[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . APPELLANT;

AND

MATHESON . . . . . RESPONDENT.

H. C. OF A. 1955.

SYDNEY, *April* 18; *May* 5.

Williams, Kitto and Taylor JJ.

*Workers' Compensation—Federal employee—Injury—Nature—Another injury sustained by employee in same accident causing loss—Compensation—Determination—Statutory provisions—Mandatory—Commonwealth Employees' Compensation Act* 1930-1950, *ss.* 9, 12, 20, *First Schedule, pars.* 1 (*c*), 3 (*b*), *Third Schedule—The Constitution* (63 & 64 *Vict. c.* 12), *s.* 73 (*ii*)—*Judiciary Act* 1903-1950, *s.* 39 (2) (*b*)—*District Courts Act* 1912-1953 (*N.S.W.*), *s.* 142.

The application of s. 12 of the *Commonwealth Employees' Compensation Act* 1930-1950 and the Third Schedule thereto is not confined to the case where the total effect of an accident satisfies a description found in one of the items of the schedule. If by an accident an injury is sustained which causes any such loss as is mentioned in the schedule or in sub-s. (5) or sub-s. (6) of s. 12, and the other conditions of that section are satisfied, a lump sum becomes payable by force of the section; and it is irrelevant that by the same accident the employee may have sustained another injury which itself has caused a loss specified in the Third Schedule, or in respect of which compensation has become payable under s. 9 and the First Schedule or in respect of which no compensation at all is payable.

APPEAL from the District Court, Sydney, New South Wales.

A claim was made to the Commissioner for Employees' Compensation by George Matheson for compensation under the *Commonwealth Employees' Compensation Act* 1930-1950, in respect of injury sustained by him on 18th September 1951 during the course of his employment as senior carpenter in the Postmaster-General's Department.

The evidence before the delegate of the commissioner showed that Matheson had sustained an injury to his left leg which had caused the permanent loss of some part of the efficient use of that leg to above the knee for the purposes of his employment at the

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date of the injury. It further showed that partial incapacity for work had arisen from the injury to his right leg and hip, but it did not show that in respect of his right leg Matheson suffered any of the injuries specified in the Third Schedule to the Act because the injury affected his right hip and was, therefore, more than an injury to Matheson's right leg to above the knee.

The delegate of the commissioner determined, on 7th July 1954 and 26th August 1954, that Matheson sustained personal injury by accident arising out of or in the course of his employment by the Commonwealth on 18th September 1951, namely a fractured left tibia, involving the knee joint, resulting in a twenty per cent loss of the efficient use of his left leg above the knee in and for the purposes of his employment, and he was thereby entitled to compensation under s. 12 and the Third Schedule in the sum of £187 10s. 0d.; and that compensation was payable to Matheson on the basis of five per cent of his weekly pay at the date of injury as varied by par. 3 (*b*) of the First Schedule to the Act as from 28th December 1953 to a date to be determined by the commissioner or his delegate while he remained incapacitated to the extent of five per cent loss of efficiency as a result of injury to his right hip on 18th September 1951 during the course of his employment as senior carpenter in the Postmaster-General's Department, New South Wales, subject to review in the event of Matheson obtaining employment.

Matheson appealed to the District Court, Sydney, under s. 20 of the *Commonwealth Employees' Compensation Act* 1930-1950 against the determination made on 26th August 1954, on the ground that the commissioner erred in determining that Matheson was incapacitated to the extent only of five per cent of efficiency as a result of the said injury.

Both parties agreed that Matheson was entitled to some compensation.

The facts as found by the judge (*Prior* D. C.J.) were that Matheson while in the employ of the Commonwealth, fell from a girder on which he was working and injured both his legs. He was in hospital for some six months and then spent five months convalescing during which time he was paid compensation. Matheson was given light work by the Commonwealth between August 1952 and 28th December 1953, on which latter date he attained the age of sixty-five years and was retired from the Commonwealth service having been employed therein for thirty-two years. Matheson had unsuccessfully attempted to obtain suitable employment.

The medical witnesses called by Matheson and also those called by the Commonwealth agreed that Matheson was unable to perform

the general duties of a carpenter and was fit only to work on a level surface in a workshop, and that prolonged standing or prolonged walking would cause difficulty to him. They further agreed that Matheson would have to intersperse his standing with frequent short rests.

On the medical evidence the judge found that Matheson sustained compensable injuries which had the effect of partially incapacitating him from work and that such partial incapacity was permanent. The injury to his left leg rendered it impossible for Matheson to carry out the duties of a general carpenter and that, for the purposes of his employment as a carpenter, he had suffered more than partial and permanent loss of the efficient use of his left leg.

The judge held that s. 9 (1) of the Act was a general provision which would apply to all injuries received by an employee and that s. 12 provided a further scale of compensation for certain injuries set forth in the Third Schedule of the Act, and he determined: that Matheson fell within par. 1 (*c*) of the First Schedule as being partially incapacitated for work by his injury, and (ii) that the amount of weekly compensation to be paid to Matheson during his incapacity be the sum of £8 15s. 0d. per week.

From that decision the Commonwealth appealed, under s. 142 of the *District Courts Act* 1912-1953 (N.S.W.) and s. 39 (2) (*b*) of the *Judiciary Act* 1903-1950, to the High Court.

Dr. *F. Louat* Q.C. (with him *J. P. Slattery*), for the appellant. This is a proceeding in the District Court of New South Wales within the meaning of s. 3 of the *District Courts Act* 1912-1953 (N.S.W.). Section 142 of that Act is a remedial provision creating a right of appeal, and for the purposes of that section an appeal would lie to the Supreme Court in this case upon a question of law. The trial judge was in error in point of law in the construction which he gave to the *Commonwealth Employees' Compensation Act* 1930-1950. The judge misconstrued the provisions of s. 12 in such a way as to suggest that one of them was inapplicable, whereas it was applicable. Although a consequential matter of re-assessment may be involved, this Court has power under s. 37 of the *Judiciary Act* 1903-1950 to make a proper order or to send it back for that purpose. The judge held that sub-s. (6) (*b*) of s. 12 of the *Commonwealth Employees' Compensation Act* 1930-1950 did not apply, but it is clear that the findings made by his Honour lead to the direct result that sub-s. (6) (*b*) does apply. What the judge said as to the injuries sustained by the respondent in his left leg should have led

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his Honour to the conclusion that s. 12 and the Third Schedule were directly applicable, not that they should be rejected as inapplicable. The respondent had permanently and totally lost the efficient use of his leg and s. 12 (6) has the function of saying that in that case the schedule is to be applied. Section 12, in its provisions (5) and (6), is so drawn that whether there is a partial loss of efficient use or a total loss the section is equally designed to provide for the application of the schedule. Section 12 only applies when the injury causes incapacity other than total and permanent incapacity for work. Then the injured person gets the maximum scale of payment. The view taken was that the injury went further than the leg. Argument is not submitted to the Court which would tend to limit the compensation the respondent might properly receive. The appellant is concerned to urge only that whatever sum the judge's findings might properly result in the respondent receiving, they should be, and must be, assessed under s. 12 because sub-s. (l) is mandatory in requiring that compensation in this type of injury should be assessed under s. 12. If that is so then it might well be that he should receive £937 10s. 0d. The result then is that the injury to the right hip should be separately assessed in relation to the incapacity which has to be dissected out as flowing from that particular injury. The decision of the Full Court of the Supreme Court of New South Wales in *Mason* v. *Commissioner for Railways* (1) has some relevance. To find out how much incapacity flows from particular injuries is not easy but the structure of this Act and its clear commandment require that it should be attempted. The main proposition in which the judge erred is that he was obliged to apply s. 12 and the Third Schedule There were reasons for not applying it. The order should be varied, by awarding a lump sum under s. 12 and the Third Schedule and a continuing payment for fifteen per cent incapacity under s. 9 of the Act in relation to the right hip. Loss of leg above the knee must mean, when translated into terms of efficiency, loss of the efficient use of the whole leg. The very things pointed out by this Court are being done (*Emerson* v. *Metropolitan Water, Sewerage & Drainage Board* (2) ). The purpose of the Third Schedule is to make sure that for certain kinds of specified injuries which do cause some incapacity, an injured person will get both irrespective of what they might contribute to the total of his incapacity. The terms of the language of s. 12 require that where a scheduled injury can be identified it should be paid for in the prescribed manner.

(1) (1941) 42 S.R. (N.S.W.) 23; 59 W.N. 14.

(2) (1940) 14 W.C.R. (N.S.W.) 133.

The words "where that which an employee sustains" do not readily yield the meaning "all that an employee sustains" the totality of that which an employee sustains by an accident is one of the injuries.

[He was stopped.]

*F. McAlary*, for the respondent. The respondent is entitled to a weekly payment and not merely to a lump sum under the schedule. Whether or not the injuries he sustained fall within the first column of the Third Schedule must be a question of fact so that when looking at the totality the question is: is it correct to describe them as an injury to his arm or to a certain portion of his leg? The scheduled injuries only refer to "injury" *simpliciter*. There must be found such a state of physical impairment that it would be proper to describe it as the loss of an arm, the loss of a hand, or the loss of a leg, or something of that nature. But where there is an impairment involving more than that portion of the body which may be in point, then the matter is one for determination by the judge. It would be proper, when a complexity of injury is found, to say that the injury which he suffered is not properly described as loss of the left leg above the knee even giving that the extended meaning required and directed by s. 12 (6). This is a case about which the trial judge might hold different views. From time to time questions of incapacity for work, physical incapacity, were confused with economic incapacity. The respondent did not suffer an injury which could be described as loss of the leg above the knee, therefore the judge should not have assessed it under s. 12, but should have dealt with it under s. 9. The schedule itself is really only of value where one finds injuries to some part of the body *simpliciter*. The respondent was in a position where he was totally and permanently incapacitated for work. It may be that the judge did not consider whether the respondent was incapacitated for work as distinct from incapacitated from work. There is a distinction between capacity for work and capacity to work, the basis being that incapacity for work is an incapacity to earn wages, whereas incapacity to work refers to a person's physical ability to perform different types of work. The judge's findings are findings in connection with the respondent's physical capability. Examination of those findings shows that the respondent falls within the position of having only residual capability for work. He is an "odd lot" (*Cardiff Corporation* v. *Hall* (1)). The percentages were fixed in relation to the general labour market, and not in

(1) (1911) 1 K.B. 1009, at p. 1021.

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relation to the respondent's ability to resume his former employment. The respondent was engaged upon a special type of work. When it was no longer available the question of whether his incapacity for work was total or permanent was a question that was still open despite the fact that he had resumed work and had, in fact, worked during that period of time.

Dr. *F. Louat* Q.C., in reply.

*Cur. adv. vult.*

May 5.

The following written judgments were delivered :—

WILLIAMS J. This is an appeal by the Commonwealth of Australia from an order for compensation made in proceedings under s. 20 of the *Commonwealth Employees' Compensation Act* 1930-1954 by his Honour Judge *Harvey Prior*, a Judge of the District Court of New South Wales. The appeal is brought to this Court by virtue of s. 142 of the *District Courts Act* 1912-1953 (N.S.W.) and s. 73 (ii) of the Constitution and s. 39 (2) (*b*) of the *Judiciary Act* 1903-1950. Although the appeal to the Supreme Court under s. 142 of the *District Courts Act* 1912-1953 is confined to questions of law the appeal to this Court, as the present Chief Justice pointed out in *Wishart* v. *Fraser* (1) " is a full appeal on law and fact of the same nature as other appeals to this court in its appellate jurisdiction. When s. 39 (2) (*b*) refers to State law, it does so for the purpose only of saying from what decisions given by State courts exercising Federal jurisdiction an appeal shall lie as of right. It does not draw in the law of the State for the purpose of defining the nature or scope of the remedy or the jurisdiction of this court " (2).

The facts giving rise to the application to his Honour may be shortly stated. On 18th September 1951 the respondent, whilst employed in the Department of the Postmaster-General as a general carpenter, suffered serious injury by accident arising in the course of his employment by falling to the ground from a girder about twenty feet above it. Severe damage was done to his left leg where he suffered a fracture of the left lateral tibia involving the knee joint. He also suffered a fracture of the upper third of the shaft of the right femur and a fracture of the right side of the pelvis. As a result of the accident he was in hospital for six months and spent the following five months convalescing. He was paid compensation for the whole of these periods. He resumed light work of a supervisory character with the Department in August 1952 and continued this work until 28th December 1953 when he was

(1) (1941) 64 C.L.R. 470.

(2) 1941) 64 C.L.R., at p. 480.

retired on attaining the age of sixty-five years. Since he retired he has sought to obtain other work but has not succeeded. The respondent has almost completely recovered the use of his right leg. Dr. Callow said : " His right leg recently has shown very little loss of length and no gross deformity. Union of the bone is quite firm and the leg lies in the everted position with the toe turned out. Hip and knee movements are practically of a full range ". The injury to the left leg has proved to be far more serious. Dr. Callow said : " In the left leg there was outward deviation of the leg at the knee joint and obvious lateral instability at the knee joint. There was pain when the joint was forced in any direction but both flexion and extension were almost at full range. X-ray examination showed fracture. A gross irregularity of the joint surface of the knee ".

At the time of the accident the respondent was employed as a senior carpenter and to perform his duties it was necessary for him to work at heights and on uneven surfaces. He is now only fit to work as a carpenter at a bench on the level surface in a workshop. He said that his right hip is now slightly stiff but he could work on his right leg reasonably well until fatigue came on when he would have to sit down. He said the left leg was the bad leg, the knee area was weak and on the slightest fatigue became very painful. He said that he had to use a stick continuously, that he found great difficulty in getting to or from work, and that he was no longer capable of carrying around a kit of carpenter's tools and moving about on a job. He had to sit down to ease his legs at frequent intervals.

It will be convenient at this stage to refer to s. 9 (1) and s. 12 and to the schedules of the *Commonwealth Employees' Compensation Act*. Section 9 (1) provides that :—" If personal injury by accident arising out of or in the course of his employment by the Commonwealth is caused to an employee, the Commonwealth shall, subject to this Act, be liable to pay compensation in accordance with the First Schedule to this Act." Paragraph (1) of the First Schedule provides for the amount of compensation payable (*a*) where death of the employee results from the injury ; (*b*) where the employee is totally incapacitated for work by the injury ; and (*c*) where the employee is partially incapacitated for work by the injury. Section 12 provides : " (1) Subject to this Act, where an employee sustains, by accident arising out of or in the course of his employment, any of the injuries specified in the first column of the Third Schedule to this Act, the compensation payable shall, when the injury results in incapacity other than total and permanent incapacity for

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work, be the amount specified in the second column of that Schedule opposite the specification of the injury in the first column . . . (5) Where an employee sustains an injury which causes partial and permanent loss of the efficient use of a part of the body specified in the Third Schedule to this Act in and for the purposes of his employment at the date of the injury, there shall be payable an amount of compensation equivalent to such percentage of the amount of compensation payable under this section in respect of the loss of that part as is equal to the percentage of the diminution of the efficient use of that part. . . . (6) For the purposes of this section and of the Third Schedule to this Act, the loss of a specified part of the body shall be deemed to include—(a) the permanent loss of the use of that part; and (b) the permanent loss of the efficient use of that part in and for the purposes of his employment at the date of the injury." The Third Schedule which is headed: "Compensation for Specified Injuries" contains two columns. The first column specifies the nature of the injuries, each injury being described as the loss of some defined part of the body: one item is "Loss of leg above knee". This must mean the loss of a leg to above the knee. The second column specifies the amount payable for each injury.

It will be seen that s. 12 applies only where the injury results in incapacity other than total and permanent incapacity for work. It provides that the loss of a specified part of the body shall be deemed to include the permanent loss of the efficient use of that part in and for the purposes of the employment the employee was engaged in at the date of the injury. It also provides that where an employee sustains an injury which causes partial and permanent loss of the efficient use of a part of the body specified in the Third Schedule in and for the purposes of such employment there shall be payable a percentage of compensation equivalent to the percentage of the diminution of the efficient use of that part.

It is clear from the evidence that the respondent has sustained an injury to his left leg which has caused the permanent loss of at least some part of the efficient use of that leg to above the knee for the purposes of his employment at the date of the injury. It is also clear from the evidence that partial incapacity for work has arisen from the injury to his right leg and hip. It could not, however, be said that in respect of the right leg the respondent suffered any of the injuries specified in the Third Schedule because the injury affected his right hip and it was, therefore, more than an injury to his right leg to above the knee. This caused the delegate of the

Commissioner for Employees' Compensation to make two determinations of compensation, the one dated 7th July 1954 under s. 12 (5) of the Act in respect of the injury to the respondent's left leg and the other dated 26th August 1954 under the First Schedule par. 1 (*c*) as varied by par. 3 (*b*) of the Act in respect of the injury to his right leg.

From these determinations the respondent appealed to the District Court. His Honour made a single award under the First Schedule par. 1 (*c*) as varied by par. 3 (*b*). He ordered that the sum of £8 15s. 0d. per week should be paid during incapacity. He considered the question whether the injury to the respondent's left leg was an injury specified in the first column of the Third Schedule. He said that this scale (that is the scale in the Third Schedule) is a compensation payable for the named injuries, *inter alia* :—(a) when the injury results in incapacity for work other than total and permanent incapacity; (b) when the injury causes partial and permanent loss of the efficient use of the part of the body specified in and for the purposes of his employment at the date of the injury. He said that the injuries incurred by the respondent were not contained in the first column of the Third Schedule and (a) above therefore did not apply. In order to determine whether or not the respondent fell within (b) above it was necessary to pose the question : in and for the purposes of his employment at the date of the injury, did the respondent's injury cause partial and permanent loss of the efficient use of his left leg ? He said that the respondent was a senior carpenter employed by the Postmaster General's Department and to perform his duties it was necessary for him to work at heights on uneven surfaces. The medical witnesses called by both sides agreed that the respondent was unable to perform the general duties of a carpenter and was fit only to work on a level surface in a workshop, that prolonged standing or prolonged walking would cause difficulty to him, and that he would have to intersperse his standing with frequent short rests. In these circumstances did the injury to the respondent's left leg cause partial and permanent loss of the efficient use of the leg in and for the purposes of his employment as a general carpenter, or did the injury render his leg useless to him as a general carpenter ? His Honour said that on the medical evidence he found that the injury to the left leg rendered it impossible for the respondent to carry out the duties of a general carpenter so that for the purposes of this employment he had suffered more than partial and permanent loss of the efficient use of his left leg. In these circumstances (b) above did not apply, and his Honour determined that the respondent

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fell within cl. 1 (*c*) of the First Schedule as being partially incapacitated for work by his injury. It is difficult to follow this reasoning. His Honour found, it would seem, that the respondent in and for the purposes of his employment at the date of the injury had suffered a permanent loss of the whole of the efficient use of his left leg. One would have thought that this finding would have led his Honour, pursuant to s. 12, sub-ss. 1 and 6 (*b*) of the Act, to award compensation at the full amount specified for the loss of a leg above the knee in the Third Schedule at the date of the injury, that is £937 10s. 0d., and that he would then have made a further award in respect of the right leg under the provisions of the First Schedule par. 1 (*c*) as varied by par. 3 (*b*). If he was prepared to apply s. 12 (5) to the injury to the left leg where the permanent loss of the efficient use of that leg in and for the purposes of the employment of the respondent at the date of the injury was partial only, it is difficult to follow why he did not apply s. 12 (6) (*b*) where the loss of efficiency was total.

Before us counsel for the respondent sought to uphold his Honour's award, but on a different ground. It was contended that, and it seems to be the crux of the case, s. 12 only applies where the whole of the injuries received in the one accident can be brought within the injuries specified in the Third Schedule. If this cannot be done, as in the present case, s. 12 has no operation and the scale and conditions of compensation must be determined in accordance with the First Schedule. This construction would give a very limited scope to the operation of s. 12. The section would not apply where, in addition to a loss of one of the specified parts of the body, such as the amputation of an arm, the employee suffered any other injury, however slight, which caused some partial incapacity for work however temporary. The section requires that the injury must be a permanent loss of a specified part of the body or a permanent loss of the use of that part or a permanent partial or total loss of the efficient use of that part for a particular purpose and that the injury must not cause a total and permanent incapacity for work. It deals specifically with identifiable severable portions of the body and regards the permanent loss of any of these parts or their use or their efficient use for a particular purpose as a permanent physical detriment to the capacity of an employee for work and, therefore, as an injury properly to be compensated for by a capital sum. The section is mandatory. It requires compensation to be determined in accordance with its provisions in all cases where the employee sustains any of the injuries specified in the first column of the Third Schedule. It is immaterial whether the injury is the

only injury received in an accident or whether other injuries are received as well. What is material is that the sole injury or one or more of several injuries should be identifiable as an injury to the part of the body specified in the Third Schedule. The injury to the respondent's left leg is such an injury.

For these reasons the appeal should be allowed and the award of compensation by his Honour set aside. In lieu thereof the respondent should receive two awards. He should receive a lump sum payment under the Third Schedule for the permanent loss of the efficient use of his left leg in and for the purposes of his employment at the date of the accident. The question is whether that loss is total or partial. The loss is very considerable, but it is impossible to agree with his Honour that it is total. It is, at most, partial. Dr. Callow, whose estimate is more favourable to the respondent than that of Dr. Watts, estimates the loss of efficiency at fifty-five per cent. The respondent should be allowed this percentage. Fifty-five per cent of £937 10s. 0d. is £515 12s. 6d. He should be awarded this amount. The parties have agreed that, if there should be two awards, the compensation payable for the injury to his right hip should be determined under the First Schedule par. 1 (*c*) as varied by par. 3 (*b*) on the basis of fifteen per cent of his weekly pay at the date of the injury as from 28th December 1953 while he remains incapacitated to the extent of fifteen per cent loss of efficiency as a result of this injury. The order for costs made by his Honour should stand. There should be no order for costs on this appeal.

Kitto J. The reasoning which led the learned District Court judge to his conclusion does not appear very clearly from the transcript of his judgment, but his Honour seems to have taken a view of sub-s. (5) of s. 12 with which in two particulars I am unable to agree.

As to the respondent's left leg he said : " On the medical evidence I find that the appellant's injury to his left leg renders it impossible for him to carry out the duties of a general carpenter, and that for the purposes of his employment as a carpenter he has suffered more than partial and permanent loss of the efficient use of his left leg. In these circumstances (b) above (which is a reference to the provision contained in sub-s. (5) ) does not apply ". But sub-s. (5) applies, in the case of a leg, whenever an injury causes partial and permanent loss of the efficient use of the leg in and for the purposes of the employment which the employee had at the date of the injury ; and in such a case it entitles the employee to an amount of compensation equivalent to such percentage of the scheduled

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amount as is equal to the percentage of the diminution of the efficient use of the leg. It is a mistake to suppose that, where there is a permanent loss of portion only of the efficient use of the leg in and for the purposes of the employment at the date of the injury, the case is to be treated as one of permanent and total loss of the efficient use of the leg in and for those purposes if the partial loss makes it impossible for the injured man to obtain a job in the same line of employment. A serious, though only partial, loss of efficient use may well be described as making it impossible for the recipient to carry out his old duties in full, and as a consequence it may deter employers from engaging him at all; yet it remains a partial loss of efficient use. Sub-section (5) operates in such a case to limit the compensation to an amount proportionate to the loss of efficient use for the purposes of the employment, notwithstanding the fact that even so limited a loss puts the former duties of the employment, considered as a whole, outside the man's capacity. In the present case there was no medical evidence upon which it could be found that the respondent had lost the whole of the efficient use of his left leg for the purposes of his former employment. The highest percentage of loss which was suggested was fifty-five per cent. Dr. Callow, who gave that figure, certainly did say that the respondent was totally incapacitated in the general labour market, but he made it clear that what he meant by that was that the respondent could not hope for employment as a general carpenter, as distinguished from employment in some special carpentering job of a kind at which he could sit down for a substantial part of his working time. But what employment he could get was irrelevant to sub-s. (5). The question was simply how far the efficient use of his leg in his old employment was reduced.

Then, as to the respondent's right leg, the learned judge seems to have accepted, without stating reasons for doing so, the view that the Third Schedule was inapplicable because the loss of efficiency in the use of that leg sprang from an injury which affected the pelvis as well as the thigh. But strictly speaking the "injuries" specified in that schedule, as in sub-s. (1) of s. 12, are not injuries; they are losses of certain parts of the body by or in consequence of injury. Sub-sections (5) and (6) use more precise language. Sub-section (6) extends the schedule to the permanent (and total) loss of the use of such parts (i.e. for any purpose) and to the permanent (and total) loss of their efficient use in and for the purposes of the employment at the date of the injury, and sub-s. (5) extends it to the permanent and partial loss of the efficient use of such parts in and for the purposes of that employment. If any such loss of use

as is mentioned in either sub-s. (5) or sub-s. (6) is caused by an injury, it is not, I think, necessary to inquire whether the cause of that loss was an injury to the part of the body the use of which has been lost or to some other part of the body or to both. All that matters is that the use lost is of a part specified in the Third Schedule. Accordingly, if the parties had not otherwise agreed at the hearing of this appeal, I should have thought that a lump sum ought to have been awarded under sub-s. (5) in respect of the right leg; but, as it is, the case will have to be dealt with on the basis of weekly payments so far as the right leg is concerned.

I agree with my brethren that the application of s. 12 and the Third Schedule is not confined to the case where the total effect of an accident satisfies a description found in one of the items of the schedule. If by an accident an injury is sustained which causes any such loss as is mentioned in the schedule or in sub-s. (5) or sub-s. (6) of s. 12, and the other conditions of that section are satisfied, a lump sum becomes payable by force of the section; and it is irrelevant that by the same accident the employee may have sustained another injury which itself has caused a loss specified in the Third Schedule, or in respect of which compensation has become payable under s. 9 and the First Schedule, or in respect of which no compensation at all is payable.

In my opinion the proper order on this appeal is that which my brother *Williams* has proposed.

Taylor J. I agree with the order proposed and merely wish to add a few words.

Section 9 of the *Commonwealth Employees' Compensation Act* 1930-1950 provides that if personal injury by accident arising out of or in the course of his employment by the Commonwealth is caused to an employee, the Commonwealth shall, subject to the Act, be liable to pay compensation in accordance with the First Schedule to the Act. It is clear that multiple injuries may be caused to an employee by a single accident arising out of or in the course of his employment. In such a case the employee, as an employee to whom personal injury has been caused, is entitled, under s. 9 and the provisions of the First Schedule, to receive compensation in the nature of weekly payments. Where total incapacity for work has resulted the employee is entitled to receive a specified weekly sum together with additional amounts for any dependant wife and children. In the case of partial incapacity the diminution in the earnings, or in the earning capacity of the employee, plays a part, subject to a prescribed maximum, in determining the amount of

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the appropriate weekly payments. It is of some importance to observe that compensation under this section is given in respect of incapacity for work resulting from an *injury* whether the injury is constituted by one or more physical impairments. The extent of the diminution resulting from the injury is, of course, a question of fact, but, whatever the finding may be, it represents a degree of incapacity which results from his multiple injuries and is not, except in a notional sense, the sum total of a number of lesser diminutions each resulting from each single physical impairment.

This conception is, it seems to me, carried forward into s. 12 which, it may perhaps be said, provides a broad and ready estimate for partial incapacity supervening upon any of the injuries specified in the Third Schedule. This section applies only " when the injury results in incapacity other than total and permanent incapacity for work " and the question immediately arises whether, as used in this context, the word " injury " refers exclusively to the scheduled injury which an employee may have sustained or whether it is wide enough to cover the total *injury* where an employee, as the result of one accident, has suffered multiple injuries some of which are to be found in the schedule and some of which are not. An examination of the schedule provides reasons for thinking that the latter is the true view. It is, I should think, apparent that the loss of the distal phalanx of the little finger of the left hand, or any of a number of the other comparatively minor injuries specified in the schedule, could never be said to result in total and permanent incapacity for work. Yet s. 12 has no application where the employee has sustained any such physical impairment if the *injury* to him has resulted in total and permanent incapacity.

In my view the word " injury ", as used in this qualifying provision, refers to the *injury*—whether constituted by a scheduled injury alone, or by a scheduled injury and other injuries contributing to the diminished capacity of the employee—which the employee has sustained as a result of any one accident, and the provision excludes the operation of the section when the *injury*, so understood, results in total and permanent incapacity. The first step in the construction of s. 12, therefore, is that it has no application for instance to the case of an employee who has, in the one accident, suffered the loss of a finger and other unscheduled injuries which together result in total and permanent incapacity for work. The section, however, is expressed, affirmatively, to operate when the injury results in incapacity other than total and permanent incapacity for work and, if the word " injury " is to be understood in the broad sense to which I have already referred, it is clear that it was

intended to operate in the case of multiple injuries—some of which are to be found in the schedule and some of which are not—which result only in partial incapacity.

There are, of course, difficulties involved in this view. In particular, it may, in such cases, often be necessary to assess the degree of incapacity resulting from unscheduled injuries when they form part only of the *injury* to the employee and this may be said to call for an assessment on a somewhat artificial basis. Again, in some cases, difficulties may be experienced in applying the provisions of sub-ss. (1) and (3) of s. 13. But difficulties, at least as formidable as these, are involved in the contrary view to which, upon the language of s. 12, I am not prepared to subscribe.

*Appeal allowed. No order as to costs of appeal. Order of court below set aside except as to costs. Order that under the Third Schedule of the Commonwealth Employees' Compensation Act* 1930-1954 *respondent be paid* £515 12s. 6*d. compensation for the injury to his left leg. Order that under the First Schedule of that Act par.* 1 (*c*) *as varied by par.* 3 (*b*) *compensation also be paid to the respondent on the basis of fifteen per cent of his weekly pay at the date of the injury to his right hip,* 18*th September* 1951, *as from* 28*th December* 1953 *while he remains incapacitated to the extent of fifteen per cent loss of efficiency as the result of that injury. Liberty to apply.*

Solicitor for the appellant, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *F. F. White.*

J. B.