that is a real causal relationship; in other words, the simple question to be asked is, "Is the injury the substantial cause of the death or incapacity total or partial?" Then we are left with the two further ideas, "injury caused by accident" and "accident caused by the employment." Of course the law says, "injury by accident," and "accident arising out of the employment"; but let us disregard the precise words for a moment. There is a general conception that the employment must have caused the accident and the accident must have caused the injury.

Investigation shows that the law started off—going back over a period of 43 years—just in that simple way. The judges said the employment must cause the accident and the accident must cause the injury. But after 40 years it is now clear that the relation between the employment and accident is not cause and effect, and the relation between accident and injury is not cause and effect. The pseudo causes have been revealed as pseudo causes, and the relationship between the employment and the accident on the one hand and the injury and the accident on the other has become more subtle. The relationship comes to be thought of in terms of the things the law protects against, and not as a real causal relationship.

At intervals of about seven years during the development of this law we can pick out considered statements about the causal relations of employment, accident and injury. I shall come back to try and explain what the real significance of these passages is later on. It will hardly escape your attention that the first of them seems to state the matter in very simple terms as to the causal connection between employment and accident and injury. Seven years later a more philosophical judge is asked to discuss certain difficulties in certain questions, and seven years later again a still more philosophical treatment reveals how much more

subtle this relation is than was considered at first. This was said in 1910 by Lord Loreburn in a very well-known compensation case, *Clover Clayton v. Hughes* [(1910) A.C. 242]:

> "Courts of law have frequently been obliged to consider, especially in actions on policies of insurance, what is to be regarded as the cause of some particular event. In one sense every event is preceded by many causes. There is the *causa proxima,* the *causa causans,* the *causa sine qua non*; the *causa proxima* is alone considered in actions on a policy as a general rule. I do not think that is the proper rule for cases under section now under discussion."

The first thing you observe is that there is beginning to be a characteristic kind of causation appropriate to workers' compensation law and not to be found in other branches of law:

> "It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which actually happened would not have happened and if the accident is one of the contributing causes without which the injury which actually followed would not have followed."

That involves two things, the recognition of the causal connection between the employment and the accident and between the accident and the injury. It is a causal connection of what we might describe as the "but for" form, an accident which would not have happened "but for the employment" and an injury which would not have happened "but for the accident." This is the simplest and crudest kind of causation, this "but for" causation. Lord Loreburn concluded by saying:

> "There must be some relation of cause and effect between the employment and the accident as well as between the accident and the injury."

In that case there was no illusion apparently; there were two simple sorts of causation between employment and accident and accident and injury which can be conveniently described as the "but for" kind of causation. And Lord Atkinson, in the same case, put it in very much the same way although he reached a different conclusion.

In 1917, seven years later, Lord Haldane, in *Thom v. Sinclair* [(1917) A.C. 127], said this:

> "The question really turns on the character of the causation through the employment which is required by the words 'arising out of.' Now it is to be observed that it is the employment which is pointed to as the distinctive cause and not any particular kind of physical occurrence."

Now you are getting to a stage where it is a general situation which is to be looked upon as the causal factor; or, to put it in another way, the idea is arising that it is a characteristic risk of the employment which it is the policy of the law to compensate for. Really causation is changing into something quite different, namely, what is the hazard against which the law as a matter of policy provides protection?

> "The condition is that the employment is to give rise to the circumstances of injury by accident. If the section when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of a liability and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one"(!).

That is the only expression in Lord Haldane's judgment of which I find it possible to disapprove. How he thought the question became a simple one after all those years I do not know; but you may observe this, that when he tells us to consider not the detailed fact of the employment but rather the circumstances surrounding the employment, then the problem as one related to the nature of the risk or hazard is coming to be disclosed. It is not the risk of somebody else's carelessness which it is the policy of the law to

protect against; it is the risk arising out of being employed which it is the policy of the law to protect the worker against. The kind of causal relation which will matter will be a causal relation which refers to the fact of the employment; the risk or hazard is of the employment. Lord Haldane said:

> "Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment and there is no need to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged.
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> "My Lords, the expression 'cause' is almost invariably used in a way which lacks precision. In strict logic the cause cannot be pronounced to be less than the sum of the entire conditions. But in ordinary speech and practice we select some one or more out of what is an infinite number of conditions to be treated as the cause. From the practical standpoint of the man in the street, the cause of the setting of a house on fire was the striking of a match, whilst from that of the man of science it was the presence of all the conditions which enabled potential to be converted into kinetic energy. On the other hand for the Court which tries a question of arson the cause is the intention of the accused and any deed done which has accomplished this intention. What then is the special protection which the Act of 1906 directs us to take in the practical selection of the circumstances which are to be determined when an event has arisen out of the employment which has amounted to injury by accident within the meaning of the Act? I suggest that the Court is directed to look at what has happened proximately and not to search for cause or conditions lying behind as would have been the case if negligence on the part of the employer had to be established."

You observe in this passage that there is no requirement in the Act as to what a man ought to do, what ought an employer do and what ought a worker do. You are confined to the simple problem as to whether the accident arose out of one of the circumstances of the employment. Then seven years later Lord Haldane gave another judgment making even clearer this view. He said:

> "Now the expression 'arising out of' no doubt imports some kind of causal relation with the employment, but it does not logically necessitate direct or physical causation . . . but the statute does not prescribe such causation as this being required before a claim can arise. The right given is no remedy for negligence on the part of the employer but is rather in the nature of an insurance of the workman against certain sorts of accidents. The legislature appears to have provided that he is to be insured against certain injuries by accident which may happen to him, provided they arise out of the conditions under which he is employed. That the accident should have arisen out of his fulfilment of these conditions seems to be all that is required to establish the only kind of causation that is demanded. The expression 'cause' may always be regarded as including an infinity of conditions but in ordinary life we have to look for those which are relevant to the standpoint of inquiry. A direct physical cause will of course fall within those which are included in Section I of the Workers' Compensation Act but the scope of the Act and the inquiry which it enjoins appear to extend also the general conditions under which the workman has been directed to act . . . The kind of causal relation required as satisfied by cases in which there has been injury by accident arising out of what the workman had to do as distinguished from being directly physically caused by it. It is not easy to lay down how far such conditions may extend . . . They must be such that the accident has some sort of causal relation with them although not necessarily an active physical connection."

These passages will indicate to you what kind of a transition has gone on in the process of making the law. Thirty years before, to Lord Loreburn, the matter was a simple one—"There must be some causal connection between the employment and the accident, and it must be a proximate and not a remote cause." But in the course of years it becomes clear that what is important is not really a causal connection, not even that the employment must be a proximate or close cause of the accident; but what you have to ask is whether it falls within the kind of risk against which this branch of the law is designed to protect the claimant. What might be the cause if the law was designed to protect against other kinds of matters will not be a cause once you ascertain the kind of risk or hazard which is within the policy of the law. My point really is that we only begin to understand causation when we abandon the research for one precise basis of cause in the law and realize that every particular branch of the law with its own policy has its own kind of causation.

It was with some general theory of that kind in mind that I set out to enquire into the three kinds of causes or so-called causes involved in the apparently simple proposition that a worker was entitled to be paid, or his dependants were entitled to be paid, for incapacity or death resulting from an injury caused by an accident caused by the employment, and to trace the evolution of this conception of causation over a period of 40 years. As a matter of fact, the field is an extraordinarily rich one, and in odd moments of leisure I have read and noted 112 cases on that branch of the law which represents about half the varied reported cases in England and Scotland on just those points alone. No doubt if one goes to the other British Dominions which have the workers' compensation law in the same terms, the number of reported decisions becomes pretty considerable.

You can take two problems—the relation between the accident and the injury and the relation between the employment and the accident. Taking the relation between the employment and the accident, you find a series of legal

propositions involving progressive clarification. The best way to deal with the matter is chronologically.

First of all, you get this conception—a negative one—that if the accident arises out of something which is likely to happen to anybody whether engaged in the employment or not, then, although the "but for" test would show that the employment caused the accident because if the man had not been engaged in the employment then but for the employment he would not have been there and been hurt; still, that is not quite enough. The "but for" test breaks down when the Court is satisfied that, all the same, it is the kind of risk which had no characteristic relation to the employment. For instance, boys are larking and one of them is pushed into a hole and the person who is pushed into the hole picks up a stone and throws it at the boy who pushed him into the hole and that boy is injured. Is that an accident arising out of the employment? It was argued that if the boys had not been employed there the boy would not have been pushed into the hole and he would not have thrown the stone and caused the injury, so it was said that the accident arose out of the employment. The Court said, "No, clearly not; that was a risk which arose out of the larking, which is a normal risk that would arise anywhere. It was not the kind of risk which this particular branch of the law was intended to protect against."

That was one of the earliest cases and no great difficulty arose in deciding it. But it foreshadowed the most characteristic test that emerges in this particular aspect, the test of whether the risk is an "incidental" risk or a "characteristic" risk. The very words used reinforce my contention that the problem is not really of causation but is one of policy in regard to the hazard protected against. That decision that I have described was reinforced where you get a deliberate practical joke. Thus a workman was wheeling a barrow past a barn door and one of his fellow workmen hoisted him up on a hook and dropped him and inflicted serious bodily harm. It was said again that it was the combination of the barn and the hook and the presence of

the man at work which caused the injury. So it was, but all this had nothing to do with the employment. A deliberate practical joke is not an incidental characteristic of the work.

Those two early cases lead us naturally up to the difficulties of the so-called "locality risk." Take the case of the man who was struck by lightning while engaged in building a brick wall. He was 20 feet up the brick wall when he was struck by lightning, and it was claimed that that was an injury from accident arising from the employment. Against this view, it was said anybody might be struck by lightning; why give this man compensation? Why was there any causal connection between his employment and the accident? The claimant recovered because it was said that he was in a more dangerous position than the ordinary man walking along the street. He had been exposed to the risk by reason of his employment. We began to perceive the idea that special exposure is enough to create the necessary causal relationship. If he had been standing at the foot of the wall he would have been in no more dangerous position than a member of the public walking on the surface of the earth who might be struck by lightning. Putting him up in an exposed position 20 feet high, he becomes exposed to an additional risk. This additional risk explains the award. [*Andrew v. Failsworth Society* (1904) 2 K.B. 32].

Thus we see being built up the conception of the nature of the hazard which is protected against under the guise of an elaborate causal conception. You can see why, bearing the general principle in mind, you get courts finding the same kind of characteristic risk even where the danger is due to the deliberate act of somebody else. A cashier who is murdered by robbers who have planned to seize the money which he is carrying—that is an injury by accident arising out of the employment because cashiers are more exposed to the activities of murderers than other people.

Contrast that with the decision, very often cited, of a claim by a lady's maid who was sitting in a room in a house where she was employed, at an open window. A cockchafer flies in the window and she becomes so excited in chasing it that she

injures her own eye. There is no doubt it was an injury by accident. It was said for her that if she had not been employed she would not have been sitting in that particular room, that that is where she was engaged to be, and so there you have all the necessary characteristics. The real reason why the Court rejected the claim was that it was not the kind of accident against which the law purports to provide protection. It was not an incidental risk of the employment; it was not the kind of hazard which as a matter of policy the law contemplates. Looking back, it is easy enough to notice the gradual emergence of these principles, but it is not so easy to deal with all the material circumstances of employment and industry. In fact, the reports show divergences from the main line of what may be seen now as an evolution of doctrine.

The very next case before the Court of Appeal was one which showed a slipping back to the older idea of cause. It was the case of a teamster who was sent into a stable by his employer to eat his dinner. He was sprung at and bitten by a cat. For this he recovered compensation. It was said that the risk of being bitten by the cat in the stable was a risk of the occupation. I think the truth was that it was not, that it was really as extraneous to the employment as the cockchafer which caused the maid's eye to be injured. But the interesting thing about the cat bite case is that if the Court had not been talking about cause in a not very scientific way and had been talking about what kind of risk was intended to be covered by the law, one would not find a decision of that kind.

So much for the first clear idea of what was involved in the question of industrial risk as characteristic of the employment.

The next difficulty may be expressed in this way. Supposing the injury was one which might happen to all the public, did it become an incidental risk because it happens to occur to a man while he is engaged in his employment. Does the law say, "We do not protect you against that hazard because it may happen to anybody," or does the law say, "Though it

may happen to somebody it does happen to you while you are employed, and it happens to you because you were employed. So it is an incidental risk of the employment and the hazard protected against none the less because it is also a risk which any member of the public may run." The courts began by saying "No, it is not a risk protected against," or, to use the classic expression, "it is not caused by the employment." Consider the case of a baker's driver who is compelled to deliver bread in the middle of winter and suffers frostbite to his hands. Is that an accident and an injury by accident arising out of his employment? The courts began by saying, "No, it is not. It is a risk that may happen to anybody because of the winter, and anybody who goes about for any purpose may have frostbitten hands; therefore there is no causal connection between the employment and the accident and the injury." That decision was in 1912. [*Warner v. Couchman* (1912) A.C. 35.]

Nothing is clearer than that as the courts abandon the attempt to find causal relation and really set out to find the risk or hazard protected against, they rejected just that kind of decision. Later on they say, "If he is taken into the streets by his job he is taken into the area of cold or heat or any particular circumstances notwithstanding the fact that other members of the public are subject to the same risk; none the less it is a hazard or risk that it is the policy of the law to provide compensation for." In this sense there is a causal relationship between the employment and the accident.

The subject arose 23 or 24 years later, when the earthquake in New Zealand brought the buildings toppling about the workmen, who were engaged in their ordinary work; numbers of them were injured by roofs and walls falling on them and they claimed compensation. Eventually, the matter went to the Privy Council. Of course, it was said this was the normal amount of risk to which everybody in Napier and the Hawkes district was subject. There was no causal relation, it was said, between the employment and this particular accident. Everybody in the place ran the risk and

many people suffered injuries as the result of buildings falling, and it could not be said that this was caused by the employment. The Judicial Committee said that those men should recover compensation. Of course their injuries were not caused by the employment in the narrow sense of causation, but the risk was incidental to their employment because through their employment they were where they were, and being where they were, it was the roof and ceiling of their workplace which fell on them. The risk or hazard of the roof of your own workplace falling on you is just the kind of risk which it is the purpose of this law to provide compensation for, so that whereas in *Watner v. Couchman* the driver did not recover for his frostbitten hands because everybody would have got frostbitten hands, in 1933 Thomas Borthwick & Sons' workmen did recover for the ceiling and the roof falling on them in the earthquake, though everybody else in Napier and Hawkes suffered the same kind of danger and damage. [*Brooker v. Borthwick* (1933) A.C. 669].

Similarly, of course, in street accident cases injuries to collectors or canvassers whose business takes them walking about the streets and going from house to house and who are hurt in a street accident, the accident there is held to be caused by the employment or to arise out of the employment because the very fact that their employment requires them to move about in the streets brings about that risk or hazard which the law is designed to protect them against. You get some peculiar decisions in this class illustrating how the narrow conception of cause led the courts astray. In one case a brewer's driver was standing alongside a trough with his horses and a drunken man came up and interfered with the horses. The driver warned the interfering drunk that he was likely to be injured by the horses and the drunk knocked him down and injured him severely. [*Mitchinson v. Day Bros.* (1913) 1 K.B. 603]. The Court said that it was not an accident arising out of the employment; but I think it would not so hold to-day. [cf. *Thom v. Sinclair* (1917) A.C. 127, per Lord Haldane]. But it is rather

interesting to contrast that case with the one about the brewer's driver who left his horses and went across to a pub for a drink, and on his way back to his horses was knocked down by a tramcar and injured. The Court said that the accident here did arise out of the employment, that it was a risk protected against, because getting a drink in the course of a day's work is necessary to a worker as he is employed from eight a.m. till eight p.m. He had to have some food and he had to have some drink, and having a glass of drink was incidental to his employment, and walking across the street with the possibility of being injured in the street was a risk of accident which the law was designed to protect.

That has carried us up to about 1917, where you get one of a run of cases which really indicates that the law was beginning to be self-conscious about this problem. In *Thom v. Sinclair* [(1917) A.C. 127] the House of Lords had to deal with a case of a fish curer. She was working in a shop and the adjoining premises collapsed and they brought down the shop in which the fish curer was working. She was injured by the fall of the roof which, of course, was caused not by anything her employer did, not by anything connected with the state of his premises, not by anything arising out of the nature of her activity. The only relation between her employment and the accident was that her employment brought her to the place where she was put under that roof and in fact that roof fell on her. The issue raised before the House of Lords was whether the causal relation between the employment and the accident was something arising out of the nature of the functions of the worker, or was it the risk or hazard due merely to the fact that the worker was actually there engaged in her work? That was a clear issue, really. If the worker was to succeed in a case like that, then the kind of causal relation between employment and accident was of a very much more general character than is envisaged in the expression "substantial cause" or "proximate cause." It would become unmistakeably clear that the real test was the risk or hazard guarded against and not merely proximate causation. The House

of Lords held unanimously that the claimant succeeded. The fish curer succeeded because her employment put her under the roof, and it was the policy of the law to protect people from all that happens to them while they are at their place of employment. I am disregarding some difficulties which may arise out of the expression "in the course of."

That represented 20 years' evolution, and I think it is fair to say that by that time the real nature of the problem was disclosed. It is interesting to observe that passage which I read to you earlier from Lord Haldane's judgment about causation is in marked contrast to the very simple expression in *Martin v. Loviebond* [(1914) 2 K.B. 227].

So much for what I venture to suggest is the relatively clear evolution of a principle—the disclosure of a principle in what is not what I would call a problem of true cause, but a problem of legal policy. This particular thesis is borne out by the growth of the kind of exceptions that are grafted on to this particular principle. One of these is the so-called exception of "added peril."

A concrete example will make this category clear. There is the case of the boy in a coal mine who sits upon one tub of a train of tubs which is being trucked along a corridor in the coal mine. He gets on to the tub almost under the notice which prohibits employees from riding on tubs in a train, and as the train goes down the corridor he hits his head on a projecting piece of timber and is very seriously injured. Was that an accident arising out of the employment? Nearly everything I have said up to the present would lead you to say "Yes"; but at this stage the House of Lords began to introduce qualifications and to say "No, it is not arising out of the employment. There is no causal connection between the employment and the accident because it is due to an added peril. The law is designed to protect a man against the risks or hazards of his employment, but is not designed to protect him against risks or hazards of his own conduct." The added peril cases start off presumably on that basis. I have just described for you the facts in *Barnes v. Nunnery Colliery* [(1912) A.C. 44]. Again we have another example

in *Plumb v. Cobden Flour Mills* [(1914) A.C. 62]. In this case a man was stacking flour by hand and there was a revolving shaft going across the scene of the stack and he thought it would be much easier if he swung the rope over the revolving shaft and hauled the bags up. He did so, and was carried up the shaft and his arm injured. He was going out of his way to employ mechanical means which were not part of his employment. That was an added peril and the case contains a very elaborate explanation by Lord Dunedin of the meaning of the phrase.

I want to indicate how these cases of added peril developed because they throw much light on the problem of causation. If the courts had said that every time a worker was negligent or careless he had added to his normal employment peril, and had refused compensation, the results, of course, would have been disastrous and illogical. If what I have been saying is right, the policy of this branch of the law was to protect a man against the normal risks or hazards of his employment, and one of the normal risks or hazards of industrial occupation, of course, is that a man may be hurt in the surrounding danger of industry through his own carelessness. Clearly the policy of the law was to protect a man against that particular hazard, the hazard of damage, caused by the potential dangers of the industrial environment in conjunction with his own carelessness. At some time or other he is bound to be careless. Then he will be hurt because the danger is always there. It took the courts some time to distinguish between a case of added peril, that is a hazard not covered by the law, and the case where a man was injured through his own negligence but which remained still an injury by accident due to the employment. The distinctions became very subtle. Thus, if what he had been doing was merely a careless way of doing what he is employed to do, then an injury resulting was compensable, it was still a risk or hazard of the employment. On the other hand if what was done, if the added peril was something quite different from what he was employed to do and not merely a negligent way of doing what he was employed to

do, then he was held to have been injured not by his employment but by the added peril which he has brought upon himself. The distinction is a logical one and indicates the principles the courts are evolving. The application of that distinction is very difficult. A farm labourer who was driving a reaping machine with a pair of horses and a moving knife found that one of the traces had come loose. Now the sensible thing for him to do was to place the knife in a safe position, alight and replace the trace. Instead, the driver, without putting the knife to safety, balanced his way along the pole and then fell when the horses started forward. He was badly hurt by the knife being dragged over him. That represents a typical situation. There he was in one sense employed in doing what he was required to do. Was he doing it in such a way that it was an added peril, so that the accident did not arise out of his employment? The extremity of his foolishness was so clear that the House of Lords said that this was an added peril and not a negligent way of performing his work. [*Stephen v. Cooper* (1929) A.C. 570]. Like many other distinctions in the law, you can distinguish black midnight from the midday sun, but the intermediate cases are not so easy to distinguish.

In the next case where this issue arose, a railway employee who was walking across the railway yards to get hot water to make some tea found a line of trucks standing apparently stationary and he decided that the easiest way to get to the hot water was to dodge between the trucks. Somebody shunted the trucks and pushed them over him and injured him very badly. It was part of his employment to go and get hot water, and the proper track lay across the railway yards. Was the difference between walking around the stationary trucks and going through them so great that in going through instead of walking around he was doing something different from his employment altogether? Was that an added peril which took him out of the employment or was it a negligent or careless way of doing what he was employed to do? If it was the former, then the law says the accident is

not caused by the employment; if it was the latter, then the accident was caused by the employment.

I only mention these rather bewildering matters to make clear what I suppose is probably unmistakeable at this time that the problem is not one of causation at all. It is a problem of the policy of the law in defining the quality of the hazard or risk that the worker is protected against.

The same sort of principle extends along a very subtle line of cases called "access cases." Take the case of the sailor who leaves his ship and has an accident on his return. If a sailor falls off the quay before he gets to the gangway, though he is still in his employment—mark that, he is still in his employment—if he falls off the quay and is drowned that is not an accident caused by the employment, but if he gets to the gangway it is an accident caused by the employment. Just to explain the matter in that way suggests artificiality, but when you do analyse these accidents, whether the worker had got to the means of access or not, you see again that what the courts are really evolving is the relation between the accident and the risk or hazard protected against. They say: "As long as a man is standing on the quay he is in the same position as the rest of the public and falling off the quay for him is no different from anybody else; but when he gets to his ship and slips or falls there, he has passed out of the category of the rest of the public and into the category of his own particular employment. That is a risk or hazard of his employment as opposed to risk or hazard of people who frequent the waterside."

(This principle paraphrased in the inelegant colloquialism of direct speech has now been definitely established by the House of Lords in *Weaver v. Tradagar Iron Co.* (1940) A.C. and followed by the Full Court of Victoria, *M. Fiske v. Horner and Monnatt* (1941) V.L.R. 170. But the principle (which cost my client the appeal in Fiske's case), though clear enough to a mere lecturer, was rejected by the trial judge, a unanimous Court of Appeal and a dissenting Lord Chancellor in Weaver's case. A re-reading of this lecture

after the decision in Fiske's case reveals the defects of what is known as an academic approach to the law!)

So you can get access cases illustrating the same kind of thing as the added peril cases. They illustrate the gradual evolution of the conception of accident and scope of the hazard involved in the theory of causation. Every now and again a judge solves the problem by saying that the employment was or was not a proximate cause of the accident. Of course that is more or less the importation of a false idea. On the whole it would be better if he did not talk about the the causal relation in this limited way.

As to the other problems which I should have liked to have discussed with you, that is the problem of the relation of injury and accident, the evolution of doctrine, these stand on completely different ground. What I have been outlining I would describe as the discovery of a pseudo cause, a discovery that the supposed causal relation was not a causal relation at all but a matter of legal policy. What happened in the history of the relation of accident and injury has been quite different again. The courts began by saying injury must be caused by the accident. The language used suggested a normal causal relationship, so that the accident had to be the proximate cause of the injury. The evolution here led to the abandonment of the causal connection altogether. The phrase itself became descriptive of the injury and therefore a substitute for causal relation. The courts came to say: "We will compensate for accidental injury rather than injury caused by accident." The injury had to have a particular character about it, namely, accidental. In the early stages the courts had considered the matter by first asking whether there was an accident, and if so, did it cause the injury. Sometimes claimants failed because they could not point to a definite accident that caused the injury, and sometimes they failed, though they could point to an accident, because it was not the proximate cause of the injury. Gradually the courts, and particularly the House of Lords, began to abandon that idea. Lord Macnaughten made it clear that

the expression did *not* mean an injury caused by an accident but that it *did* mean accidental injury, that is, an injury that was fortuitous and unexpected. There was only a slow evolution to the full acceptance of that view.

There was a leading case in 1914, *Trim v. Kelly* [(1914) A.C. 667]. A schoolmaster of a technical school in Ireland had stopped the boys from playing hockey. They arranged to attack him, and when he got on to the ground they set on him with hockey sticks, with the result that he died. One of the things the court enquired about was whether that kind of thing had happened in the school before. They considered whether it was really an accident, whether it was unexpected or the kind of thing that a schoolmaster in that part of Ireland would look for. The court held that it came within the conception of accident, although of course it had been planned or designed. The House of Lords said that did not prevent the result being an injury by accident. It was fortuitous and unexpected, and therefore it was an accident. The deceased did not deliberately design it for himself, but somebody designed it for him. The fact that the boys hit him was not an accident, but it was an accidental injury. By the time you get to that conclusion the idea of an accident *causing* injury has changed very much.

The subsequent history of this piece of the law, and particularly from its medical side, is full of interest. In recent years its most interesting aspect has been what are known as the "heart cases." I will say a word or two about heart cases to illustrate the way in which the causal connection has become attenuated.

Put very broadly, the problem arises in heart cases in this way: A man drops dead at work; the post-mortem reveals a very advanced stage of heart failure due to arterio-sclerosis or myocarditis or some serious heart complaint which has terminated in his death. In practically all those cases the subject had died of a defective heart, a degenerated heart which ultimately gave out on him, and he died at his work. The general tenor of the decisions

has been to enable a claimant to succeed under those circumstances. They have held that his death had resulted from injury by accident arising out of his employment. Take the extreme case of the worker who raised his hand above his head. That was the last effort and it was just sufficient to break down a thoroughly diseased heart, and cause his death. On those facts he was held entitled to compensation, as death had resulted from injury by accident arising out of his employment. Not only was that so held, but it is not an anomalous decision. There are plenty of others in this part of the law—not odd decisions.*

There is a clear line of authority exemplifying what the law has come to. I cite that to you because it illustrates what happens to this expression "injury by accident." Nobody can suppose in those circumstances that there was any "accident" or that there was a causal connection between it and the injury. There is a physiological change in the man himself which occurs at his work, and the physiological change results in the death or incapacity of the physiologically-changed man accidentally, that is to say, without anticipation or design. The physiological change occurs as the result of activity occasioned by his employment and in this sense, and only in this sense, are the causal links completed. So you can see how completely this expression "injury by accident" has ceased to describe causal connection and come to describe a characteristic of injury. If I had had time to trace chronologically the cases of injury by accident, you would have seen how early cases insist on the causal relation and how the law gradually drifts away from that to evolve quite a different conception altogether, indicating again that causation is used to cover very many different relationships, and gradually, as the policy of the law becomes disclosed, the courts began to use other expressions and dropped all references to cause and concentrated on the purpose for which the law is designed.

There are two comments I do feel justified in making.

**Editors Note.*—See *Adelaide Stevedoring Co. Ltd. v. Forst* (1941) A.L.R. 212.

The first is a very general one, and it is this, that lawyers are rather inclined to be a little supercilious about workers' compensation law. They think it is unscientific as law and that it is full of vagaries and irregularities and illogicalities and more a project of sympathy than logic. I think that is largely due to the fact that there is no systematic study of workers' compensation law, and no academic study of it. It is not taught in law schools, and a man coming to a case in compensation law, for instance a case of the brewer's drayman, will look to see what cases there are reported of the same kind. He will find something pretty close to his own brief and alongside it is another case of another brewer's drayman in which the result is different. He is inclined to say that there is no logical principle in workers' compensation law. There are bad decisions in this law as there are in all others, but there has been a real evolution of doctrine of a logical and even, I think, of a philosophical character. I am not desirous of imposing a high-flown theory on a series of cases, but I think that an honest study does reveal a gradual emergence of clearer principle.

The other point I venture to suggest is this: that what may sound to you like a high-flown philosophical theory is often the best guide to practice. If the lawyers concerned and courts bother to analyse the problems fundamentally, then we shall be less likely to have repetition of examples of conflicting decisions which do mar this branch of the law. A genuine attempt to get to the fundamental logical problems involved would lead to the avoidance of empirical errors which are to be found now and again.

DISCUSSION

His Honour Judge Stretton: Mr. Chairman and gentlemen and Mr. Phillips, I take pleasure in opening the discussion which I hope will follow upon the remarks of our learned lecturer, because, looking back on the last occasion when the matter was discussed quite irrelevantly by Mr. Phillips and myself, I feel that we gave off sparks rather than discussed the matter, and I feel that thereby I did myself a grave injustice. It might seem more appropriate to say that I feel I have caused Mr. Phillips to suffer under some injustice, but that is not so because, ultimately, when one speaks in intemperate terms of the opinion of a gentleman of his undoubted intelligence, then it is the speaker who utters those terms who does himself an injustice.

I am very interested by Mr. Phillips' discussion. One thing which he has said has oppressed me much for some time: I have had the feeling before ever I became interested in workers' compensation law, and it was a feeling which is shared by some of my friends who are really lawyers, that the tendency of superior courts, of courts of appeal, is to make the law much too subtle. One feels that in courts of appeal—and I speak now of the law generally and not of workers' compensation law—there is a tendency to conduct a debating society in which each member hopes to show each other member that he is ahead of him in legal knowledge and agility, which is very confusing to those members of the profession who are unfortunate enough to find themselves obliged to read the decisions! I speak quite seriously, gentlemen, because I am convinced that the law is daily falling into disrepute for this very reason. It has been the proud boast of our lawyers that they could be certain in advising their clients, but nowadays no man can advise his client with any certainty because we have come to a state of affairs likely to defeat the just rights which the more robust lawyer of the past could have advised a man that he undoubtedly had.

In that way the law generally, it appears to me, and again I assure you that I draw confidence in saying this by greater lawyers than I am, is moving away from the wants of the people. It is not something which can be brought with certainty to apply to the problem between Smith and Jones but it is a game of skill to be played by technicians at the expense of Smith and Jones, or one of them.

In that respect it does appear to me that the law has moved away from the wants of the people, and the curious, and I am sure undesigned, paradox when you come to workers' compensation law, is that it has moved in the direction of the wants of these people. What I am trying to express is this: that it is the over-subtle which has crept into workers' compensation law which has afforded the worker as a class much wider benefits than a reading of the Act in its ordinary English sense could ever be brought to him, and there had been by accidental paradox for once the situation that the law has become for the vast number of the workers something designed more and more every day to meet their urgent needs. It is not a credit to the lawyers. It is a mere accidental result, and that subtlety has almost gone to this extent—I think one may say—of reversing the onus of proof in workers' compensation cases so that now, however fair or impartial the tribunal may be, if it reads the Act first and if it can sustain the reading of the authorities afterwards, it will feel that in effect the respondent has in some cases to prove that he is not liable rather than that the worker has to prove that he is entitled.

When you come to consider heart cases that Mr. Phillips has referred to, I think, perhaps, one may be pardoned if he made the grisly joke that heart cases make bad law.

Getting down to a more practical matter of interest to members of the two classes of our society, is the astonishment with which I sometimes find myself dealing with medical evidence which is given before our Board. It appears to me that I have taken for many years too low an opinion of my own profession. Sometimes before the Board it becomes quite manifest that the divergence of opinion transcends the ambit of legitimate difference of opinion, and one is forced to the conclusion that here are two sets of people using all the weapons they have. I have been quite satisfied on two occasions that a medical witness has gone much farther than his knowledge and intelligence warranted.

What the cure may be I do not know, but it is one of my most distressing embarrassments in trying to decide between those conflicting bodies of opinion to come to some sort of temperate decision in the matter; and I find myself violently excusing them who do not offer for themselves any excuse.

It seems to me that of all the jurisdictions the workers' compensation jurisdiction ought to be the last field for any sort of chicanery or subterfuge.

I am glad and anxious to add that it happens, in my estimation, only upon very few occasions, but that it does happen I am quite certain.

I feel that the Workers' Compensation Act should be a more workaday formula for the solving of workaday problems, and that we ought not to import methods of dialectitians into our considerations. There is, of course, no jury in that jurisdiction, but when you view the sort of problem that has to be solved, when you read the legislation which has been erected for the purpose of finding a solution, it seems to me that we would do better with commonplace intelligence brought to bear upon those problems than with the niceties and dialectical skill that have rather overshadowed the needs of the problems that arise. Mr. Phillips has rightly said that it is easy to walk with certainty at high noon, but when you get into the workers' compensation morass it is in the twilight that you may come to grief, as many a better man has done before you.

Mr. Norris: If I may be pardoned for offering two observations upon Mr. Phillips' address, I would like to say in the first place, by way of criticism, that I regret to find a member of the staff of the Melbourne University venturing to state categorically and definitely that there is no economic study of workers' compensation. I assure him he is mistaken, though I would not claim that the study that is undertaken at the University of workers' compensation law is particularly profound; still, it does exist, and the criticism directed to the staff is not justified.

The next observation I would make is that I am very glad to hear that Mr. Phillips is merely beginning a study of what is an extraordinarily interesting problem. From a limited study on reported cases on the subject, I have been impressed by the fact that the text books on the subject are not by any means of the best, but that they are merely collections of cases and no real synthesis of the decisions has been attempted. I hope that Mr. Phillips' further study will lead him to a definition of the risk or hazard that is to be protected and in respect of which compensation is to be awarded, as opposed to what is at present, I think, a mere description of it by, to some extent at any rate, merely particular instances. I think that an extraordinarily interesting study would be to arrive at some real definition of the risk or hazard that is to be protected and guarded

against. Might I say that I particularly enjoyed Mr. Phillips' synthesis so far as it has gone at present. I think it does go far beyond anything which we will get from the books on the subject at the moment.

Dr. McMeekin: First of all, I would congratulate Mr. Phillips on his very able address. Some of my medical colleagues will probably join issue with me on this, but I have long felt that medical evidence as given in the Workers' Compensation Court leaves a great deal to be desired. I have had a good deal of experience in those cases, and I have endeavoured to give fair opinions, and I may say that on many occasions I have given opinions against people who have asked for compensation; but I have had experience of a number of cases where I have had grave doubts about the medical evidence that has been given on the other side. I think, frequently enough, medical men are asked to give evidence in those cases who do not understand in the slightest degree the Workers' Compensation Act, and they do not really understand the problem upon which they are asked to give evidence.

I have come to the conclusion that a study of medico-legal cases is one of the most useful studies a medical man could be asked to do. After he has really studied a dozen or so of those cases, it not only helps him with the medico-legal side if the problem, but it helps him occasionally to understand the ordinary everyday problems of medical practice. There is nothing to my mind which teaches a medical man so much about taking a history in detail without examining and dissecting every detail as a medico-legal case. There is this point of view, that a great many medical men regard these cases as a nuisance, it may necessitate their attending court, and they do not go into them therefore with the same enthusiasm as they do with medical cases. It would pay them very well indeed to take every care and pay every attention to every case of this sort which they have brought under their notice.

In regard to the question of heart cases, I suppose about the most thorny problem that has ever beset the medical profession is heart cases. I have come to the conclusion that as the law stands at present, almost without exception the dependants of every employee who dies at his work from heart failure will claim successfully under the Workers' Compensation Act. The last case that I had the privilege of reading, and I do not think possibly I was fully aware

of it, was the case of a man called Hetherington, a colliery worker in Western Australia. He was working below ground and he, presumably, as all colliery workers do, was working hard; and he got through that quite satisfactorily, but in order to get back to the surface he had to walk up an incline, and he did that successfully; but soon after reaching the top of the incline he dropped dead. He was found very soon after by some of his fellow workers and subsequently a case was heard by a police magistrate who found in favour of the dependants. Subsequently the case went to the Full Court of W.A. and they found in favour of the colliery. It was taken to the High Court and they found in favour of the dependants; and there the matter apparently finished. [*Hetherington v. Amal. Collieries* (1939) 62 C.L.R. 317.] From a medical standpoint there is not the slightest doubt that the man's work had nothing to do with it. He was due to die and he duly died when his work finished; but because he died at a certain time and at a certain place, it cost the colliery or the insurance company the maximum amount. The High Court found that verdict unanimously. As far as I can see, that is going to be the condition of affairs so far as heart cases are concerned. I have noted with very great interest the process of evolution that has been going on, according to Mr. Phillips, and it is soon going to get to the point that any illness that arises during a man's employment, such as pneumonia, or anything else, will be duly compensated by the maximum amount of compensation for the amount of incapacity. I am not saying that is wrong, but I think it is about time that it was made perfectly clear that the courts are going to take that view. Pneumonia is a case that I have in mind. Mr. Phillips mentioned a case of the seaman who slips off the wharf. He gets nothing if he slips off the wharf, but if he slips off the gangway he gets compensation. What about a cloudburst occurring while the seaman is on the wharf, with the result that he gets pneumonia? If fortuitously the cloudburst occurred while he was on the gangway and he gets pneumonia, is he to be compensated? It may be stretching the point a bit, but perhaps not very much, because it seems to me that the whole trend of the workers' compensation is getting to the point where any illness will be regarded by the Workers' Compensation Board as being a case for compensation.

Mr. Eggleston: The remarks of the last speaker suggest

to me that there are certain economic effects of workers' compensation which should be understood. In Western Australia, which he mentioned, I understand that workers' compensation costs add 2 per cent. to the costs of wages in the total employment of Western Australia, and the premiums on policies in Western Australia are double what they are in Victoria. The question of workers' compensation, therefore, has very big repercussions. I do not think this is quite relevant to the general purpose of the evening, but it leads me to discuss why that is so, and that is relevant to certain suggestions which have been made this evening, i.e., as to the character of the evidence which is brought before the workers' compensation tribunals by medical certificates and medical evidence. It is commonly suggested in Western Australia that the presence of hospital benefits in the Workers' Compensation Schedule adds enormously to the cost of workers' compensation in that State. I understand that the doctor will order a man into hospital and he can get a month's benefits in hospital; and that is so common that the hospital benefit is an enormous addition to the cost of the workers' compensation. It is quite obvious, I think, that a great many of the certificates upon which this is given are false, and the only excuse given is that the doctors have to give those certificates because, if they do not do so, the union would soon put them out of their job. I know that that does take place because I have a case of accident insurance in Victoria where the doctor gave a certificate that a man had had an accident. He had never seen the man and the man had never had an accident at all. The insurance company made enquiries of the man and asked him had he had an accident, and he said he hadn't. It appears that his wife had been in conspiracy with the insurance agent and told the doctor that her husband had had an accident, and the doctor gave a certificate on that representation. I just mention this case in support of the remarks I have made.

I do want to compliment Mr. Phillips on the way he has dealt with the subject. I think his analysis of the development of judicial doctrines was extraordinarily informative, and I think his observations will help in the development of legal doctrine very much in the future if they are treated with the respect they deserve. I think Mr. Phillips has not only made an examination of the development of the doctrine of cause in workers' compensation in a very illuminating way, but his examination seems to me indirectly to throw some light on the whole theory of the liability for torts of

which there is no very satisfactory exposition in the legal text books at the present time. If Mr. Phillips went on with the development of the doctrine of cause that he has elaborated so far, and discussed the whole doctrine of tort, it should lead to very interesting results.

Dr. Ostermeyer: I would like to express my appreciation of Mr. Phillips' treatment of this subject. The subject has both a logical and legal side, and his treatment has been logical. I remember many years ago in the journal of the *Australian Philosophical Association* there was an article on *Law and Logic.* It started with a quotation from Holmes that the basis of law is not logic. That gave me a bit of a shock, because I thought law was logic. But when I read Professor Bailey I found logic and law were very far from identical, and when you come to consider causation you find that the legal view and the logical view are hemispheres apart. I was astounded at that. Mr. Phillips has simply reiterated that and given infinite examples of it. For example, he has defined an accident. What is an accident? That is a very logical question. I am not making any criticism of Mr. Phillips' results, but an accident has not been clearly defined, and I am talking as a logician and not a medical member. Then he went into causes, and then we get to effects: you may get the effects of an effect of an effect of an effect, and when the doctor comes in he starts with the effect of an effect of an effect. There is the accident; that is the central point. Some lawyer goes back to the cause of the cause of the accident, and the medical man goes on with the effect of the effect of the effect. They go in two different directions. It is a curious thing. I do not think the word "cause" occurs in the Workers' Compensation Act. It says "arising out of his employment." "Arising" can hardly be said to be a logical term. There has been a great deal of legal decision and discussion about what employment is. The question has been largely one of common law and statute law. Where does case law come in? What is the Legislature doing in regard to the effect of this long line of legal decision? Why has not the Parliamentary draughtsman incorporated them in the Act? It would do away with a great deal of legal subtlety and dialects. Why do not they incorporate it in our Statutes? It seems to me that "arising out of his employment" might be defined more specifically. Then again we come to injury by accident, and accidental injury is another thing. How on earth is one to differentiate? It seems to me that Mr. Phillips' efforts as a logician or

dialectitian to distinguish between those is a very fine piece of work. I just make these few remarks as a logical medical member. There are various queries about the medical part of the subject. For instance, in heart cases —a man dies at his work from heart failure, and his dependants are compensated as if his death arose out of his employment. That may be law, but it is not common sense. When a man dies at his work, does that arise out of his employment? As a matter of fact, it might have happened somewhere else.

Mr. Vroland: I would like to add my tribute to the excellence of Mr. Phillips' address. I cannot accede to the proposition of His Honour Judge Stretton that we want a more robust type of mind rather than the refined mind to be brought to bear on this subject. All the refinements and all the niceties of the law have resulted in building up the strength of our institutions. If we study the facts before we express an opinion, the problem which we have to deal with will become clear. Once the problem is clear to the trained lawyer, he is well on the way to its solution.

I mentioned that for this reason. Our State Government has seen fit to constitute a Board comprising a member of the Judiciary and two laymen—I do not quarrel with that at all, but I do quarrel with the further distance it has gone, that is, to permit so-called workers' compensation advocates, non-trained lawyers, advocates, enthusiastic, untrained union secretaries, to come along and appear before the Board and pretend to do something for the worker whom they are quite incompetent to protect in any shape or form. The Government fails to recognize this fact, that if it wants to give the workers confidence, and I assume that the appointment of the Board is in pursuance of the policy of giving the worker more confidence, it should employ highly trained legal men to appear before the Workers' Compensation Board. There is many a lawyer who appears before that Board without fee, or at any rate very little fee, and if the Government wants to meet this problem, which is a real one, then the solution of it does not lie in permitting incompetents to appear before the Board but in the employment of highly competent and trained men.

Shortly prior to Hetherington's case I had the case of a worker who had a very bad heart condition, but he unfortunately preferred to die during a night's sleep rather than just after he walked away from his work. I was just on the way to getting a beautiful settlement when Mr. Phillips

got this idea of dealing with "cause"! I think that every lawyer who has heard this address owes a debt of gratitude to Mr. Phillips for his lecture.

His Honour Judge Stretton: May I add one word to what I have said, Mr. Chairman, otherwise my remarks are without basis. What I failed to say in my remarks was that we have the most august authority for the proposition that the Workers' Compensation Act must be read in a popular sense; bear that in mind and see what the courts have done to the word "accident," and then perhaps Mr. Vroland will change his opinion.

Dr. Dickson: This has been a burning question in this State and other States and possibly all over the world—the unreliability of certain medical certificates. I think in this State it has improved, and I know that in the last two or three years the Medical Board of Victoria has dealt with at least two cases, and I understand it is prepared to deal with any others that arise. The Board has given very specific warning that any abuse in regard to medical certificates might result in the deregistration of the medical practitioner, and that matter is probably fairly well safeguarded.

Mr. Eggleston spoke of the burden on industry. We hear a good deal of that at different times. An analysis of the published figures might be misleading on this question. Some few years ago I had occasion to investigate the position in New South Wales and out of a total cost of £1,600,000 the medical certificates issued to injured workers amounted only to £2,000. When the Third Party Motor Car Insurance Bill was before the House last year, it was stated that £500,000 had been collected in premiums in Victoria and £200,000 had been paid out. So the burden on industry seems to be more connected with the profits of insurance companies than with the benefits to injured workers; but in that difference of £300,000 it should be remembered that very substantial rebates are given, and one company I know of in this State which handles a great deal of workers' compensation this year has given a 40 per cent. rebate to its policy holders, so that, based on 100 premiums, 40 of them are returned to the policy holders. The State Insurance profit last year was £348,000, including bonuses. The other question of medical advocates is one about which I feel very strongly. I understand that the Workers' Compensation Board has power to use medical men as assessors just as on a marine enquiry

they will use captains and men of experience; and I would urge that it would overcome a great number of the evils connected with this use of medical men if medical witnesses were not called, or if they were called that their evidence would be checked by assessors who would be in a position to tell the judge and his colleagues, "This man is a liar or a fool," or that the other man's evidence is worthless. I think that would limit the evil complained of.

A vote of thanks to the speaker was carried by acclamation.