COMMENT

INCAPACITY FOR WORK IN WORKERS' COMPENSATION LAW

BY

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I. INTRODUCTION

In three recent decisions, *Cage Developments Pty Ltd* v. *Schubert*,[1] *Yacob* v. *Arnott's Snack Products Pty Ltd*[2] and *State Rail Authority of New South Wales* v. *Belgrove*,[3] the New South Wales Court of Appeal has had the opportunity of considering, in the context of the Workers' Compensation Act 1926 (N.S.W.) (hereinafter "the Act"), the meaning of the expression "incapacity for work", a phrase which is of particular importance in section 9 of the Act, where, *inter alia*, it delimits one of the types of damage for which compensation is payable under the Act.[4] The results of these decisions, as will appear, are hardly satisfactory. Indeed, the law has been in an unsatisfactory state since the inconclusive decision of the High Court in 1950 in *Thompson* v. *Armstrong & Royse Pty Ltd*.[5] It is not too late to put matters right, for although the decision in *Cage Developments*[6] has been upheld by the High Court, it was approved on grounds which do not relate to the meaning of "incapacity for work".[7] It is, therefore, timely to review and evaluate the law relating to "incapacity for work", especially as it has not been the subject of academic criticism.[8]

II. THE LAW RELATING TO INCAPACITY

In order to lay the basis for an evaluation of the law, it is necessary to recount certain relevant well-established rules and principles in summary form, and in some such way as they would be found in a standard text on workers' compensation law.[9] These are:

(1) The incapacity must result from an injury.[10] Thus, the incapacity is not relevant where, for example, it is the result of current economic conditions.[11]

(2) "Incapacity for work" means, in the succinct words of Fullagar J.,

"inability for physical reasons to sell [the worker's] labour on the open market".[12]

(3) Such incapacity may be total or partial: "there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch".[13]

(4) The onus of establishing total or partial incapacity is on the worker.[14]

(5) The incapacitated worker is entitled to compensation, in accordance with section 9 of the Act, that is, *inter alia*, to his "current weekly wage rate" for the first twenty-six weeks after the injury, and thereafter to ninety per cent of his average weekly earnings for the past twelve months, subject in the latter case to limits imposed by the statute.

(6) In determining the amount of weekly compensation, section 13 of the Act requires that regard be had to "any payment, allowance, or benefit ... which the worker may receive from the employer during the period of his incapacity".

(7) Further, in the case of partial incapacity, section 11 (1) (a) requires that the amount of the weekly compensation "shall in no case exceed the difference between the weekly amount which the worker would probably have been earning as a worker but for the injury and had he continued to be employed in the same or some comparable employment, and the average weekly amount he is earning or is able to earn, in some suitable employment or business, after the injury..."

Whilst all of the above rules are clearly established, it is not surprising that, as with most rules of law, not only can problems arise in their application, but the rules themselves can be questioned. For example, it can be difficult in relation to rule (1) to determine when an incapacity results from prevalent economic conditions rather than from relevant injury; indeed, it can even be questioned whether the whole idea of making such a distinction is not "a very unreal approach to a very real problem".[15] Again, whilst accepting that the onus remains on the worker in accordance with rule (4), there may be doubt as to whether some onus, evidential or otherwise, should at any stage rest upon the employer.[16]

Uncertainty of the type mentioned in the last paragraph is to be expected. But what is fairly surprising is that, notwithstanding their long experience of workers' compensation claims, the courts are still having difficulty with the meaning of the fundamental concept "incapacity for work", that is, with rule (2). The difficulty has been presented in the form of a choice between assigning a "physical" or an "economic" meaning to the concept, and a resolution of that choice in favour of the "physical" interpretation.[17]

III. INCAPACITY: PHYSICAL OR ECONOMIC?

It is suggested that, as it stands, the expression "incapacity for work" implies both a "physical" and an "economic" condition: the "physical" derives from the

use of the word "incapacity",[18] whilst the "economic" is deduced from the word "work".[19] The two aspects of the phrase are contained in the statutory definition of "incapacity", which refers to both physical ("disfigurement") and economic ("where it is sufficient to affect the earning capacity of a worker or his opportunities for employment") elements.[20]

Now, the meaning of the "physical" condition is fairly obvious: it refers to the bodily incapacity for actually doing work.[21] But the "economic" condition can mean one of two things. First, it may mean that the physical condition must relate to the labour market in which, after the injury, the worker sold or could reasonably be expected to sell his labour.[22] Thus, to quote the example given by Mahoney, J.A. in *Yacob's* case,[23] the loss of a finger on his left hand would almost certainly constitute an "incapacity" within the Act for a violinist, but not necessarily for a trial lawyer, since in the latter case the physical condition may have no relation to the work which the lawyer was doing or could reasonably be expected to do. In the case of the violinist the incapacity can be described as "economic" because the inability to work in the relevant labour market *implies* an economic loss, namely, the loss of the monetary rewards which are exchanged for the violinist's work. It is in this sense that the courts have usually described an incapacity for work as "economic" for the purposes of workers' compensation law.[24] It is at once apparent that such a description is strictly unnecessary since it adds nothing to the description of the "physical" condition. Thus, the violinist can also be described as being physically incapacitated for doing work — that is, work in a relevant market — and therefore within the Act.[25] This brings us back to the point made at the beginning of this section, namely, that in the abstract the phrase "incapacity for work" implies both a physical and an economic condition.

The abstract implications of the phrase will also usually coincide with reality, so that it will not make any difference whether the incapacity in issue is described as "physical" or "economic"; this is because both aspects will usually manifest themselves at the same time. Thus, a worker who is physically unable to work, or to work to the same degree, as a result of a relevant injury, and who is consequently unable to sell his labour in a relevant market, or at any rate is unable to sell his labour for as much as he could obtain for it before the injury, is incapacitated in both a physical and an economic sense. His condition is a paradigm of "incapacity for work".

It is where the abstract implications of the phrase do not coincide with reality that the second meaning of "economic condition" becomes relevant. This is that there must be *actual* economic loss before a worker can be said to be incapacitated for work, the mere implication of such loss from the phrase not being enough.[26] The result of the adoption of this view would, of course, be that a worker who suffered a physical incapacity for work would have no claim under the Act where such incapacity did not lead to any economic loss. The courts have firmly, but it is submitted wrongly, rejected this conclusion, on the basis that "economic loss is not, as such, part of the concept of incapacity. . . ."[27]

The leading case is *Thompson* v. *Armstrong & Royse Pty Ltd*,[28] where the question was whether a worker, totally incapacitated for work in the physical sense for a particular period of time, was entitled to recover compensation under section

9 of the Act when he had been in receipt of holiday pay for that period of time. The majority of the High Court, consisting of Latham C.J., McTiernan, Fullagar and Kitto JJ., held that, as during the period in question he was physically unable to earn wages, the worker was entitled to compensation under section 9 notwithstanding his receipt of holiday pay.

It was to this authority that Glass J.A., with whom Reynolds J.A. agreed, turned for guidance in *Cage Developments*.[29] The facts are straightforward. A worker had suffered a compensatable injury within the Act, and thereafter he conducted a business in partnership with his wife. The business made substantial profits which exceeded his pre-injury income. The question was whether the profits were relevant when assessing compensation for a period of total incapacity in the physical sense. It was held that they were not.[30] Glass J.A. said:[31]

> [O]nce incapacity for work has been established as a physical fact it is no answer for the employer to show that earnings accrue to the worker from sources independent of his personal exertion.

Thus, in both of the above cases, by relying on the fact that physical incapacity for work was the relevant "head of damage", the court held that the post-injury income was irrelevant and that the worker was accordingly entitled to the compensation provided for by the Act. It would follow logically that if the true head of damage is physical incapacity for work then *all* post-injury income is irrelevant to the question of the existence or otherwise of that incapacity, except in so far as the provisions of the Act may require it to be taken into account *for that purpose*,[32] and except to the extent to which receipt of post-injury income is relevant to the question of the existence of an incapacity in an evidentiary sense, that is, as tending to deny or establish the existence of the incapacity. This was acknowledged, but with a qualification, by Kitto J. in *Thompson's* case:[33]

> [T]he fact that a worker, after receiving an injury, is found to be in receipt of wages is never decisive of capacity for work. This fact may or may not point towards the conclusion that he has capacity for work; and whether or not that is the proper conclusion depends upon the circumstances. To the extent to which the wages are produced by anything other than work, *e.g.*, by the compassion of the employer, the receipt of them is irrelevant to the question of capacity for work....

His Honour is clearly correct in saying that wages can only be relevant to the question of the existence of an incapacity for work in an evidentiary sense, for the statute is quite specific that it is the incapacity itself, not any loss of wages, which is the relevant head of damage. But his Honour's qualification that the source of such wages must in any event determine whether they are relevant to capacity for work is, with respect, not free from difficulty. First, it begs the question of the distinction between "work" and "non-work" wages. His Honour's confident assertion that "the clearest possible case of wages being produced by something other than work would seem to be the case where wages are paid because of a legal obligation to pay them for a period in which no work is performed",[34] is far from obvious. Secondly, it raises the question why there should be a distinction between "work" and "non-work" wages for evidential purposes. Thirdly, if the statement means that "non-work" wages are irrelevant to all aspects of "the question of capacity for work" it is clearly too wide, for it ultimately leads to the conclusion

that compensation is determined by the nature of the wages, not by "incapacity" as required by section 9 of the Act.

What this suggests is that "the question of incapacity for work" is in fact more than one question. The expression is used in a number of sections of the Act and "the question of incapacity for work" is inevitably bound up with the section in issue and the purpose of that section. Now, the object of section 9, the section we are considering, is two-fold: (a) to define as "incapacity for work" the loss for which compensation is payable; and (b) to fix the rate of compensation for such loss.[35] Given that post-injury income, as we have seen, is only relevant in an evidentiary sense to the establishment of incapacity, it follows that the receipt of such income should only be relevant in section 9 to the *assessment* of the rate of compensation. Yet in both cases there was a sound reason for treating the post-injury income as raising a question about the very existence of the incapacity. Both were cases where the physical incapacity was total, and in such cases there is no section in the Act which authorises the computation of the compensation payable under section 9 with regard to post-injury earnings. Section 13, it is true, requires that regard shall be had to certain post-injury payments from the employer.[36] But the section has been restrictively interpreted to refer only to such payments as are received in respect of the incapacity in issue.[37] It follows that post-injury income can only be a relevant question in a case of total incapacity if related to the existence or otherwise of the condition itself.

The position is quite different in the case of partial incapacity, where the existence of section 11 (1) (a) enables post-injury income to be considered in its proper place, namely, in the assessment of compensation.[38] As Lord Macmillan said in *McCann* v. *Scottish Co-operative Laundry Association Ltd*:[39]

> It is true that if the workman has resumed work after his accident and is in fact earning the same wages as before his accident, the employer is freed from liability so long as that state of matters continues, even if the workman is still partially incapacitated, *but this is because the statutory method of calculating compensation yields nothing*. (Emphasis added)

The effect of this is sometimes expressed by saying that in the case of partial incapacity wages and compensation are mutually exclusive.[40]

But the fact that the "doctrine of mutual exclusivity" cannot apply in cases of total incapacity does not, it is submitted, lead to the conclusion that, as post-injury wages can only be relevant, if at all, at the level of the existence or otherwise of incapacity, the word must be understood as delimiting a physical condition for the purposes of section 9. This is simply because the existence of the physical condition — even with its economic implication — ought not *per se* to determine the right to compensation under section 9, for section 9 functionally is concerned with compensation for economic loss,[41] and the right to compensation therefore ought, both as a matter of logic and of commonsense, to depend on whether such loss is in fact suffered. This does not mean that "wages" become the subject of compensation in section 9. It means simply that the incapacity for work in section 9 must be a truly "economic incapacity", an incapacity which results in economic loss. Again, this does not mean that, for the purposes of section 9 of the Act, incapacity in the physical sense is *completely* irrelevant, just that it is irrelevant *at*

a particular time, because at that time it results in no economic loss. Of course, if at some stage in the future the physical incapacity does result in economic loss, there will at that time be incapacity for work.[42]

If this is right, the immediate problem is to determine which post-injury payments eliminate the economic loss flowing from physical incapacity for work and which do not. On the one hand, everyone is agreed that wages paid by an employer in return for work prevent economic loss.[43] On the other hand, everyone would probably also agree that post-injury income which the worker would have received in any event — for example, income for investments — is irrelevant to the economic loss suffered. In between these two extremes there is no doubt room for debate about many types of post-injury income. The solution to any such debate is, with respect, to be found in the judgment of Glass J.A. in *Schubert's* case,[44] in the distinction between income which is produced by personal exertion and that which is not. It is where post-injury income is "personal-exertion income" that it ought to be relevant as preventing economic loss.

But what is "personal-exertion income"? His Honour provided no definition of the term in *Schubert's* case,[45] but it is a term which is well-known in income-tax law, where it means, *inter alia*, "earnings, salaries, wages, commissions, fees, bonuses, pensions, superannuation allowances, retiring allowances and retiring gratuities, allowances and gratuities received in the capacity of employee or in relation to any services rendered, the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person ...", but excluding interest, rent and dividends.[46] This general understanding of "personal-exertion income" could be applied to effect a classification of post-injury income for the purposes of workers' compensation legislation, subject, of course, to specific provisions in the Act which dictate a different result. For example, section 7 (2B) of the Act makes superannuation payments irrelevant in any question of compensation.

Applying the distinction between income derived from personal exertion and income not so derived, it is submitted that the decisions in *Thompson*[47] and *Schubert*[48] are clearly wrong, although the result in the former would be the same today by virtue of section 7 (2B) of the Act. In both cases the post-injury income was income from personal exertion and should therefore have been relevant to incapacity for work. Indeed, commonsense alone suggests that "holiday pay" and "partnership income" should be treated no differently from ordinary wages. Indeed, the effect of treating them differently ultimately results in the worker making a financial profit from his injury.

It should be noted that the distinction between personal-exertion and other income will not only be relevant to compensation in cases of total incapacity. It is also relevant to post-injury income in the case of partial incapacity, because section 11 (1) requires that regard be had to what the worker now "earns" or "is able to earn". This, of course, begs the question of what are relevant "earnings" for the purposes of this section. The section itself provides one answer: it includes "employment or business" income.[49] But the statutory answer is not exhaustive, and when the issue relates to, for example, voluntary payments,[50] the suggested classification of such income provides the appropriate answer.

In view of the above analysis it is possible to deal fairly briefly with the decisions in *Belgrove*[51] and *Yacob*,[52] both of which raise the meaning of "incapacity for work" but in a different form.

IV. THE DECISION IN *BELGROVE*[53]

The question in this case was whether, for the purposes of section 9 (1) (a) of the Act, the right to obtain compensation arose at the date when the relevant injury resulted in physical incapacity for work (here the date of the infliction of the injury), or when such physical incapacity led to economic loss (here the date of retirement). Mahoney J.A., with whom Reynolds J.A. agreed, held that the relevant incapacity in section 9 (1) (a) was a physical one, and hence the right to compensation accrued at the date of the infliction of the injury. Samuels J.A. dissented and held that, for the purposes of section 9 (1) (a), incapacity was only relevant when it resulted in economic loss, with the result here that the right to compensation accrued at the date of retirement.

In the light of our analysis of section 9,[54] it is submitted, with respect, that the judgment of Samuels J.A. is correct. The relevant incapacity in a question of compensation under section 9 ought to be such as results in economic loss, and this case is *a fortiori* those discussed above since the issue was only one of how the compensation should be computed: the right to some compensation was not in doubt. The result of Samuel J.A.'s judgment is also sensible, as his Honour illustrated with the following example:[55]

> Assume the case of a worker who sustains an injury which leaves him partially incapacitated for work in the physical sense. But he soldiers on, assisted by the benevolence of his workmates. This, one might think, represents a situation which is by no means uncommon. Accordingly, he continues to receive full wages and does not make, and would have no right to make, a claim for compensation: or, at least, to be more precise, he would have no right to receive compensation while he continues to be in receipt of full wages. This situation continues for a period in excess of twenty-six weeks. Then he finds it impossible to continue. He stops work and makes a claim for compensation. If the [judgment of the court] is sound, he could not rely upon s.9 (1) (a) because he would be barred on the ground that the period of his incapacity, in the sense of physical incapacity for work, had already exceeded twenty-six weeks. I do not find this answer persuasive, because that period of twenty-six weeks ran and expired before the hypothetical worker suffered a compensable incapacity, and thus before his right to compensation arose.

The result of the decision of the majority in this case is interesting in that it illustrates that the physical interpretation of incapacity does not invariably result in the worker's financial advantage.

V. THE DECISION IN *YACOB*[56]

The question in this case was whether a worker, partially incapacitated for work, but able to earn the same amount of wages as he could before the injury, should be deemed to be totally incapacitated within section 11 (2) of the Act and entitled to compensation on this basis. The Court of Appeal held that he should be so

deemed. But, with respect, the purpose of deeming a worker totally incapacitated under section 11 (2) is ultimately, and expressly,[57] for the purposes of compensation.[58] Like section 9, this section is, therefore, functionally concerned with compensation, not with the existence of incapacity in the abstract. It follows, on the analysis suggested above, that the incapacity should only have been relevant under section 11(2) if it resulted in economic loss.[59]

VI. CONCLUSION

The conclusion is inescapable that a court when faced with (i) the effect of post-injury income on a question of total incapacity for the purposes of section 9 of the Act; (ii) the effect of such income on a question of partial incapacity for the purposes of sections 9 and 11(1) of the Act or (iii) the question whether an incapacity should be deemed total under Section 11 (2) of the Act, ought to hold that economic loss, as defined above,[60] is as necessary a component of the phrase "incapacity for work" as it is of the expression "lost earning capacity" at common law.[61] There are at least two reasons why a court should not hesitate to embrace this submission. First, and most importantly, it is surely the policy of the Act to allow a claimant to recover the actual economic loss which he suffers as a result of the work-related injury, subject to the limitations imposed by the Act itself.[62] On the one hand, this clearly means that recovery cannot be restricted to loss of wages as such[63] — although this may have been so under the original workers' compensation statute from which section 9 is ultimately derived.[64] On the other hand, there is no reason to suppose that the intention of the legislature was to allow the claimant to recover more than his actual financial loss, subject, of course, to such exceptions as the Act itself specifies.[65]

Secondly, the economic interpretation of incapacity is the only one which, as far as section 9 of the Act is concerned, is really consistent with the leading case of *Ball* v. *William Hunt & Sons Ltd.*[66] This case dealt with the converse of the problem which was considered in Section III of this paper. It concerned the situation where there was undoubtedly economic loss as a result of a relevant injury, but where the worker's physical capacity for work was not impaired. The House of Lords held that it was proper to make worker's compensation payments under the equivalent of section 9. It is difficult to see how an insistence on physical incapacity is really consistent with the result in *Ball*,[67] in which the economic loss was the factor of primary importance, and whose authority has never been doubted.

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FOOTNOTES

1 [1981] 2 N.S.W.L.R. 227.
2 [1982] 1 N.S.W.L.R. 632.
3 [1982] 2 N.S.W.L.R. 738.
4 Compensation is also payable for medical, hospital and related expenditure (s.10), and for loss of certain types of bodily function (s.16).
5 (1950) 81 C.L.R. 585. The decision is "inconclusive" because the court was equally divided so that the decision of the Supreme Court of New South Wales was affirmed pursuant to the Judiciary Act 1903 (Cth) s.23 (2) (a).

6 Note 1 *supra*.
7 (1983) 57 A.L.J.R. 709.
8 See C.P. Mills, *Workers Compensation (New South Wales)* (2nd ed. 1979) paras 190, 224; E.F. Hill and J.B. Bingeman, *Principles of the Law of Workers' Compensation Particularly in Victoria* (1980) 79-80.
9 *E.gs.* Mills, note 8 *supra*, especially paras 188-198, 221-236; Hill and Bingeman, note 8 *supra*, especially Ch. 6.
10 Hill and Bingeman, *id.*, 73-77. Note that a considerable body of case-law is devoted to explaining the meaning of "injury" as defined in s.6 (1) of the Act: see Mills, note 8 *supra*, paras 38-67.
11 Mills, *id.*, para. 226.
12 *Thompson* v. *Armstrong & Royse Pty Ltd*, note 5 *supra*, 615.
13 *Ball* v. *William Hunt & Sons Ltd* [1912] A.C. 496, 499-500 *per* Earl Loreburn L.C.
14 *Phillips* v. *Commonwealth* (1964) 110 C.L.R. 347; *J. & H. Timbers Pty Ltd* v. *Nelson* (1971-72) 126 C.L.R. 625.
15 *Scroope* v. *Gooley* [1975] W.C.R. 17, 18 *per* Westcott J.
16 Consider *Commonwealth* v. *Muratore* (1978) 141 C.L.R. 296, especially 303-304 *per* Murphy J.
17 See Sections III-V *infra*.
18 See *Commonwealth* v. *Muratore* note 16 *supra*, 300-301 *per* Jacobs J.; *S.R.A. of N.S.W.* v. *Belgrove* note 3 *supra*, 745 *per* Mahoney JA.
19 See *Thompson* v. *Armstrong & Royse Pty Ltd*, note 5 *supra*, 621-622 *per* Kitto J.; *Barbaro* v. *Leighton Contractors Pty Ltd* (1980) 30 A.L.R. 123, 138; *Bartlett (A.J.) Pty Ltd* v. *Drenkovski* (1982) 40 A.C.T.R. 7, 11.
20 Workers' Compensation Act 1926 (NSW) s.6 (1) definition of "incapacity".
21 *Thompson* v. *Armstrong & Royse Pty Ltd* note 5 *supra*, 597.
22 *Williams* v. *Metropolitan Coal Co. Ltd* (1948) 76 C.L.R. 431, 444; *Yacob* v. *Arnott's Snack Products Pty Ltd* note 2 *supra*, 636.
23 *Ibid.*
24 See especially *Thompson* v. *Armstrong & Royse Pty Ltd*, note 5 *supra*.
25 *Yacob* v. *Arnott's Snack Products Pty Ltd*, note 2 *supra*, 636.
26 *Thompson* v. *Armstrong & Royse Pty Ltd*, note 5 *supra*, 607-609 *per* Williams J. See also *Carmichael* v. *Colonial Sugar Refining Co. Ltd* (1944) 44 S.R. (N.S.W.) 233; *Davey* v. *The Commissioner for Railways* [1944] W.C.R. 179.
27 *S.R.A. of N.S.W.* v. *Belgrove*, note 3 *supra*, 745 *per* Mahoney J.A.
28 Note 5 *supra*.
29 Note 1 *supra*.
30 But Mahoney J.A., whilst holding the partnership income of no probative value *in casu*, left open the possibility that the nature and significance of post-injury income may "depending on the circumstances" fall to be considered: *id.*, 231.
31 *Id.*, 229.
32 There are currently no such provisions.
33 Note 5 *supra*, 622.
34 *Ibid.*
35 See rule (5) in Section II *supra*.
36 See rule (6) in Section II *supra*.
37 *McDermott* v. *Owners of S.S. Tintoretto* [1911] A.C. 35; *Thompson* v. *Armstrong & Royse Pty Ltd*, note 5 *supra*, *per* McTiernan, Fullagar and Kitto JJ.; *contra*, *per* Latham C.J. and Webb J.
38 See rule (7) in Section II *supra*.
39 [1936] 1 All ER 475, 482-3, emphasis supplied.
40 *Thompson* v. *Armstrong & Royse Pty Ltd*, note 5 *supra*.
41 See rule (5) in Section II *supra*.
42 This really answers Latham C.J.'s objection to the "strange result" of this solution in *Thompson* v. *Armstrong & Royse pty Ltd* note 5 *supra*, 595.
43 See Mills, note 8 *supra*, para. 224.
44 Note 1 *supra*, 228-231.
45 *Ibid.*
46 Income Tax Assessment Act 1936 (Cth) s.6 (1) definition of " 'income from personal exertion' or 'income derived from personal exertion' ".
47 Note 5 *supra*.
48 Note 1 *supra*.
49 Hence in the period of partial incapacity in *Schubert's* case, note 1 *supra*, the partnership income was clearly relevant, and much of the case was concerned with the correct method of assessment of such

income. It was on this issue that the case was upheld in the High Court: see note 7 *supra*.

50 As in *Rixon* v. *Wild Life Sanctuary Ltd* (1968) 89 W.N. (Pt. 1) (N.S.W.) 41.

51 Note 3 *supra*.

52 Note 2 *supra*.

53 Note 3 *supra*.

54 Section III *supra*.

55 Note 3 *supra*, 741-742.

56 Note 2 *supra*.

57 "Shall be compensated as if..."

58 The section no doubt has many other objects: see Mills, note 8 *supra*, para. 235.

59 This may also suggest some solutions to the so-called "mutuality" problem in s.11 (2) in so far as these have not been provided by the reformulation of that section by the Workers' Compensation Amendment Act 1980 (NSW), s.5, Sch. 2: see Mills, note 8 *supra*, para. 235.

60 Text to Notes 43-46 *supra*.

61 See especially, *Graham* v. *Baker* (1961) 106 C.L.R. 340, 347. And see Tilbury, "Damages For Personal Injury: Delimiting The Economic Loss" (1982) 14 *U.W.A.L. Rev.* 469, especially 481-490.

62 See rules (5) (6) and (7) in Section II *supra*.

63 *Thompson* v. *Armstrong & Royse Pty Ltd*, note 33 *supra*.

64 Workmen's Compensation Act 1897 (UK), First Schedule, ss. 1 (b), 2. See *Anslow* v. *Cannock Chase Colliery Co.* [1909] A.C. 435, 437 *per* Lord Loreburn L.C.

65 *E.g.* ss 7 (2A), (2B) of the Act. S. 16 (see note 4 *supra*), may also be considered an exception, or it may be regarded as authorising recovery for non-economic loss: see N.S.W.L.R.C., *Accident Compensation W.P. I: A Transport Accidents Scheme For New South Wales* (1983) Ch. 9, especially para. 9.3.

66 Note 13 *supra*.

67 *Ibid.*