[HIGH COURT OF AUSTRALIA.]

BRUGNONI . . . . . APPELLANT;
PLAINTIFF,

AND

HYDRO ELECTRIC COMMISSION . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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MELBOURNE, *May* 28;

SYDNEY, *Sept.* 12.

Dixon C.J., Williams, Fullagar, Kitto and Taylor JJ.

Workers' Compensation—Assessment—Amount payable—Rules governing—Construction—Provision that nothing in certain rules to limit amount payable for any injury during any period of incapacity due to illness resulting from that injury—Injury to worker involving brain damage—Development of neurosis—Partial incapacity due to brain damage and neurosis—Whether neurosis separate and distinct illness or mental and nervous consequence of brain damage—Workers' Compensation Act 1927-1954 (18 *Geo. V. No.* 82—*No.* 3 *of* 1954) *First Schedule, rr.* 2, 4, 5.

Section 5 of the *Workers' Compensation Act* 1927-1954 (Tas.) provides so far as material that "If in any employment a worker suffers personal injury by accident . . . arising out of and in the course of the employment, his employer shall, subject to this Act, be liable to pay compensation in accordance with the provisions of the first schedule". The first schedule which is intituled "Rules Relating To The Calculation Of Compensation" contains five rules. Rule 2 (1) provides that the compensation payable under the Act, except as provided in r. 4 in respect of the specified injuries therein referred to, where total or partial incapacity for work results from an injury sustained by the worker, shall be a weekly payment during the incapacity of an amount calculated in accordance with sub-r. (2) of this rule. Sub-rule (2) I. provides that in the case of total incapacity for work the compensation shall be a weekly payment during the incapacity of an amount equal to the aggregate of (*a*) the sum of £9 in respect of the worker himself and (*b*) and (*c*) where applicable, certain further sums in respect of the wife and children of the worker. Sub-rule (2) applies in the case of partial incapacity for work. Sub-rule (6) of r. 2 provides that the total liability of an employer in respect of compensation under either or both of pars. I. and II. of sub-r. (2) of this rule

shall not in any one case exceed £2,340. Rule 4 (1) contains a scale of compensation for specified injuries. It provides that "In respect of an injury specified in the second column of the table set forth hereunder, the compensation payable under this Act, where total or partial incapacity results from the injury, shall, subject to sub-r. (2) of this rule, be the amount respectively specified opposite that injury in the second column of that table." Item 6 in the second column of that table is "Total and incurable loss of mental powers involving inability to work" and the amount specified is £2,340. Sub-rule (2) of r. 4 provides that the provisions of sub-r. (1) of this rule shall be read and construed subject to the following provisions:—I. The total sum paid as weekly payments in respect of any period of total incapacity caused solely by the injury in respect of which compensation is payable under this rule, except in respect of the periods specified in the table of periods of no deductions, shall be deducted from the lump sum payment provided in the table set forth in sub-r. (1) of this rule (the period of no deductions allowed in respect of item 6 is twenty-six weeks), IV. Where a worker suffers by the same accident more than one of the injuries set forth in sub-r. (1) of this rule he shall not in any case be entitled to receive more than £4,500. Rule 5 is as follows: "(1) In any case where a worker sustains any injury—I. Which, as to the major part thereof, consists of an injury for which compensation is payable under r. 4 of this schedule: or II. Which consists of a lesser but substantial degree of any injury for which compensation is payable under that rule, the injury shall, subject to this rule, be regarded as an injury for which compensation based on the table set forth in r. 4 shall be payable, and a judge may award as compensation such amount as, having regard to the provisions of r. 4, appears to be just and proportionate to the degree of injury sustained by the worker. (2) Nothing in sub-r. (1) of this rule or in r. 4 shall limit the amount of compensation payable for any injury during any period of incapacity due to illness resulting from that injury, if such period of incapacity is additional to any period of incapacity resulting from the injury, and the amount of compensation payable pursuant to this rule shall be payable in addition to any weekly payments payable in respect of any such period of incapacity due to illness. (3) Where a worker has sustained an injury in respect of which compensation would, but for this sub-rule, be payable under sub-r. (1) of this rule, and a judge is satisfied that—I. The amount of compensation which would be so payable would be substantially less than the amount of compensation which would be payable in pursuance of r. 1 or r. 2, as the case may be, if compensation were assessable in accordance with either of those rules: and II. Because of the special circumstances of the worker (including, without limiting the generality of that expression, the nature of his injury in relation to the nature of his former usual employment), the amount of compensation payable under sub-r. (1) of this rule would be inadequate, the judge may award compensation pursuant to r. 1 or r. 2, as the case may be, without regard to the provisions of sub-r. (1) of this rule and of r. 4. (4) In no case shall the amount of compensation payable to any worker under this rule in respect of any one injury exceed four thousand five hundred pounds."

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A worker while working during quarrying operations on 5th October 1955 was struck on the head by a stone hurled by an explosion as a result of which he suffered a fractured skull and bleeding into the substance of the brain. He was in hospital from that date until 15th June 1956. During this period and up to 27th June 1956 he was paid compensation at the rate of £9 per week in accordance with r. 2. He then resumed work on light duties but claimed that because of his injury he was unable to continue with these duties and left his employment on 1st October 1956. Medical evidence was given that by reason of the damage to the brain tissues the worker suffered from a neurosis which together with the brain damage constituted his disability.

Held, that rr. 2 and 4 provide alternative and mutually exclusive methods of awarding compensation and where the injury is one of the injuries specified in r. 4 (1) the compensation must be assessed under that rule.

Held, further, that the neurosis was not a separate and distinct illness within the meaning of r. 5 (2) supervening upon the impairment of the worker's mental powers involving inability to work caused by the physical damage to his brain but was a mental and nervous consequence of that damage and part and parcel of the impairment.

Held, further, that the discretion of the trial judge miscarried in assessing the percentage under r. 5 (1) at fifty per cent and in the circumstances ninety per cent was a proper figure as a result of which the amount of the award would be £1,820.

Held, further, by *Dixon* C.J., *Williams*, *Kitto* and *Taylor* JJ., *Fullagar* J. *contra*, that the case should not be remitted to the Supreme Court to consider whether the circumstances were such as to justify an award under r. 5 (3) since the Supreme Court could not be satisfied that an award under r. 5 (1) would be substantially less than the amount payable if assessed in accordance with r. 2 since the maximum amount under each was £2,340.

Decision of the Supreme Court of Tasmania (*Gibson* J.), varied.

APPEAL from the Supreme Court of Tasmania.

Sesto Brugnoni applied to the Supreme Court of Tasmania by summons dated 29th August 1956 for an order that weekly payments which had been made by the defendant the Hydro Electric Commission to him pursuant to the *Workers' Compensation Act* might be redeemed by payment of such lump sum as might be determined by a judge and applied for his benefit in such manner as might seem fit and for an order that the court might determine what additional sum, if any, he was entitled to receive by reason of incurable loss of mental powers involving inability to work (the degree and extent whereof the court was asked in its discretion to determine).

The application was heard before *Gibson* J. who, on 15th March 1957, ordered that the defendant pay to the plaintiff as workers' compensation the sum of £884 0s. 6d.

From this decision the plaintiff appealed to the High Court. The facts and the arguments of counsel are set out in the judgments hereunder.

R. C. Jennings and *R. G. De. B. Griffith*, for the appellant.

C. G. Brettingham Moore, for the respondent.

Cur. adv. vult.

Sept. 12.

The following written judgments were delivered :—

DIXON C.J. I have had the advantage of reading the judgment of *Williams* J. and the judgment of *Fullagar* J. No purpose would be gained by my going over the ground so adequately covered by those judgments which are in agreement down to the point of the choice by this Court of the relief which we should give. For my part I prefer the course proposed by *Williams* J. of fixing the percentage which we think appropriate under sub-r. (1) of r. 5 of the first schedule of the *Workers' Compensation Act* 1927 (as amended to 1954) of Tasmania rather than of remitting the matter for reconsideration on the basis of r. 2 in pursuance of sub-r. (3) of r. 5. In choosing between these two possible forms of relief it is important to bear in mind that sub-r. (6) of r. 2 provides that the total liability of an employer in respect of compensation under the sub-rules of that rule dealing with total and with partial incapacity shall not in any case exceed £2,340. It is undesirable if it can be avoided to direct a rehearing, even a restricted rehearing. And having regard to the foregoing limitation it seems unlikely that any really useful result would be achieved by doing so. I think that we are fully justified in fixing ninety per cent under r. 5 (1). That means a figure of £2,106 which is subject to a deduction under r. 4 (2) of £286, leaving £1,820. Subject to the qualification I have made concerning the judgment of *Fullagar* J. I agree in his judgment. I agree entirely in the judgment of *Williams* J. and in the order which his Honour proposes namely that the appeal be allowed, the order of the Supreme Court discharged and in lieu thereof a sum of £1,820 be awarded.

WILLIAMS J. On 5th October 1955 the appellant, a single man, whilst employed by the respondent, was struck on the head by a stone hurled by an explosion during quarrying operations and suffered a severe head injury diagnosed as a fractured skull and

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cerebral contusion. Cerebral contusion means that there is bleeding into the substance of the brain causing damage to its grey matter. He was in the Royal Hobart Hospital from 5th October 1955 to 15th June 1956. From the date of admission until 27th June 1956 he was paid compensation at the rate of £9 per week in accordance with r. 2 of the first schedule of the *Workers' Compensation Act* 1927 (Tas.). After his discharge he was employed on light duties by the respondent but claimed that he was unable to continue because of the injury to his head and left his employment on 1st October 1956. He was again paid compensation at the rate of £9 per week from that date until 14th February 1957. On the 29th August 1956 he applied by summons in chambers to a judge of the Supreme Court of Tasmania under s. 24 of the *Workers' Compensation Act* to have the weekly payments redeemed by the payment of a lump sum. In the summons (as amended) he asked for an order that the weekly payments which had been made by the respondent to the appellant pursuant to the *Workers' Compensation Act* might be redeemed by the payment of such a lump sum as might be determined by the judge and applied for this benefit in such manner as to the judge should seem fit and for an order that the judge might determine what additional sum, if any, the plaintiff was entitled to receive by reason of the incurable loss of mental powers involving inability to work (the degree and extent whereof the judge would be asked in his discretion to determine). The summons was heard by *Gibson* J. who ordered the respondent to pay to the appellant as compensation under the *Workers' Compensation Act* the sum of £884 0s. 6d. This sum was arrived at by his Honour's awarding the appellant under r. 5 (1) II. of the schedule half the sum of £2,340 payable under item 6 of r. 4 (1) of the schedule, that is to say £1,170, and deducting therefrom the total sum paid as weekly payments to the appellant (£519 19s. 0d.) less the total of such payments for twenty-six weeks (£234) in accordance with r. 4 (2) I. of the schedule.

Section 5 of the *Workers' Compensation Act* provides so far as material that "(1) If in any employment a worker suffers personal injury by accident . . . arising out of and in the course of the employment, his employer shall, subject to this Act, be liable to pay compensation in accordance with the provisions of the first schedule." Section 24 of the Act provides so far as material that "(1) Where a weekly payment has been continued for not less than three months the same may be redeemed by payment of such lump sum as may be determined by agreement or by a judge upon application by or on behalf of the person liable to make such payment or of the worker."

The first schedule which is intituled " Rules Relating To The Calculation Of Compensation " contains five rules. Rule 1 which applies where death results from the injury sustained by the worker is not material. Rule 2 (1) provides that the compensation payable under the Act, except as provided in r. 4 in respect of the specified injuries therein referred to, where total or partial incapacity for work results from an injury sustained by the worker, shall be a weekly payment during the incapacity of an amount calculated in accordance with sub-r. (2) of this rule. Sub-rule (2) I. provides that in the case of total incapacity for work the compensation shall be a weekly payment during the incapacity of an amount equal to the aggregate of (*a*) the sum of £9 in respect of the worker himself and (*b*) and (*c*) where applicable, certain further sums in respect of the wife and children of the worker. Sub-rule (2) II. applies in the case of partial incapacity for work. Sub-rule (6) of r. 2 provides that the total liability of an employer in respect of compensation under either or both of pars. I. and II. of sub-r. (2) of this rule shall not in any one case exceed £2,340. Rule 3 contains a formula for calculating the average weekly earnings of a worker for the purposes of the Act and is immaterial. Rule 4 (1) contains a scale of compensation for specified injuries. It provides that " (1) In respect of an injury specified in the second column of the table set forth hereunder, the compensation payable under this Act, where total or partial incapacity results from the injury, shall, subject to sub-r. (2) of this rule, be the amount respectively specified opposite that injury in the second column of that table." Item 6 in the second column of that table is " Total and incurable loss of mental powers involving inability to work " and the amount specified is £2,340.

Sub-rule (2) of r. 4 provides that the provisions of sub-r. (1) of this rule shall be read and construed subject to the following provisions :—I. The total sum paid as weekly payments in respect of any period of total incapacity caused solely by the injury in respect of which compensation is payable under this rule, except in respect of the periods specified in the table of periods of no deductions, shall be deducted from the lump sum payment provided in the table set forth in sub-r. (1) of this rule (the period of no deductions allowed in respect of item 6 is twenty-six weeks), IV. Where a worker suffers by the same accident more than one of the injuries set forth in sub-r. (1) of this rule he shall not in any case be entitled to receive more than £4,500. Rule 5 is the most material of the rules for the purposes of this appeal. Its text is as follows : " (1) In any case where a worker sustains any injury—I. Which, as to the major part

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thereof, consists of an injury for which compensation is payable under r. 4 of this schedule: or II. Which consists of a lesser but substantial degree of any injury for which compensation is payable under that rule, the injury shall, subject to this rule, be regarded as an injury for which compensation based on the table set forth in r. 4 shall be payable, and a judge may award as compensation such amount as, having regard to the provisions of r. 4, appears to be just and proportionate to the degree of injury sustained by the worker. (2) Nothing in sub-r. (1) of this rule or in r. 4 shall limit the amount of compensation payable for any injury during any period of incapacity due to illness resulting from that injury, if such period of incapacity is additional to any period of incapacity resulting from the injury, and the amount of compensation payable pursuant to this rule shall be payable in addition to any weekly payments payable in respect of any such period of incapacity due to illness. (3) Where a worker has sustained an injury in respect of which compensation would, but for this sub-rule, be payable under sub-r. (1) of this rule, and a judge is satisfied that—I. The amount of compensation which would be so payable would be substantially less than the amount of compensation which would be payable in pursuance of r. 1 or r. 2, as the case may be, if compensation were assessable in accordance with either of those rules: and II. Because of the special circumstances of the worker (including, without limiting the generality of that expression, the nature of his injury in relation to the nature of his former usual employment), the amount of compensation payable under sub-r. (1) of this rule would be inadequate, the judge may award compensation pursuant to r. 1 or r. 2, as the case may be, without regard to the provisions of sub-r. (1) of this rule and of r. 4. (4) In no case shall the amount of compensation payable to any worker under this rule in respect of any one injury exceed four thousand five hundred pounds."

It was under rr. 4 (1) item 6 and 5 (1) II. that his Honour assessed the initial sum of £1,170. He considered that the injury to the appellant consisted of a lesser but substantial degree of the injury specified in item 6 and that fifty per cent of the amount of compensation payable in respect of this injury would be just and proportionate to the degree of that injury sustained by the worker. He was pressed to award additional compensation under r. 5 (2) on the basis that the neurosis the appellant developed subsequently to the date of the accident was an illness for which additional compensation was payable within the meaning of that sub-rule but refused to do so holding that the plaintiff's condition "whether due to brain damage alone, or to neurosis alone, or to a combination of

both, is the ' injury ' " referred to in item 6. The medical evidence, and particularly that of Dr. Foxton, the Director of Mental Health in Tasmania, which his Honour accepted, proves that the tissues of the appellant's brain were seriously injured by the blow he received on his head with the result that he has since suffered from dizziness, headaches, insomnia, anxiety, irritability and feelings of deep depression. These are the symptoms of neurosis, a mental and nervous condition which develops imperceptibly and replaces the defective functioning of the brain caused by the physical damage to the brain sustained in the accident from which the appellant may or may not recover in the course of time. Dr. Foxton said that it was difficult now to assess how much the appellant's present disability was due to brain damage and was irreversible and how much was due to anxiety about himself and was recoverable (was in other words not incurable). He said that if the appellant did not recover within three years from the neurosis it was improbable that he would ever do so. It is apparent from the evidence that the appellant had shown few signs of recovery at the date of the hearing of the summons, eighteen months after the accident, so that more than half the period estimated by Dr. Foxton within which it was possible for the appellant to recover had then elapsed and Dr. Foxton said that if there is no improvement as time goes on the prospects of recovery diminish. Whilst the neurosis continues the appellant's mental condition will continue to be such that he will remain, if not totally incapacitated, at least very seriously incapacitated for work.

It will be seen from the terms of the summons that compensation was claimed on the basis that the appellant should be awarded a lump sum in redemption of the payments of £9 per week provided by r. 2 (2) I. (*a*) and that he might also be entitled to an additional sum under item 6 of r. 4 (1) and r. 5. His Honour rightly held that rr. 2 and 4, subject to the modifications contained in r. 5, provide alternative and mutually exclusive methods of awarding compensation and that where the injury is one of the injuries specified in r. 4 (1) the compensation should be assessed under rr. 4 and 5 (1). This necessarily follows from the terms of r. 2 (1) which excepts from the provisions of that rule total or partial incapacity for work which results from the injuries specified in r. 4 (1). But, as appears from a study of the provisions of rr. 4 and 5, a worker may recover not only the amount of compensation payable in respect of a specified injury or injuries or a percentage thereof but in addition compensation under r. 5 (2) during any period of incapacity due to illness resulting from that injury, if such

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period of incapacity is additional to any period of incapacity resulting from the injury. And this additional compensation would be computed presumably in accordance with r. 2 (2) and be redeemable under the provisions of s. 24. Further there is the alternative method of assessing compensation provided by r. 5 (3) where the conditions prescribed are fulfilled and this sub-rule authorises the judge to award compensation pursuant to r. 1 or r. 2 as the case may be without regard to the provisions of sub-r. (1) of r. 5 and of r. 4. But the judge, in awarding compensation under r. 2, could not award more than the maximum sum of £2,340 because of the provisions of sub-r. (6) of this rule. Sub-rule (4) of r. 5 provides that in no case shall the amount of compensation payable to any worker under this rule in respect of any one injury exceed £4,500, but this provision could not apply to an award of compensation under r. 2 pursuant to sub-r. (3) of r. 5 because of the provisions of sub-r. (6) of r. 2. Paragraph IV. of sub-r. (2) of r. 4 had already provided that where a worker suffers by the same accident more than one of the injuries mentioned in the table set forth in sub-r. (1) of r. 4 he should not in any case be entitled to receive more than £4,500, so that it would seem that sub-r. (4) of r. 5, whilst it could apply in terms to percentage awards under sub-r. (1) of r. 5 in respect of more than one of the injuries specified in sub-r. (1) of r. 4, must be intended to relate to cases where an award is made under sub-r. (2) of r. 5 in addition to an award under sub-r. (1) of this rule.

In these circumstances the questions at issue on the appeal really narrow down to three, (1) whether his Honour was right in holding, as he did, that the neurosis was not a separate and distinct illness within the meaning of r. 5 (2) supervening upon the impairment of the plaintiff's mental powers involving inability to work caused by the physical damage to his brain but was a mental and nervous consequence of that damage and therefore part and parcel of that impairment; (2) whether the percentage of fifty per cent of the maximum sum of £2,340 payable in respect of item 6 awarded by his Honour was so low that it could not reasonably be considered to be a proper exercise of the discretion to award a percentage of the sum of £2,340 just and proportionate to the injury sustained by the appellant; (3) whether the case should be remitted to the Supreme Court to consider whether the circumstances are such that an award could and should be made under the provisions of sub-r. (3) of r. 5 without regard to the provisions of sub-r. (1) of r. 5 and r. 4. The first of these issues has been fully discussed by *Fullagar* J. in his reasons for judgment and it is sufficient to say

that for the reasons which there appear it is clear that *Gibson* J. was right in holding that the neurosis was not an independent illness supervening upon the accident but a mental and nervous condition induced by the accident and a product of the physical injury to the appellant's brain. The second and third issues can be disposed of together. It is not easy to determine what is an injury to a lesser but substantial degree of an injury described as the " total and incurable loss of mental powers involving inability to work ". But broadly it may be said that the loss of mental powers must be such as to involve an inability to do the sort of work the worker was capable of doing at the date of the accident and that this loss must be incurable. Total and incurable loss of mental powers would probably involve complete inability to do such work while partial loss of mental powers incurable to the extent of that loss would probably involve at least partial inability to do such work. It was pointed out that r. 4 (1) only refers to total or partial incapacity resulting from the injury and does not like r. 2 (1) refer to total or partial incapacity for work resulting from an injury, but the total and partial incapacity to which r. 4 (1) refers must be total or partial incapacity for work and this is at least clear in respect of item 6 which refers to total and incurable loss of mental powers involving inability to work. It is clear from the evidence that the physical damage to the plaintiff's brain has caused a considerable incurable loss of part of his mental powers involving inability to work, that he was at the date of the hearing of the summons unable to work, and that unless he recovers from the neurosis, as to which the prognosis is on the whole unfavourable, it is unlikely that he will be able to work in the future. He was therefore at the date of the hearing of the summons in a condition very closely approximating total and incurable loss of mental powers involving inability to work. In these circumstances the award of only fifty per cent of the maximum amount can only be described as unreasonably low. *Fullagar* J. has said that the award is so low that it should be reviewed and that it should be at least eighty per cent of the maximum amount. Having considered the whole of the evidence it would appear that an award which would be just and proportionate to the degree of injury specified in item 6 of r. 4 (1) sustained by the appellant would be ninety per cent of the maximum amount. The final question is whether the case should be remitted to the Supreme Court so that the question whether, in accordance with the provisions of r. 5 (3), an award should be made under r. 2 without regard to the provisions of r. 5 (1) and r. 4 could be considered. But if an award

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of ninety per cent of the maximum amount allowed under item 6 is substituted for the present award, it would be difficult if not impossible for the judge to be satisfied that an award under r. 5 (1) and r. 4 would be substantially less than the amount of compensation which would be payable if it were assessed in accordance with r. 2 seeing that the maximum amount payable under this rule is also £2,340. It would not appear therefore that any benefit could accrue to the appellant from remitting the case.

For these reasons the proper course would appear to be to allow the appeal with costs and to vary the order under appeal by substituting for the sum of £884 0s. 6d. the sum of £1,820.

FULLAGAR J. This is an appeal by a worker against an assessment of workers' compensation by the Supreme Court of Tasmania (*Gibson* J.). It depends upon the construction of some obscure provisions of the *Workers' Compensation Act* 1927-1954 (Tas.) and it will be convenient to set out the substance of the relevant provisions before referring to the facts and the nature of the proceedings.

The provision which gives the general right of compensation is s. 5 which, so far as material, provides that if in any employment a worker suffers personal injury by accident arising out of and in the course of the employment, his employer shall, subject to the Act, be liable to pay compensation in accordance with the provisions of the first schedule. The first schedule is headed " Rules Relating To The Calculation Of Compensation ". Rule 1 relates to cases where death results from the accident and is not relevant. Rule 2 (1) provides that " The compensation payable under this Act, except as provided in r. 4 in respect of the specified injuries therein referred to, where total or partial incapacity for work results from an injury sustained by the worker, shall be a weekly payment during the incapacity of an amount calculated in accordance with sub-r. (2) of this rule." Rule 2 (2), so far as material, provides that in the case of total incapacity for work the compensation shall be a weekly payment during the incapacity of a sum of £9. The rest of r. 2 (2) is not material, for the worker in this case had no dependants.

Rule 4 (1) provides that in respect of an injury specified in the second column of the table set out therein the compensation payable under the Act where total or partial incapacity results from the injury shall, subject to sub-r. 2 (2) of this rule, be the amount respectively specified opposite that injury. Item 6 in the table is " Total and incurable loss of mental powers involving inability to work ", and the sum set forth opposite this item is £2,340. Rule

4 (2) provides that the total sum paid as weekly payments in respect of any period of total incapacity caused solely by the injury in respect of which compensation is payable under r. 4, except in respect of specified periods, shall be deducted from the lump sum payment provided in the table contained in r. 4 (1). The period to be excepted in the case of item 6 is twenty-six weeks. Rule 5 should be set out in full. Sub-rule (1) of this rule provides: "(1) In any case where a worker sustains any injury—I. Which, as to the major part thereof, consists of an injury for which compensation is payable under r. 4 of this schedule: or II. Which consists of a lesser but substantial degree of any injury for which compensation is payable under that rule, the injury shall, subject to this rule, be regarded as an injury for which compensation based on the table set forth in r. 4 shall be payable, and a judge may award as compensation such amount as, having regard to the provisions of r. 4, appears to be just and proportionate to the degree of injury sustained by the worker." This is the provision under which *Gibson* J. assessed compensation. Sub-rule (2) of r. 5 provides:—"Nothing in sub-r. (1) of this rule or in r. 4 shall limit the amount of compensation payable for any injury during any period of incapacity due to illness resulting from that injury, if such period of incapacity is additional to any period of incapacity resulting from the injury, and the amount of compensation payable pursuant to this rule shall be payable in addition to any weekly payments in respect of any such period of incapacity due to illness." This is the provision on which the appellant mainly relies. Sub-rule (3) of r. 5 provides: "(3) Where a worker has sustained an injury in respect of which compensation would, but for this sub-rule, be payable under sub-r. (1) of this rule, and a judge is satisfied that—I. The amount of compensation which would be so payable would be substantially less than the amount of compensation which would be payable in pursuance of r. 1 or r. 2, as the case may be, if compensation were assessable in accordance with either of those rules: and II. Because of the special circumstances of the worker (including, without limiting the generality of that expression, the nature of his injury in relation to the nature of his former usual employment), the amount of compensation payable under sub-r. (1) of this rule would be inadequate, the judge may award compensation pursuant to r. 1 or r. 2, as the case may be, without regard to the provisions of sub-r. (1) of this rule and of r. 4." Sub-rule (4) of r. 5 provides—"In no case shall the amount of compensation payable to any worker under this rule in respect of any one injury exceed four thousand five hundred pounds."

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The only other provision in the legislation which it is necessary to mention is s. 24 of the Act, which provides that where a weekly payment has been continued for not less than three months the same may be redeemed by payment of such lump sum as may be determined by agreement or by a judge upon application by or on behalf of the person liable to make such payment or of the worker.

The appellant worker was employed by the Hydro Electric Commission as a labourer. On 5th October 1955, when he was working in connexion with certain quarrying operations, he was struck a severe blow on the head by a stone hurled by an explosion. He was in the Royal Hobart Hospital from the date of the accident to 15th June 1956, after which he attended at the Out-patients' Department and the Psychiatric Clinic. He appears to have resumed work on 27th June 1956, but to have been in such a nervous condition as to have been unable to continue, and he ceased work on 2nd October 1956. Except for that period he was paid compensation at the rate of £9 per week up to 14th February 1957, which was a day or two before the application about to be mentioned came on for hearing before *Gibson* J. The total amount of compensation so paid was £519 19s. 0d. The application was made by summons dated 29th August 1956, which (as amended) asked for an order that the weekly payments to the appellant should be redeemed by payment of a lump sum to be determined by the Court *and* for an order determining what additional sum, if any, the applicant was entitled to receive " by reason of incurable loss of mental powers involving inability to work (the degree and extent whereof the Court will be asked to determine)".

It is to be noted that this summons, as amended, asked for two things. It asked in the first place for an order for the redemption of future weekly payments by payment of a lump sum under s. 24 of the Act. And it asked in the second place for an order under rr. 4 and 5 (1) II. of the first schedule. But, as *Gibson* J. observed, the court could not make both orders. Either one could have been made, but not both. They are strict alternatives. Rule 2 (1), as I read it, provides for payment of compensation at a weekly rate *except* in the cases provided for by r. 4, and r. 4 provides that in respect of the specified " injuries " *the compensation payable shall be* the amounts respectively specified. An applicant who seeks redemption under s. 24 of future weekly amounts payable under r. 2 must proceed on the footing that the appropriate basis of compensation is by way of weekly payments under r. 2. An applicant who seeks payment of a lump sum under r. 4 (whether or not he invokes also r. 5 (1) II.) must proceed on the footing that the

appropriate basis of compensation is by way of a lump sum under r. 4. It is true that the two bases of compensation overlap, so to speak, to this extent that in many cases—probably in most cases—weekly payments will have been made under r. 2 for some period before a claim is made for a lump sum under r. 4. But sub-r. (2) of r. 4 takes care of this possibility by providing that from the amount payable under r. 4 (1) there shall be deducted weekly payments made in excess of a specified amount, which varies according to the listed injury. This provision does not negative, but rather emphasises, the mutual exclusiveness of the two bases on which a lump sum by way of compensation may be claimed. The mutual exclusiveness is further emphasised by r. 5 (3), which has been set out above, and to which it will be necessary to refer later. The exception in r. 2 (1) is of everything that is provided in r. 4. It thus covers the weekly payments inferentially allowed by sub-r. (2) of r. 4, as well as the lump sums fixed by sub-r. (1) of r. 4. Then r. 5 by its own terms attaches itself to r. 4, and consequently falls within the exception.

At the hearing before *Gibson* J. the appellant and one of his friends gave evidence, and there was a good deal of medical evidence. Actuarial evidence was also given, but, as recorded, it is inadequate to enable a redemption sum to be arrived at. The assessment of compensation, whichever of the two possible bases was adopted, must have presented very considerable difficulty to any tribunal called upon to undertake the task. His Honour held that the case called for the application of r. 5 (1) II. to item 6 in r. 4 (1). That is to say, he was of opinion that the appellant had established a "lesser but substantial degree" of the "injury" listed as item 6 of r. 4 (1) under the description of "total and incurable loss of mental powers involving inability to work". And he awarded, as "just and proportionate to the degree of injury sustained" by the appellant, one-half of the amount payable under r. 4 (1) in respect of the injury so described. The amount so payable would have been £2,340, and one-half of that sum is £1,170. From that sum of £1,170 his Honour deducted the amount of weekly payments deductible under r. 4 (2), and ordered that the amount of compensation payable to the appellant should be £884. His Honour thus assessed compensation on the second of the two bases which are referred to in the summons, and which, though treated by the summons as cumulative, are really alternative.

The primary argument for the appellant was based upon r. 5 (2). It was said (1) that there was a period during which the worker suffered from incapacity due to illness resulting from his injury,

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(2) that such period of incapacity was additional to the period of incapacity resulting from his injury, (3) that the learned judge should have ordered weekly payments in respect of such period of incapacity due to illness, and (4) that he should then have ordered a lump sum payment by way of redemption of such weekly payments. A factual basis for this argument was sought in certain evidence given by Dr. Foxton, a psychiatrist. His Honour expressly said that he accepted the evidence of this witness. Dr. Foxton said that the appellant had suffered a fracture of the skull and cerebral contusion, which he defined as meaning a " bleeding into the substance of the brain ". There must, he said, have been some damage to the grey matter of the brain. It was common for a " neurosis " to develop after such a head injury, and a neurosis had developed in this case. The symptoms of the neurosis were mainly depression, anxiety, irritability, insomnia, headache and pains in the arms and legs. The pains were said to be " probably a neurotic exaggeration ". The neurosis, though unquestionably associated causally with the physical damage to the brain, was " psychogenic " and in itself a distinct thing from that physical damage. Dr. Foxton said that he would call the neurosis an " illness ".

Gibson J., in my opinion, rightly rejected the argument based on r. 5 (2) and on the evidence of Dr. Foxton, and rejected it for a right reason. Although the " items " set out in r. 4 are referred to, both in the operative part of the rule and in the heading of the second column, as " injuries ", what is described is really in each case, and in particular in the case of item 6, a condition in which the worker finds himself as the final result of the accident, whether that result be immediate or delayed. The relevant condition is one in which the worker has totally and incurably lost his mental powers, and the so-called neurosis is merely an element in that condition and part and parcel of it. As *Gibson* J. said, " the condition, whether due to brain damage alone, or to neurosis alone, or to a combination of both, is the ' injury ' within the meaning of r. 4." In other words, " the neurosis is not an ' illness resulting from the injury ': it is itself part of the ' injury '." The " illness " to which r. 5 (2) refers is an illness, which, though it would not have happened if the injury by accident had not happened, is something distinct from the condition brought about by that injury. An instance which occurred to me during the hearing is the case of a worker whose leg has to be amputated, and who, while recovering from the operation, contracts pneumonia, and, by a chain of causation making it possible to say that the pneumonia results from the injury, has to spend a longer time in hospital than would otherwise have been necessary.

For these reasons the main argument for the appellant, in my opinion, fails. Counsel, however, advanced, though he did not elaborate, two other submissions. He asked this Court to hold that *Gibson* J. had, in the exercise of the power conferred by r. 5 (1), awarded to the appellant too low a percentage of the total amount prescribed as appropriate to item 6 in the table in r. 4 (1). He also suggested that r. 5 (3) should be applied to the case. If this were done, the result would be that the case would be taken outside r. 4, and a lump sum by way of compensation would be arrived at by applying first r. 2 and then s. 24 of the Act.

With regard to the first of these two arguments, the case was obviously considered with care by the learned judge. But, although he thought that the appellant would " probably be affected to some extent by the injury to the tissue of the brain for the rest of his life ", he obviously attached great importance to what he described as the " qualified optimism " of Dr. Foxton as to the appellant's chance of " substantial recovery, especially when the question of compensation is resolved ". I cannot help thinking that his Honour regarded Dr. Foxton's diagnosis and prognosis as more favourable than they really were. It is true that Dr. Foxton thought that the appellant was suffering to some extent from " compensation neurosis ", but he added : " I don't think the amount of compensation worries him very greatly." He also said that the appellant was so depressed that an award of £2,000 or £3,000 by way of compensation " would not help him much ". He said that " brain damage and its results tend to be permanent ", that permanent incapacity from the brain injury was likely, that the man seemed to be continuously depressed, that there was " quite a lot of room " for the view that the neurosis would continue (which I take to mean that it would be more or less permanent) though he thought that there was a " balance of probability " that it would not. Having regard to these observations, I would be much disposed to describe Dr. Foxton's general view as one of qualified pessimism rather than qualified optimism.

There was a good deal of other evidence apart from that of Dr. Foxton, and the picture which it presents is, on the whole, a dismal one. The initial injury was obviously very severe. The appellant was in hospital for nearly a year, and the records indicate that it was only towards the end of that period that he showed any improvement. He went back to work for about three months, but suffered pain and could not endure noise, and was unable to continue with it. There has been no suggestion that his case is not a perfectly genuine one. Before the accident he was a cheerful

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man and a hard worker. As late as September 1956 we find Dr. Foxton himself recording : " This man's personality has completely changed since his injury. He is now depressed and neurasthenic. His attitude is one of hopelessness. He is severely depressed." He declined to go to an institution known as " Millbrook Rise ". He gave as his reason that, if he went there, he would never come out. It may well be significant that, as counsel informed us, Millbrook Rise is generally regarded in Hobart as " the half-way house ". He received payments of compensation as for total incapacity until just before the matter came before *Gibson* J., and it seems to have been accepted that at the time of the hearing (a year and nine months after the accident) he was still a totally incapacitated man. As my brother *Williams* J. observed towards the end of the hearing of this appeal, the evidence as a whole really seems to point to a high degree of probability that his loss of mental power is incurable, and it is to be remembered that the assessment of a lump sum has to be made once and for all.

In such a case as this the assessment of the primary tribunal is not lightly to be set aside, but I am left with the conviction that the appellant is not adequately compensated by the order of the Supreme Court of Tasmania, and I think that that order should be discharged. This Court could now, on the material before it fix a higher sum to be paid by way of compensation under r. 4. If this were to be done, I would not adopt a lower percentage than eighty per cent of the amount set opposite item 6 in the table. But I think that the matter should be remitted to the Supreme Court, because of the second argument of the appellant, which calls in aid r. 5 (3). This argument has still to be considered. As I have said, it was not elaborated before us, but I attach importance to it.

The whole basis of compensation involved in r. 4 is extremely unsatisfactory. It contains obvious anomalies. Some of the " injuries " listed are unlikely to occasion more than the most ephemeral incapacity. In the case of others, the worker may in many cases be much better off if compensation is assessed on the primary basis provided for by r. 2, whether or not the weekly payments are " redeemed " under s. 24. The table takes no account of a worker's age or circumstances, or of the kind of work in which he was engaged before the accident. Rule 5 (3) proceeds, I think, from a recognition of the defects of r. 4. In cases falling within r. 5 (1), it authorises a judge, where two conditions are fulfilled, to award compensation under r. 2 notwithstanding the terms of r. 2 (1) and r. 4 (1). The two conditions are, to put it shortly,

(a) that the worker would be better off under r. 2, and (b) that, because of special circumstances, the amount payable under r. 5 (1) would be inadequate.

It seems to me that a case might well be made for the application of r. 5 (3) to the appellant worker. I would give a very wide meaning to the expression " special circumstances ". One such circumstance might well be thought to consist in the age of the appellant (he is thirty-two years of age) and the possibility of a long life in a more or less incapacitated condition. The words in brackets in r. 5 (3) II. might also be held to apply to him, for it seems clear that he is totally unfitted, and likely to remain totally unfitted, for the work in which he was engaged before the accident, or (most probably) for any kind of work except light labour. On these matters this Court cannot pronounce, for it has not full material before it, and it has not heard full argument on the matter. But the case should, in my opinion, be remitted to the Supreme Court for consideration of the application of r. 5 (3), and, if that rule is found not to be applicable, for reconsideration of the amount to be awarded under r. 5 (1). If r. 5 (3), and consequentially r. 2, are held to be applicable, the weekly payments may, of course, be redeemed under s. 24.

The appeal should, in my opinion, be allowed, the order of the Supreme Court discharged, and an order made to the effect indicated above.

KITTO J. I have had the advantage of reading the judgments prepared by *Williams* J. and *Fullagar* J. I agree that the percentage to be fixed under r. 5 (1) of the first schedule should be ninety per cent, and that accordingly the appellant should be awarded £1,820 0s. 6d. in lieu of £884 0s. 6d., which was the sum awarded by the Supreme Court. Subject to that, I concur in both judgments and think that the appeal should be allowed accordingly.

TAYLOR J. For the reasons given by *Williams* J.—to which I have nothing to add—I agree that this appeal should be allowed and that the award to the appellant should be increased to the sum of £1,820.

Appeal allowed with costs. Vary the order under appeal by substituting for the sum of £884 0s. 6*d. the sum of* £1,820.

Solicitors for the appellant, *Piggott, Jennings & Wood.*
Solicitors for the respondent, *Dobson, Mitchell & Allport.*

R. D. B.