SOME ASPECTS OF WORKMEN'S COMPENSATION IN NEW BRUNSWICK *

Daniel M. Hurley ‡

1. History of Workmen's Compensation

The principle of systematic compensation for losses due to industrial accidents has been applied in some countries of Continental Europe, e.g., Germany, for nearly eighty years.

Great Britain introduced workmen's compensation legislation in 1897.[1] The underlying principle as stated in the first section was as follows:

> "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman his employer shall . . . be liable to pay compensation . . . "

Other parts of the British Commonwealth followed quickly, New Zealand passing her first Compensation Act in 1900,[2] until all the British Commonwealth legal jurisdictions were applying Acts similar to the Act in Great Britain. The first Compensation Act in Canada appeared in 1902,[3] with Australia following shortly after. Agitation in the United States for workmen's compensation legislation began in about 1902 but was met with considerable opposition and it was not until 1911 that ten States successfully introduced Workmen's Compensation Acts.[4]

The first New Brunswick Compensation Act was passed in 1903.[5]

All of those early Acts were based on a principle of **employers liability** which some retain to this day. At first those

---

*The following substantially reproduces a talk delivered as part of a symposium arranged by the Faculty of Law of the University of New Brunswick at the Mid-Winter Meeting of the New Brunswick Section of the Canadian Bar Association held at Fredericton, N. B., February 10 and 11, 1961.

‡Daniel M. Hurley, B.A. (St. Thomas), B.C.L. (U.N.B.), L.L.M. (London), of the Faculty of Law, University of New Brunswick.

1. Workmen's Compensation Act (1897), 60 Vict., c. 37.
2. See Macdonald's Worker's Compensation in New Zealand, 2nd. ed., (1934).
3. Workmen's Compensation Act (1902), Statutes of British Columbia, c. 74.
4. See Larson's Workmen's Compensation Laws, vol. 2.
5. Employers' Liability Act, (1903) 3 Edw. VII, c. 11.

Acts simply provided that employers were liable to pay compensation to their workmen injured under certain conditions regardless of negligence on the part of employer or employee. And they abolished the common law defences of common employment, voluntary assumption or risk, negligence of fellow servant and contributory negligence. Later some acts required that employers cover their risks by insurance.

The first Compensation Acts in Canada were the **employers liability** type acts. But the evolution was fast, and beginning in 1914 in Ontario the Provincial Compensation Acts began providing for a system of State insurance. The basis of these Acts was similar to the German system of accident insurance and a collective liability scheme used in some of the United States of America. All the provinces in Canada, except Saskatchewan, have now adopted a similar type of social insurance scheme. However, none of these Acts have develope to the complete social insurance scheme adopted in the United Kingdom in 1948 under the National Insurance (Industrial Injuries) Act, 1946.

The first New Brunswick Act of this type was passed in 1918.[6] Our present Act has undergone no basic change since that time.

When cases based on Workmen's Compensation Acts first reached the Courts those Acts were interpreted in the light of **tort** rules. But as the Acts developed such rules were found to be inapplicable. In search of more appropriate rules the Courts turned readily to long familiar contract rules, which were found to be equally inappropriate.

This development by the courts in the United States was described by **Horovitz** as follows:

> "In early cases the Courts tended to be strict, . . . a later trend was to construe broadly and liberally . . . present Courts refuse to follow the older narrow cases.
> . . . As one of the purposes of Workmens Compensation was to keep injured workers from becoming public charges, a **reasonable, liberal** and **practical** construction is preferable to a narrow one, and that these acts are for the giving of compensation, not for the denial thereof.
> . . . It is insurance of a social character and not to be administered on narrow common law principles applying to other types of insurance. Care must be exercised lest long judicial habits in tort cases allow judicial thoughts and opinions in compensation cases to be too much influenced by outmoded or modified factors of decision."[7]

---

6. Workmen's Compensation Act, (1918) 8 Geo. V, c. 37.

7. Horovitz, Current Trends in Workmen's Compensation, (1947).

I suggest that in those words of **Samuel Horovitz** lies the key to the proper interpretation of the present New Brunswick Workmen's Compensation Act,[8] which unfortunately appears at times to get lost.

2. The New Brunswick Workmen's Compensation Act

General.

The New Brunswick Workmen's Compensation Act is divided into two parts; Part I and Part II.

Part I provides for a scheme of compensation for workmen or dependants of workmen who suffer injury or death within the scope of their employment in certain industries. It provides for a Compensation Board to administer the Act and adjudicate claims.

Part II, which is very short, has nothing whatever to do with workmen's compensation.

Practitioners, however, ought to be keenly aware that by virtue of Part II a workman, not entitled to compensation, may have a right of action which does not exist at common law or otherwise in statutes.

Since Part II is brief I shall consider it first.

Part II.

This part applies to industries to which Part I does not apply. This can only be properly understood by closely examining the definition of "industry" in Part I together with REGULATION 2 to the Act. "Industry", is defined as referring to, inter alia, "part of an industry". Regulation 2 excludes from the scope of Part I any "industry" where not more than a specified number of workmen are employed therein. The usual number is 2 or 3, although sometimes more, and nearly every type of "industry" is listed in Regulation 2. It must be that "industry" even as defined in Part I, is to be given a very liberal construction in Regulation 2, so as to bring the small **operations** (excluded from the scope of Part I), within the scope of Part II. This view is somewhat supported by s. 29(2) authorizing the Board to determine whether any **operation**, undertaking or employment is an industry.

The provisions applicable to whatever industries, or persons, that do come within the scope of Part II are to say the least, sketchy. There are two sections, totalling approximately one

---

8. The Workmen's Compensation Act, R.S.N.B. 1952, c. 255, as amended.

page. These two sections attempt to codify the common law, relating to negligence, and include statutes relating thereto, e.g., fatal accidents, and contributory negligence. This is, of course, much too ambitious, and as a result I am inclined to think that, generally speaking, the Act would be improved by the omission of Part II. However, Part II does give a workman within its scope a right of action against **owners** and **suppliers** of works, machinery, etc. as well as their employer, and exempts him from the negligence of his fellow employee, i.e., the doctrine of common employment is abolished. "Lord Abinger planted the Doctrine of Common employment, Baron Alderson watered it, and the devil gave it increase."[9] It is good to see it decline.

Part I.

Part I of the New Brunswick Workmen's Compensation Act provides for compensation for injured workmen and for the creation and administration of a fund from which the compensation is paid. It is basically a social insurance scheme.

Without retreating into further historical commentary on the act it is important to point out that the nature and purpose of the New Brunswick Act has been subject to judicial comment the effect of which one might, at times, feel is lost in a confusion of technicalities.

In 1918, Mignault, J., in speaking of the New Brunswick Act, said:

> "The object of the . . . Act was to give to the workman a remedy where none could be claimed under the common law . . . "[10]

In 1934, Barry, C.J.K.B., said, inter alia;

> "The Workmen's Compensation Act is a long step forward in social legislation designed to rehabilitate and aid in getting injured workmen back to work and to assist in lessening or removing handicaps resulting from their injuries . . ." [11]

How often have such commendable principles been deliberately or unwittingly trampled, even to the extent of making the Act the instrument by which a workman's common law or statutory rights have been frustrated.

Part I of the Act does not apply to **all** workmen in New Brunswick, but only to those employed in the "industries" listed

---

9. **Hayward v. Drury Land Theater Ltd.** (1917) 2 K.B. 899, at p. 915.

10. **C.P.R. v. Cheeseman** (1918) 57 S.C.R. 439; 45 D.L.R. 257.

11. **Fleck v. Workmen's Compensation Board** (1934) 8 M.P.R. 33; [1934] 2 D.L.R. 145.

in sec. 2 read in conjunction with Regulation 2, which excludes "industries" employing less than a set number, e.g., 5, 3 or 2. However, sec. 2 does contain a large majority of all "industries" in the province and it is of considerable importance to note that since 1959 travelling salesmen appear to come within the scope of the Act,[12] which from a conflict of laws standpoint is of particular interest. But although a 1955 amendment[13] suggested an intention to include farm laborers this amendment does not appear to have been proclaimed. There are some who might feel that agriculture is an important "industry" in this Province. However it may be that most farming in New Brunswick is carried on by self-employed people. Other industries can, of course, be included at any time, even temporarily,[14] and there does not appear to be any reason why farm labour groups could not be brought within the scope of the Act, without amendment, if they so wished.

Assuming a workman is employed in an "industry" within the scope of the Act, some particular provisions must be considered as regards the "compensation" itself.

Compensation is payable to a workman or his dependants if he suffers injury or death by accident arising out and in the course of his employment in an industry within the scope of Part I unless such accident was, in the opinion of the Board, intentionally caused by such workman, or was wholly or principally due to intoxication or serious and wilful misconduct on the part of the workman and did not result in the death of the workman.[15]

Although the latter part of that provision may be considered as a gesture of magnanimity to the dependants of the successful suicide, the really drunken or wholly bad workman it holds little consolation for the unsuccessful suicide, the moderate drunk or mischevious person. To reconcile the term "intentionally caused", which has appeared in the Act since 1918, in s. 6(1) with the definition of "accident" in the 1955 amendment to the Act would tax the interpretative skill of the most astute jurist.[16]

---

12. An Act to Amend the Workmen's Compensation Act, (1959) 8 Eliz. II, c. 79.

13. An Act to Amend the Workmen's Compensation Act, (1955) 4 Eliz. II, c. 81.

14. The Workmen's Compensation Act, R.S.N.B., 1952, ss. 3 and 4.

15. **Ibid.** s. 6(1)

16. "Accident" means an unlooked for mishap or untoward event which is not expected or designed. Acts of New Brunswick 1955, c. 81, s. 1.

The first part of section 6(1) contains terms familiar to any student of workmen's compensation and are to be found in other Provincial Acts in Canada, State Acts in the U.S.A., in English and Australian Acts, and probably others. In all those places such terms have given rise to much litigation. Although the term "accident" was at first the subject of much controversy it has not been so troublesome in more recent years. This is, of course, partially due to more studious attempts to define "accident" in the Acts, and the inclusion of such things as lightning, blisters and frostbite, but also to a liberal interpretation by jurists, more in accordance with the spirit than the technicalities of the Act. For example, in 1940 the Supreme Court of Canada in deciding a case on appeal from New Brunswick Supreme Court held soreness which developed in a stenographer's back from operating a heavy machine to be an "accident" within the terms of the New Brunswick Act.[17] This kind of decision is, of course, to be hoped for, and I suggest is the only possible interpretation consistent with the nature and purpose of workmen's compensation. In so suggesting, I am fortified by the words of Richards, J. when speaking of the New Brunswick Workmen's Compensation Act, he said;

> "a generous and liberal interpretation should be placed on the provisions of the Act and that the acts of those who seek the benefits of its provisions ought not to be considered in too narrow or technical sense." [18]

Unfortunately such an approach is not to be found in the interpretation of other words and phrases in the Act. It would appear that the difficulties caused by the words "arising out of and in the course of employment," like the poor, we have always with us. Those words have bedevilled the Courts of the Common Law world since their introduction in the first English Workmen's Compensation Act in 1897. If we are not convinced by the many Canadian cases in which those words were considered, we need only glance at the reports of workmen's compensation cases in the United States, England, Australia and New Zealand to be certain that those words have been the great adversary of the workman and have successfully stood between him and compensation on numerous occasions. However, it is not necessary to look beyond New Brunswick cases to see the mischief of those words.

In 1934, the New Brunswick Supreme Court decided that a C.N.R. employee who was struck and injured by a C.N.R. train while taking a short cut along the C.N.R. line to his work was

---

17. **Workmen's Compensation Board** v. **Theed** [1940] S.C.R. 553; [1940] 3 D.L.R. 561.

18. **Re Goguen** (1935) 9 M.P.R. 186; [1935] 3 D.L.R. 104.

not injured in the course of his employment.[19] In reaching this decision the Court seemed to find an easy answer by applying the seventeen year old case of **McMannamin v. R. Chestnut & Sons Ltd.**,[20] rather than consider the Act as a whole. However in **Workmen's Compensation Board v. C.P.R. and Noell**[21] the Supreme Court of Canada held that it is **now well settled** that the risks extend to those met while he is entering upon work and departing from it.

In 1942, **Chief Justice Baxter** held that where a woodsman took shelter under a tree during a storm and was killed when lightning struck the tree there was no claim for compensation as he was not acting within the course of his employment.[22] Had the workman been cutting the tree when lightning struck I suppose a claim would have been allowed.

In that case **Chief Justice Baxter** applied English precedents which concerned quite different types of Acts. But the **Milton** case is only useful now to indicate that attitude and approach of the Courts, as the 1955 amendment expressly includes injuries by lightning.[23]

It might appear that the New Brunswick Supreme Court was inclined to adopt a more liberal interpretation in 1951 in the case of **Workmen's Compensation Board v. C.P.R. & Noell.**[24] But the Supreme Court of Canada effectively blocked any such move by reversing the Supreme Court of New Brunswick.[25] In that case an employee of the C.P.R. was injured while driving off a pier at Katy's Cove. Her contract of employment with the C.P.R. contained several requirements, e.g., she was to live at the hotel, and extended several privileges, e.g., swimming at Katy's Cove. The Supreme Court of Canada held she was not entitled to compensation as her injury did not arise out of and in the course of her employment. The test applied by the Court was that "the employee must be where she was either in carrying out a duty or under the coercion of the contract or in the exercise of conduct that was **intimately** involved, **as an incident**, with action in those two spheres."[26] And it appeared to the

---

19. **R.** v. **Workmen's Compensation Board** (1934) 8 M.P.R. 25; [1934] 3 D.L.R. 753.

20. (1917) 55 N.B.R. 571; (1917) 37 D.L.R. 302.

21. [1952] 2 S.C.R. 359; [1952] 3 D.L.R. 641.

22. **Re Milton** (1942) 16 M.P.R. 237; [1942] 2 D.L.R. 329.

23. (1955) 4 Eliz. II, c. 81, s. 1.

24. 28 M.P.R. 271.

25. [1952] 2 S.C.R. 359; [1952] 3 D.L.R. 641.

26. **Ibid.** at p. 370.

Court that the fact that Miss Noell was allowed to swim in the Cove did no make such activity an **incident** of her work. Clearly Miss Noell was not swimming because of a duty nor was she coerced by her contract. However, it is difficult to say her swimming **at that time** in Katy's Cove was not an **incident** of her employment. But the Supreme Court felt such incidents must be **intimately involved** with the employment. It must be regretted that **Harrison, J.** was overruled. With the greatest respect to **Bridges, J.,** who dissented in the New Brunswick Supreme Court, I suggest that learned Judge gave far too much attention to **old English cases** which I contend were not applicable to the present New Brunswick Act. However, it appears his judgment found favor in the Supreme Court of Canada. How the Supreme Court would draw the line between **intimately involved incidents** and those outside the scope of the employment is difficult to imagine. However, no attempt should be made to imagine how the Supreme Court would accomplish this until the case of **Kennedy v. Workmen's Compensation Board**[27] has been considered.

Kennedy, together with his truck and tractor, was hired by his sons who were carrying on woodcutting operations. Kennedy was paid a daily wage. Gas and oil for the truck and tractor was supplied by the sons. The tractor was operated by different persons including the sons and was broken while being operated by one of them. Kennedy was instructed by the son who caused the damage to take the tractor to a particular garage and have it repaired or get a new one. Kennedy went to the garage as instructed and while there decided to get a new tractor. When trying it out he was injured. The majority of the Supreme Court of Canada held that Kennedy was not entitled to compensation as his injury did not arise out of his employment, and applied **Reed v. Great Western Ry. Co.**[28] In a minority judgment **Rand and Cartwright, JJ.** thought Kennedy was entitled to compensation and said that;

> "in the broad perspective of the circumstances the occurrence was caused by the work and in the course of it."

With great deference I suggest that a worse decision can scarcely be found in the field of Workmen's Compensation.

In **Reed v. Great Western Ry. Co.,**[29] which the Supreme Court of Canada purported to apply in the **Kennedy** case, the injured workman was **clearly** not acting within the course of his employment and had been repeatedly warned by his employers

---

27. [1955] S.C.R. 524.

28. [1909] A.C. 31

29. **Ibid.**

not to do the very act which caused his injury. Also it must be of some significance that the Workmen's Compensation Act in force in England in 1909 was basically different from the New Brunswick Act in 1955. I suggest that only the minority judgment of **Rand and Cartwright, JJ.** can possibly be consistent with the nature and purpose of the present New Brunswick Act. For those who feel as I do there is some consolation in the thought that the **Kennedy** case would easily be distinguished by a Court inclined to do so, but such inclination is unlikely to be found in the Supreme Court of Canada.

Before leaving this particular point I should mention that little help can be obtained from the **presumptions** in s. 6(2), which reads as follows;

> "When the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment, and when the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment."

The same result can be obtained by rewording s. 6(1) to read "arising out of **or** in the course of . . . "

The New Brunswick Workmen's Compensation Act makes a rather limited provision, in a roundabout way, for injuries occurring outside the Province. There is little room for argument that it would extend to injuries outside the territorial jurisdiction unless expressly stipulated. Section 6(3) provides, in part;

> "When a workman is engaged in work part of which is to be performed in this Province and part in an **adjoining** province or country the work shall be considered as done and performed in this Province, and the workman or his dependants shall be entitled to be paid compensation under this Part . . ." etc

This is indeed a strange provision. "Adjoining" is not defined in the Act. Clearly the Provinces of Quebec and Nova Scotia **adjoin** New Brunswick, maybe Prince Edward Island could be considered as **adjoining** New Brunswick. Clearly no other Province in Canada could be so considered. The State of Maine can hardly be considered a **country**, but clearly the United States of America is a country adjoining New Brunswick. So then, a workman employed partially in New Brunswick and partially in any State of the United States comes within the New Brunswick Act, whereas the employee whose work takes him to other than **adjoining** Canadian Provinces will be outside the Act. For example, an employee from New Brunswick might recover compensation if injured while attending a convention in San Francisco, but not in Toronto, and maybe not in Charlottetown.

The same section further provides that if the employer does not include such workmen in the payroll which he supplies to

the Compensation Board, the employer shall be individually liable for the payment of compensation. However, in such a case the employer can avoid that liability by showing that the workman was entitled to compensation in the adjoining Province or Country. Surely it would be more consistent with the nature of the Act for the Board to pay the injured workman compensation and the Board collect from the defaulting employer.

How does the position of fishermen fit into the Act? Fishermen certainly come within the Act,[30] however, it would appear that if they are injured outside territorial waters they will be outside the Act. In this regard the Act seems deficient.

Injury or death in the course of employment within the scope of the Act may not entitle the workman or his dependants to compensation, for section 7(1) contains a general provision that "nothing in this part shall entitle any person not resident in New Brunswick to compensation payments". It is not difficult to think of situations where this provision would work hardships, particularly from the standpoint of dependants. There are, however, two exceptions to this residence rule: (1) "The Board may upon application grant leave from time to time to any workman or dependent resident in New Brunswick at the time of the accident to reside out of New Brunswick without thereby forfeiting the right to compensation payments under this Part;" (2) where by the laws of any other jurisdiction a New Brunswick resident could receive compensation if injured in such jurisdiction, then a resident of that jurisdiction injured in New Brunswick may be paid compensation. But an Order in Council must be passed by the Lieutenant-Governor in Council to the effect of the law in the foreign jurisdiction. This provision respecting an Order in Council seems to be a hangover from the pre-1918 Employer's Liability Acts, but have for the most part disappeared. There is also a provision for **reduction** of compensation payments where the recipient is resident **outside** New Brunswick "according to the conditions and cost of living in the place of residence of such dependents".

Assuming a workman comes sufficiently within the Act to be entitled to compensation, he will have no other remedy against his employer.[31] However, there is an exception to this general rule where there is a claim or right of action against the employer "under or in virtue of any statute of **Canada**, or of the **United Kingdom of Great Britain and Northern Ireland.**"[32] In such cases a workman can only claim as compensation the dif-

30. The Workmen's Compensation Act, R.S.N.B., 1952, s. 2(2).

31. **Ibid**, s. 11

32. **Ibid**, s. 8.

ference between the amount of such claim or right of action and what would otherwise be payable as full compensation, unless he releases the employer from any such claim or compensation.

It may seem at first glance that compensation claims **should** be in lieu of any other claim against the employer. But why? It was surely never the intention of the Legislature in providing for compensation to forgive an employer his negligence. Surely the whole purpose of the Act is to keep the injured employee from destitution where he has no other legal claim, and to give him some quick remedy pending settlement of any legal claim which if resisted by the employer may suffer considerable delay. I suggest it is more consistent with the true purpose of a workmen's compensation scheme to allow an employee, injured under circumstances which would ordinarily give him a right of action against his employer, the right to claim compensation **and** bring his action. The compensation could, of course, be taken into consideration to some extent in deciding the amount of damages.

The New Brunswick Act preserves rights of action against persons other than employers.[33] The injured workman or the dependents of a deceased workman may **either** claim compensation or bring action. If action is brought **and less** is recovered than compensation, the difference may be claimed. If compensation is claimed the Board shall be subrogated to the position of the workman or his dependents. The Act is silent on what happens if the Board, as subrogee, recovers from the third party **more** than the amount of compensation paid. Must it be paid to the workman, or part of it paid to him, or held in trust for him until such time as the final compensation payments are made? It should be remembered that the amounts of compensation payments may be increased from time to time.

As was mentioned a workman injured by a negligent third party may either claim compensation or bring action. This might appear as if the injured employee is put to an election and if he choses to take compensation he will loose his right of action, even if his claim is denied by the Workmen's Compensation Board. That appears to have been the thinking of the majority of the Supreme Court of New Brunswick (Richards, C. J. and Hughes, J.) in **Hart v. Rossignol.**[34] But that decision was reversed by the Supreme Court of Canada[35] upholding the minority view of **Michaud, C.J. K.B.** that the Board's denial of compensation can have no effect in respect of an action taken against a third person.

---

33. **Ibid,** s. 9.

34. [1955] 2 D.L.R. 823.

35. **Rossingol** v. **Hart** (1956) S.C.R. 314; [1956] 1 D.L.R. (2d) 705.

Section 10 of the Act provides that an injured workman has no right of action against **any** employer within the scope of the Act. However, the same provision does not apply to the dependants of a deceased workman. Not only does s. 10 not mention "dependants" but that very point was considered in the recent case of **Delorey v. Wasson.**[36] In that case all the parties involved were within the scope of the Act. Delorey was killed in an automobile collision due to the negligent operation of a Wasson Co. car by Wasson. Compensation was applied for and received by Delorey's dependants. Then Delorey's administrator brought action against Wasson and the Wasson Co. under the Fatal Accidents Act, the Workmen's Compensation Board being joined as co-plaintiff. The trial judge dismissed the action against the **Wasson Co.** apparently misdirecting himself as regards s. 10. An appeal was taken to the Supreme Court of New Brunswick. It was a happy day in the history of workmen's compensation in New Brunswick when **McNair, C.J.N.B.** refused to allow existing rights of action to be abolished except by clear words in the Compensation Act, and held that, "S. 10 makes no mention of dependents and any restrictions arising from its provisions clearly have no application to bar any of their rights." It is to be regretted, however, that the Chief Justice did not take a stronger stand as to the **positive** interpretation of s. 10 for it was argued that s. 10 read in conjunction with s. 9(1) must be treated as a nullity. That argument by itself may have some validity, but when s. 9 and 10 are read in conjunction with the other provisions on compensation the intention of the legislature is all too clear. Although I may not agree with the provision, and with respect to the draftsman, the opening words of the s. 10 might read better as "No employer or workman within the scope of this Part may bring an action against any employer within the scope of this Part".

The Act contains no other provisions as regards the scope of compensation. Particularly conspicious is the lack of a provision for reciprocal agreements with other legal jurisdictions. Most of the sections (about fifty) in Part I concern the constitution and jurisdiction of a Board, the establishment and administration of an accident fund. Time will not permit a close analysis of all those provisions, however, some mention of the Board and its jurisdictions is essential.

The Board consists of three members appointed by the Lieutenant-Governor in Council,[37] two of whom constitute a quorum,[38] and is vested with the widest powers. Its jurisdiction

---

36. (1960) 55 M.P.R. 356.

37. The Workmen's Compensation Act, R.S.N.B., 1952, s. 17.

38. **Ibid.** s. 20.

is far more sweeping than that of the Supreme Court of New Brunswick.[39] When a claim for compensation is made the Board combines the roles of defendant, judge and jury as well as collecting and administering the fund from which claims are paid when granted. This type of all-powerful judicial as well as administrative tribunal seems peculiar to Canada. It is a high tribute to Canadians that such tribunals operate satisfactorily – **if they do.** The Board is not bound by its own decisions,[40] which are final and conclusive[41] from which there is no appeal except on questions of jurisdiction and law.[42] In **Nagy v. Workmen's Compensation Board,**[43] **Hazen, C.J.** said;

> "It must have been the intention of the Legislature to leave as far as possible control in the hands of the N. B. Workmen's Compensation Board and prevent appeals being taken from their decision."

Those words seem as applicable today as they were in 1931.

Powers of the Board may be delegated,[44] and it was held by **Harrison, J.** in **Touchie v. Workmen's Compensation Board,**[45] that where a matter is referred to a committee of medical practitioners under s. 32(5) such "review" means "determination".

It is specifically provided that the decision of the Board shall be final and conclusive as to whether or not an **injury** exists.[46] However, **Rand, J.,** in the Supreme Court of Canada, specifically overruled **Richards, C.J.N.B.,** and said that the exclusive jurisdiction conferred upon the Workmen's Compensation Board to determine, inter alia, the existenc of an injury cannot have effect in respect of an action of an injury against a third person.[47] In that case, it will be remembered, the Board found there was **no injury,** but the Supreme Court of Canada allowed an action against a negligent third person. It mus be assumed the Court will apply similar reasoning in other places where the Board has exclusive jurisdiction.

---

39. **Ibid,** s. 29-34.
40. **Ibid,** s. 29
41. **Ibid,** s. 32(1).
42. **Ibid,** s. 34(2)
43. (1931) 3 M.P.R. 516.
    See **Bathurst & Crosby** v. **Workmen's Compensation Board** (1928) 53 N.B.R. 455;
    Workmen's Compensation Board v. **St. John Tugboat Co.** (1931) 4 M.P.R. 9.
44. The Workmen's Compensation Act, R.S.N.B., 1952, ss. 31, 32(5).
45. (1947) 20 M.P.R. 438; [1947] 4 D.L.R. 593.
46. The Workmen's Compensation Act, R.S.N.B., 1952, s. 32(2) (a).
47. **Rossingol** v. **Hart** [1956] S.C.R. 314; [1956] 1 D.L.R. (2d) 705.

Since the case of **R. v. Workmen's Compensation Board of N. B.**,[48] it appears settled that s. 42, empowering the Board to "reopen, rehear, redetermine, review or readjust any claim, decision or adjustment," deals with circumstances which **follow the award** of compensation and not with those which precede it. So when the Board, in that case, refused compensation on the ground that the injury did not arise out of the employment, **Baxter, J.** held the Board could not reopen the case and grant compensation. Although that may be a proper interpretation of s. 42, the result of the case seems hard to reconcile with s. 32(3) and s. 32(2) (j) which would appear to expressly authorize the very thing the Board sought to do.

It cannot be doubted that the provisions of the New Brunswick Workmen's Compensation Act enable the Board to operate in quite an arbitrary manner, however, there seems to be great reluctance in the Courts to let the Board have the last word in anything. It is to be hoped that the Courts will continue this trend as regards s. 6(4) which provides in part as follows;

> "Where the Board is of the opinion that a person entitled to compensation under this part is leading an immoral or improper life, the Board has the power, after due investigation, to withhold or suspend compensation for such a period as the Board deems proper;"

Such a Victorian provision in 20th century social legislation needs some comment. A nicer piece of Mrs. Grundyism can scarcely be found.

---

48. (1934) 8 M.P.R. 25; [1934] 3 D.L.R. 753.