IMPAIRMENT AND INCAPACITY—A STUDY IN SOCIAL SECURITY

By Mr S. E. K. Hulme, Q.C.

Delivered at a Meeting of the Medico-Legal Society held on 3rd October, 1981 at 8.30 p.m. at the Royal Australasian College of Surgeons, Spring Street, Melbourne. The Chairman of the Meeting was the President, Dr J. W. Upjohn.

A. *The Provisions and their History*

Division 3 of Part III of the Commonwealth *Social Services Act* 1947 sets out the code governing entitlement to what it calls "Invalid Pensions". The basic rule is set out in s. 24 (1):

> "24. (1) Subject to this Act, a person above the age of sixteen years who is not receiving an age pension and—
>
> (a) is permanently incapacitated for work or is permanently blind; and
>
> (b) is residing, in and is physically present in, Australia on the date on which he lodges his claim for a pension,
>
> shall be qualified to receive an invalid pension."

Alongside that provision one must set s. 23:

> "23. For the purposes of this Division, a person shall be deemed to be permanently incapacitated for work if the degree of his permanent incapacity for work is not less than eighty-five per centum."

Pursuant to those fairly primitive provisions, hundreds of millions of dollars have been and continue to be paid out.

The provisions are part of a tri-partite scheme including also:

A. An entitlement under s.108 to a "sickness benefit" for a person who is "temporarily incapacitated for work by reason of sickness or accident" and has "thereby suffered a loss of salary, wages or other income".

B. An entitlement under s. 107 for a person who is "capable of undertaking" and "willing to undertake" work "which, in the opinion of the Director-General, is suitable to be undertaken by that person" and who has "taken steps to obtain such work".

The scheme is in a sense logically complete, covering those "temporarily incapacitated for work", those "permanently incapacitated for work", and those capable of and willing to undertake suitable work but unable to find it. There is of course a fourth class of persons, com-

posed of persons capable of suitable work, but unwilling to undertake it or (much the same thing) unwilling to look for it. These persons remain outside the scheme of the Act. The Act also provides for "Special Benefit" for a person "unable to earn a sufficient livelihood for himself and his dependants (if any)": s. 124. These can cover cases of persons falling between the main provisions.

It is I think clear, that "incapacitated for work" means something like "incapacitated for work as an employed member of the workforce". That approach has been taken in cases concerning workers' compensation. In *Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (1933) 50 C.L.R. 328, the High Court said in relation to the phrase "total and permanent disablement" in s. 9 (3) of the *Workers Compensation Act* 1926 (N.S.W.)

> "The Commission was, therefore, called upon to decide whether the worker had been permanently and totally disabled, an expression which, in our opinion, means physically incapacitated from ever earning by work any part of his livelihood."
>
> 50 C.L.R. at p. 338

The presence in this Act of the words "incapacitated for work" seem to demonstrate even more clearly the connexion with employment. Capacity to perform some activities of a physical nature in the flexible environment of one's own garden is not inconsistent with the presence of a total incapacity for work. The question will at all times remain one connected with capacity for work as a member of the employed workforce.

A provision akin to the present s. 23 has been in the Act since 1941. Prior to that time, entitlement to an invalid pension under the *Invalid and Old Age Pensions Act* 1908 depended on satisfying the words "permanently incapacitated for work", which had been interpreted as meaning "totally and permanently incapacitated for work". In 1941 the Commonwealth Joint Parliamentary Committee on Social Security reported that the phrase had often caused hardship in denying pensions to persons with capacity to do some work producing perhaps only a nominal wage and in discouraging pensioners from in fact doing any such work, lest by doing it they showed that they could do something, and lost their pension accordingly. Following that report the 1908 Act was amended to provide that a person should be deemed to be permanently incapacitated for work

> "if he is permanently incapable of work or if the degree of his capacity for work does not exceed 15 per centum."

In 1947 there was enacted the Act now in force, with s. 23 in its present form.

B. *The Inaptness of Section 23*

Section 23 is misleadingly similar to provisions of workers' compensation legislation in relation to which courts and medical practitioners do perfectly sensibly express matters in terms of percentages. Thus the Table to s. 11 of the Victorian *Workers Compensation Act* 1958 provides for compensation for partial loss of sight or according to the percentage of diminution of sight or hearing. A medical practitioner will necessarily, and sensibly, express the matter, as measured by him, in terms of percentage. And similarly where there is a partial loss of use of a limb or hand or finger or joint, and the Board is faced with determining the compensation which is "just and proportionate to the degree of injury suffered". To say that a worker has lost 60 per cent of the use of a joint is within medical expertise. The medical practitioner is expressing an opinion within that expertise.

The notion of "partial incapacity for work" (clause 1 (b) (ii) of the clauses in s. 9 of the Victorian *Workers Compensation Act*) is likewise well established in workers' compensation legislation. There it is seen as relating to capacity to earn wages in the workforce, but in an activity less well remunerated than the worker's former activity. The worker is given compensation calculated by reference to the difference between his average earnings before the injury and the average amount "which the worker is earning or is able to earn in some suitable employment or business after the injury". There, "partial incapacity for work" is not expressed as a percentage of anything. The matter is measured by the financial return from the actual or assumed post-injury employment. Questions can of course arise as to what employment is "suitable", and the relevance of showing that suitable employment is available. But there is no conceptual difficulty in measurement.

But "incapacity for work" is a much more difficult concept, and doubly so when it is seen as something of which there can be a percentage. Quite simply, what does it mean, to say that a person is fifty per cent incapacitated for work? Or that the incapacity reaches the magic figure of eighty-five per cent? I am not pointing to the common enough difficulty of measuring with precision. I imagine that any medical practitioner who assessed the loss of movement in a joint at fifty per cent, would instantly agree that forty-nine or fifty-one would be just as likely figures, though less convenient for a judge whose arithmetic may be not very sophisticated. The doctor knows what he is trying to measure, notwithstanding his admission that total precision cannot be had. Nor am I talking of the difficulty in defining which work is relevant. That is a different issue. I am saying rather

that a capacity to do something, is something which one either has or has not, but cannot half have. To half have it, is not to have it. An army medical officer asked to certify whether a soldier has capacity to march thirty miles in one day, will find either that he has that capacity or that he has not. He will not—not twice, anyway—say that the soldier has a fifty per cent capacity to march thirty miles in one day, in the sense that he will drop dead at fifteen miles. Just so with capacity "for work". Given the work to be considered, then either the person has the capacity to do it, or he has not. There is no position between the two, of half having it.

Equally, if as a result of some impairment a person has capacity to do only half the jobs formerly open to him, but he can do those jobs adequately, it seems to me wholly misleading to say that he is fifty per cent incapacitated for work. Say that he takes one of those jobs, and performs it perfectly adequately. What does it mean to say of such a person in full-time employment as a member of the workforce, that he is fifty per cent incapacitated for work?

Most of us here, who engage in sedentary occupations, are this day unfit for very many jobs performed daily in this community. I imagine that no one in the community has the capacity to perform each and every such job. Is it to be said, that everyone in Australia is to some extent incapacitated for work? Something must be wrong with this percentage approach.

The result of the insertion in the Act of the notion of percentage of incapacity for work was that medical practitioners were in practice forced into expressing in terms of percentages a matter not sensibly capable of it. The straightforward question "Has he capacity to work as a member of the workforce, in work suitable for him?", was replaced by the essentially meaningless question "To what extent has he the capacity to perform as a member of the workforce?". It would be very surprising if many medical practitioners who would have said "incapacitated", if faced with a "Yes" or "No" decision on the first question, have not given answers like "Sixty per cent" when faced with a statute apparently requiring the opinion to be given as a percentage. And the result of such an expression might well be to lead the Department to deny an invalid pension to someone who would otherwise have received it.

One sees the error even more clearly, when one puts ss. 23 and 24 against the unemployment provisions of s. 107. A condition of the unemployment benefit, is that the claimant is capable of undertaking and willing to undertake, work *suitable to be undertaken by him*, and takes reasonable steps to obtain it. Say that a claimant has been denied an invalid pension, because he has only eighty per cent incapacity for

work. Work for which he has an eighty per cent incapacity, can hardly be regarded as "suitable". Nor can I explain to you how one would take reasonable steps to obtain work for which one has an eighty per cent incapacity. For that work, there is *total* incapacity. If the finding of eighty per cent incapacity meant that there was total incapacity for some work but total capacity for other suitable work in the workforce, then it would have been wrong to find total incapacity, and misleading to find eighty per cent incapacity "for work".

In short, the legislature took a wrong turning in 1941, in introducing the notion of percentage incapacity for work in this context. If difficulties of the kind found by the Joint Committee did in fact exist, what was needed was a provision making plain that the question was whether there was incapacity to work as a member of the workforce, in employment suitable for the person concerned. What was not needed was an amendment impliedly saying that if you had twenty per cent capacity for work suitable for you, you did not have total incapacity and could not have an invalid pension. It seems certain that the 1941 amendment, reflected in the present s. 23, has caused very considerable confusion. I should be surprised indeed if it has not also produced inconsistencies, hardship, and injustice.

It need not cause surprise if the legislature has enacted nonsense. The time has long gone, to be surprised by that! Nor need it cause surprise, that no one has said so. Judges and lawyers are there, by and large, not to condemn the legislature but to make its legislation work. Doctors are there, by and large, to make the sufficiently wild assumption that legislatures and lawyers know what they are doing and to answer the question. "Just keep to the point, Doctor". The only wonder is, that these few words have been found capable of almost carrying the burden so unfairly thrust upon them, for so long.

C. *Guidelines and Some Problems*

In 1979 the Director-General of Social Services was advised that:

> "Whether the claimant is totally or partially incapacitated to the requisite extent is to be determined by considering what it is which goes to incapacitate the particular claimant at the time his incapacity is considered. The incapacity arising from that source of incapacity is to be assessed by reference to what would have been the claimant's capacity for work were he not so disabled."
>
> "The state of the labour market and employment opportunities in the fields of employment so assessed as suitable for the claimant if not incapacitated are to be disregarded . . . The test is whether there is the requisite incapacity for work."

In February 1980 the Director-General issued instructions as follows:

> "Counsel have advised that the claimant's incapacity for work should be assessed by the general criterion of the degree of permanent incapacity compared with the capacity for work which the claimant would have had but for the disability. It must be impressed on all people handling invalid pension cases that the state of the labour market must be disregarded. The law is not concerned with whether jobs are available for a person in a particular condition but with whether that condition has inflicted on that person an incapacity for work to the requisite degree. Incapacity is to be ascertained with respect to the assessed incapacity of each claimant to do work of the kind for which he might be qualified apart from his incapacity. The availability of such work is irrelevant."

The instructions caused somewhat of an outcry. One commentator said:

> "If the *Social Services Act* has the basic purpose of protecting the income security of people who cannot enter or remain in the work force (and that theme underlies all the categories . . .) then"incapacity for work" must be calculated by reference to real, existing conditions, and not by reference to some fanciful utopia, in which there is plentiful work, for all persons seeking it (no matter how long their qualifications, no matter what competition is provided by other job seekers).
>
> "To argue that the state of the labour market is irrelevant to assessing a person's incapacity for work, is to argue that we should treat the work available in the 1940's as the work available in the 1980's—that we should ignore the significant movements in many work categories. (Perhaps the Department of Social Security will claim that a person who is capable of working as a domestic servant, or a crossing sweeper, is not incapacitated for work.)"

In May 1981 new Guidelines were issued, regarded as more flexible than those of February 1980. They pointed out—rightly I think—that factors of age, sex, education, lack of relevant skills and personal disabilities were to be considered along with impairment, in determining the capacity of the individual for work. To say that, is to say that incapacity is a matter for determination person by person, and not according to a mere statement of the medical condition of the person. As I say, that seems to me clearly correct.

The 1981 Guidelines contained one interesting provision:

> "A person who has lost the use of both arms or legs may be considered to be permanently incapacitated, independent of their per-

sonal and employment circumstances, even when engaged in some limited employment."

The grammar is that of the Minister of Health and Social Security. I take the last phrase, "even when engaged in some *limited* employment", as confirming the earlier direction to find permanent incapacity "independent of . . . employment circumstances". It is a pity that the draftsman shrank from dealing with the position of a person in such a condition but engaged in full-time employment. Consideration of that problem might have straightened his thinking. Several issues are raised by all this. It is necessary to proceed in stages.

(i) *The Types of Jobs to be Considered*

Once you put the word "work" in the context of "as a member of the workforce", you raise a general question as to the types of jobs which are known in the community. That can only be determined as at the relevant time. During the war there were on the coast of Britain people scanning the skies with binoculars, as a primitive kind of not-very-early-warning system for hostile aircraft. One can imagine a person with a quite serious physical impairment coping perfectly adequately with such a job. His ability to do that would be irrelevant, in a peacetime context where no such jobs existed. Clearly the work categories of 1940 cannot determine incapacity for work in 1981, and I do not think anyone would suggest that they should.

One interesting development as regards this is the increasing prevalence of part-time employment and the associated concept of "flexi-time". It is easy to imagine someone not having capacity to work an eight-hour day, but having capacity to work a four-hour day, or to work on some other basis within an accepted form of flexi-time. Problems spring to mind. Is the eight-hour day sacred in the sense that a person has a total incapacity if he lacks capacity to work an eight-hour day, though he can do four hours?

I would make two comments as to that. First, it is not a matter to be determined by medical practitioners. Nor is it in my view a matter for the Department. In the end it should be for Parliament to tell us more of what it means by its phrase "permanently incapacitated for work". It seems to me wrong for these important provisions to have been left so laconic for so long, or any longer. Secondly, I would have thought that once part-time employment and flexi-time were established in the relevant community, their existence should not be ignored. If the general eight-hour day became a general six-hour day, clearly one would think in terms of six hours, not eight. If there is an established form of employment at four hours, or three, it is not obvious why one is to ignore it.

(ii) *The Relevance of the Current Labour Market*

To talk in terms of the types of jobs known in the community, is something different from bringing into account, at any rate in normal circumstances, the current state of the labour market. And in spite of the commentator quoted earlier, it is I think very difficult to get from the present Act the concept that the varying state of the labour market is to be taken into account in determining permanent incapacity for work. Factors lying against such an interpretation include:

A. Section 27 of the Act clearly assumes that incapacity for work is something as to which a medical practitioner can certify. It is one thing to assume in a medical practitioner a general knowledge as a citizen, heightened by his medical training and experience, of the general types of jobs established in the community. It is something else again, to assume in him a knowledge of the current state of the general labour market for the type of work he finds the claimant can do; and still less a knowledge of that labour market in the particular part of Australia where the claimant happens to live.

B. The notion is "permanent" incapacity, and there is some difficulty in treating as relevant to permanent incapacity the vagaries of a fluctuating labour market.

C. The concept of "invalid" benefit suggests the irrelevance of a general community matter of that sort. It suggests something more personal to the claimant.

It is of course easy enough to seek sympathy by saying: "When those with total capacity cannot obtain work, how can you expect someone with incapacity to do so?" But such a comment has weaknesses.

In the first place, the comment really leads nowhere. If those with total capacity cannot find work, that does not show that someone with less than total capacity should be treated in any way differently from those with total capacity. More important, the comment rests on the "percentage fallacy", that partial incapacity makes a person less suited for every job for which he applies. But this is not necessarily so. Determinations of partial incapacity are usually founded on the person being unsuited for certain work although suited for certain other work. He will not authomatically be less suitable for a job involving work of the type he can perfectly adequately perform. The point illustrates the danger of forcing doctors into talking in terms of these percentages of incapacity, rather than of saying "Capable of this", "Not capable of that". It has led to thinking of the person as universally partially worse than other people, instead of in terms of "In some jobs very much worse, and in other jobs equally good."

I do see one qualification on that. If the state of the relevant labour market is one of over-supply, employers might well reject an applicant automatically, and on the ground of the mere existence of the disability. If there are many applicants all capable of doing the job, why risk one with a bad back? Such an attitude *is* linked to the underlying impairment. If such an attitude is general, it can I think be said that the inability to obtain employment flows not from the general labour market as such but from something personal to the claimant, namely his underlying physical disability. It is difficult to deny that the disability is leading to an incapacity for work in the workforce if the workforce is in fact rejecting him on the ground of the disability. It is hard to say that a person has capacity to engage in the workforce, if the workforce says he has not.

Certain anomalies must be admitted.

A. If in such a case the medical practitioner is to certify as to the matter the Act puts to him, he will require not only some knowledge of the relevant labour market, but also some knowledge of the attitudes and practices of employers within that market. I see no reason to think it a good thing to require all this of each medical practitioner concerned.

B. To the extent that such an attitude of employers depends on the state of the labour market, it is as subject to change as that market. So to an extent one does, by this approach, link a finding of permanent incapacity to something likely to change.

Something can I think be done as to the problem facing the medical practitioner. The comment as to making a finding of permanent incapacity depend on something transitory remains valid.

The reason why pension groups seek to establish the relevance of the labour market generally is that people prefer invalid pensions to the unemployment benefits to which such a labour market would entitle a claimant. The rate is higher, there is no obligation to continue the search for work and there are fringe benefits associated with invalid pensions that are not attached to unemployment benefits. Those bonuses reinforce the historic feeling that unemployment indicates failure, whereas incapacity is something which involves no sense of failure. One must ask whether it is right that the legislation should give its practical support to that attitude. Ought the legislation make people prefer a finding of total incapacity to a mere recognition that they are respectably and honourably unemployed?

(iii) *The Significance of Actual Employment*

The Statement in the Guidelines that a person who has lost both arms or both legs may be regarded as totally incapacitated for work

although "engaged in some limited employment" raises some problems. The statement is meaningful only if the limited employment concerned would otherwise be seen as being inconsistent with (85%) total incapacity. Somewhat analogous is s. 24 of the Act, which entitles every person permanently blind to receive an invalid pension. There are here, I think, overtones that to some extent an invalid pension is seen as a kind of apology from the community for anyone being in that condition. That is not an attitude I would condemn. But if that is the basis of the entitlement, it would be better to realise it. That would at least enable one to ask why such an apology is not made to a person who has lost both arms or both legs but *is* in full-time employment, which it seems does disqualify.

There is a wider problem here. Recently a Miss Susan Kennedy was quoted in the Press as saying:

> "It's not a disability. It's a malformation of the limbs. Disability implies you're not able to do things normal people can do, and I can do anything anyone else can do."

Miss Kennedy was a thalidomide baby, with tiny malformed arms. She works as a receptionist to a radiologist. She would deny most vigorously that she is incapacitated for work at all. So would Group Captain Douglas Bader, who lost both legs, flew fighter aircraft over Germany and was fully employed for many years after the war. Some years ago this Society had the privilege of being addressed by Dr (later Sir) Rupert Cross. He had been a solicitor for ten years. He tutored in Magdalen College for about another ten years. He became Regius Professor of Civil Law in the University of Oxford. He wrote numerous text-books. His book on the law of evidence is a permanent classic. Any undergraduate who said that Rupert was incapacitated for work would have been lucky to get out of the room alive—if Rupert could find him, and that might have caused difficulty, for Rupert had been blind from birth. He was, incidentally, far the worst blind man I have ever seen, as regards finding his way around. That inbuilt radar which prevents most blind people walking into walls had been omitted from Rupert's makeup. He could walk into anything. But he was a supremely great law teacher. Incapacitated for work he certainly was not.

And yet, and yet. With any of these persons who insist on their right—and prove their capacity—to work, there might come a time when they wish to stop. One would hope that the right to do so would be recognised, without having to assemble a bundle of medical evidence as to the "strain" that would result from keeping on doing what such a person has proved he can indeed do. There are situations

where one may encourage and admire, without having the right to demand. Again the problem would be easier to deal with if it were recognised, instead of being hidden by the insistence that such a person was incapacitated for work all the time he proved he was not.

(iv) *The Actual and the Desirable Role of the Medical Practitioner*

Section 27 of the Act requires that the Director-General shall, unless it is "manifest" that a claimant is permanently incapacitated for work, direct that the claimant be examined by a medical practitioner who "shall certify . . . whether, in his opinion, the claimant is permanently incapacitated for work". Clearly enough, Parliament considered the question of incapacity for work to be something within the skill of a medical practitioner.

There has recently become fashionable in the discussions a distinction drawn by the Committee on Medical Rating of Physical Impairment of the American Medical Association: see (1960) 172 J.A.M.A. 139 and (1967) J.A.M.A. 624. The distinction is between "Permanent Impairment" and "Permanent Disability". The Committee adopted the following definitions:

> "(1) *Permanent Impairment.* This is a purely medical condition. Permanent impairment is any anatomical or functional abnormality or loss after maximal medical rehabilitation has been achieved, which abnormality or loss the physician considers stable or non progressive at the time evaluation is made. It is always a basic consideration in the evaluation of permanent disability.
>
> (2) *Permanent Disability.* This is not a purely medical condition. A patient is "permanently disabled" or "under a permanent disability" when his actual or presumed ability to engage in gainful activity is reduced or absent because of "impairment" which, in turn, may or may not be combined with other factors. A permanent condition is found to exist if no fundamental or marked change can be expected in the future."

It would seem to me sensible for the Act to recognise a distinction of this kind and to make its prime reference to the medical practitioner that of impairment, indicating what the impairment is, what types of employment it disqualifies from, what types of employment it permits, what difficulties will attend the performance of the employment it does permit and leaving the ultimate decision—which is necessarily not medical but administrative—to be determined by others in the light of that medical report and of other relevant evidence, such as from the Commonwealth Employment Service.

I would have thought that the wise doctor might well go in that direction of his own initiative. To the extent that his own experience has revealed to him such a thing as "employer attitudes", he might well make reference to them. But I see no reason why he should be expected to investigate labour markets, and employer attitudes, going outside his own expertise and covering ground as to which knowledgeable evidence ought to be readily available to the Department from elsewhere in the Commonwealth system.

D. *An Instructive Case*

The invalid pension provisions were recently before the Administrative Appeals Tribunal, in *Re Panke and Director-General of Social Services* [4 A.L.D 179], a decision given on 23rd July 1981. The case is remarkably illustrative of some of the difficulties the Act creates. A 57 year old foreman electroplater, a good worker, well used to hard physical labour, injured his back lifting a lid off a vat. X-rays disclosed very advanced degenerative changes around the lowest two intervertebral discs of the spine, with arthritis of the associated joints. They also revealed marked osteoporosis, a calcium deficiency apparently unusual in men. The treatment was rest, physiotherapy and anti-inflammatory tablets to reduce the pain and stiffness. Some months later, tranquillizer tablets were prescribed for depression due to being out of work. Six months after the accident a spinal brace was prescribed and this Mr Panke wore thereafter.

Mr Panke's evidence—and his evidence was accepted, with a firm finding that he would prefer to be working—was that he could not engage in any kind of physical activity for more than about an hour, without pain and a proneness to collapse (this latter becoming less frequent, but still occurring). He could drive a car a short distance, but not far. Sitting in one position for more than about half an hour brought pain. He was still taking anti-inflammatory tablets and mild tranquillizers.

Nine months after the accident, Mr Panke's doctor concluded that there was permanent incapacity for work, judging that even if very light work could be found, a few days' employment would incapacitate Mr Panke entirely. Eleven months after the accident, a Commonwealth Medical Officer found permanent incapacity of not less than 85 per cent. This was founded partly on hypertensive heart disease, which throughout the whole case no other doctor had found. The evidence of heart disease seems to have been ignored by the Tribunal. A more senior medical officer (who had not examined Mr Panke) endorsed the report "not incapacitated to the extent of 85 per

cent". The evidence did not disclose why. An orthopaedic surgeon found that Mr Panke could not engage in any position involving bending or lifting but added "I do not consider that he is by any means 85 per cent permanently incapacitated for work".

In his evidence to the Tribunal, this surgeon expanded his views. The evidence is interesting, because it illustrates the difficulties to which these misleading percentages can lead. Asked to say what he meant by his own finding of 60-65 per cent incapacity the surgeon said:

> "Disability has been defined as that sort of thing which prevents you doing what the rest of the community does, so I guess that a 65% disability means he is not as good as the rest of the community. If he was as good as everyone else, he would be 100%."

It is I think more than a mere verbal point, to say that the issue does not involve a comparison of that kind. The issue is the claimant's incapacity and whether it flows from the disability. The evidence continues:

> "Q. Are you saying that he has got 60 to 65% of the capacity of somebody else?
>
> A. Yes, I think that would be the closest explanation."

The figures should of course have been 35 to 40%. Counsel shifted from "incapacity" to "capacity" and he and the surgeon forgot to invert the figures. It would be easy to assume from that evidence, that Mr Panke would only be 35% to 40% as good as anyone else, *at any job*. That was in fact not what the surgeon meant, for in answer to later questions from the judge he said that what he meant was that the available *range* of jobs now open to Mr Panke had been cut down to about one-third of those otherwise available. But that in turn is open to the comment that a man to whom one-third of the jobs otherwise available remain open in spite of his disability is not relevantly incapacitated for work at all.

In further answer to the judge, the surgeon said "I was trying to work it out on a purely orthopaedic basis". He added that bearing in mind "his age and medical condition", "I would be very prepared to state that I think he would have difficulty getting a job". Davies J. said: "I think that in stating the matter that way, [the surgeon] intended to convey that, in his view, it was unlikely that the applicant would be able to engage in remunerative employment."

There was also evidence from an officer of the Commonwealth Employment Service that Mr Panke, as a (by then) 59 year old man with a bad back, would be extremely unattractive to an employer.

The bad back, he said, "exacerbates the situation to the nth degree". In any event, a special situation would have to be created for him, and training given. From an employer's viewpoint training a younger person would be a better investment. There would not be much point in creating a special situation for a person of Mr Panke's age. The officer considered Mr Panke "virtually unemployable".

On that evidence, Davies J. found it a case of a person who, but for his impairment, would be in full-time employment as an electroplater aged 59 and who because of his medical condition was "virtually unemployable". That added up to total incapacity as a result of the medical condition.

That I must say seems to me unobjectionable. I would add that what put Mr Panke in peril of an adverse result was this matter of percentages. The effect of the surgeon's evidence—quite apart from that of the other witnesses—was that, but for the medical condition Mr Panke would have been in employment and that with his medical condition it was unlikely that he would again obtain employment. It was only the use of percentages which led the surgeon to arrive at his initial assessment of 60-65 per cent "in purely orthopaedic terms" and then to use that figure as the figure for the incapacity as to which the Act looked for a medical practitioner's figure. Once break the matter into medical impairment and employment result, then you could accept all of the surgeon's evidence, add the Commonwealth Employment Officer and go straight to total incapacity for work (nothing to do with 85%) on the basis that with that medical condition, no one would be likely to employ him.

The other members of the tribunal, Mr A. N. Hall and Dr M. Glick ranged more widely in their reasons. But in the end they found as a fact that Mr Panke could not engage in any full-time employment and that any residual capacity to engage in part-time very light employment, especially part-time piece work done at home was "less than 15%" and that overall there was incapacity "of more than 15%".

Again I wish we could talk facts, not figures. It is one thing to say that the likelihood of any such work being found was so remote that it was proper to find "total incapacity". I see nothing to be gained, except confusion, by attempting to express such matters as a percentage of total capacity. I would prefer Parliament to spell out the relevance or irrelevance of such matters, rather than to distort them into percentages of an assumed capacity, itself no more than notional.

E. *Conclusion*

It seems clear that the Act has not been kept in touch with changing community attitudes. In 1908, incapacity for work was I dare say

seen as almost solely a medical matter, like in the Army where the doctor certifies "Light duties only", and so on. There, the doctor knows the duties concerned, and is faced with the simple issue of physical capacity. Over the years since 1908 the notion of incapacity for work has widened. That was really the point of the amendments of 1941, though in introducing the notion of percentage Parliament chose the wrong device. There is today an increasing sense of "Is it fair to ask him to do this?", rather than merely "Can he do it physically?". I have no doubt that doctors have over the years become less stern in this regard. But the time has long since been reached, for revision of the grounds for these pensions and indeed a wider rethinking as to the pension and benefit system generally. A system which devours so much money warrants more care and thought than these provisions have had.