Chapter 3: Workmen's Compensation Law

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§3.1. Personal Injury: Application of Successive Insurer Rule to Dissimilar and Unrelated Injuries: Effect of Lump Sum Settlement of Later Injury: Double Recovery. In Carrier's Case,¹ the Supreme Judicial Court confronted the question whether an employee could receive compensation from the first insurer for an earlier hand injury after he had executed a lump sum settlement with a second insurer for a later knee injury, which later injury contributed ten percent to his incapacity. The Court held that to allow such compensation "would constitute double recovery and violate the statutory scheme" and concluded that the lump sum settlement of the later knee injury eliminated all rights to incapacity compensation for the unrelated prior hand injury, so long as the knee injury played any part, no matter how slight, in the employee's incapacity.² The Court thus affirmed the decision of the Appeals Court,³ which had reversed a decree of the superior court enforcing the Industrial Accident Board's award of compensation for total and partial incapacity for the hand injury for a period beginning shortly after the lump sum settlement of the knee injury. In denying compensation from the first insurer, the Supreme Judicial Court applied the successive insurer rule⁴ for the first time to the case of an employee who had sustained two injuries to different parts of the body and had not merely aggravated a pre-existing condition with a subsequent injury to the same place. The Court's novel extension of the successive insurer rule introduces dangerous uncertainty into the scope of the rule itself, as well as to the effect of lump sum settlements, and thus brings confusion to the practical adminis-

²Id. at 1851-52, 351 N.E.2d at 506-07.
⁴The successive insurer rule requires that "[w]here there have been several compensable injuries, received during successive periods of coverage of different insurers, the subsequent incapacity must be compensated by the one which was the insurer at the time of the most recent injury that bore causal relation to the incapacity." Evans's Case, 351 N.E.2d 505.
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On October 3, 1966 a painter injured his left hand, resulting in amputation of his index finger and five other surgical procedures. The first insurer, Shelby Mutual (the "first insurer" or "Shelby"), paid benefits for total incapacity until the employee went to work for another employer insured by Hartford Accident and Indemnity Company (the "second insurer" or "Hartford"). Two weeks after starting work, on June 7, 1967, the employee fell from a ladder and seriously injured his right knee. The second insurer thereafter paid compensation benefits for approximately twenty-seven months until it and the employee reached a lump sum agreement on September 5, 1969, redeeming Hartford's liability for compensation for that injury under section 48 of chapter 152 of the General Laws for $8,656. Shortly thereafter, the employee filed a claim against Shelby for further incapacity compensation for the prior left hand injury. Shelby paid compensation voluntarily, without prejudice, from September 6, 1969 to November 20, 1969. In May 1971, after a hearing, the single member of the Industrial Accident Board awarded benefits for total incapacity and dependency from November 20, 1969 to February 17, 1970, and for partial incapacity thereafter. When this decision was affirmed by the reviewing board, Shelby appealed to the superior court. The superior court remanded for findings on the contribution of the knee injury to the incapacity. On remand, the Board found that the knee injury contributed ten percent to the incapacity, and renewed the award of total dependency, and partial compensation. The superior court then entered a decree sustaining the award, which decree was reversed in the Appeals Court.

The Supreme Judicial Court subsequently affirmed the Appeals Court decision and held that the lump sum agreement with the second insurer barred the employee from further recovery for incapacity caused, in part, by the second injury. Like the Appeals Court, the Supreme Judicial Court reached this result through a three-step analysis. First, the Court noted that "it is settled that on a series of injuries contributing to an existing condition of disability the insurer..."
covering the risk at the time of the last injury is responsible for all disability payments.”11 Thus, because the knee injury contributed ten percent to the employee's claimed incapacity, the successive insurer rule required the second insurer to assume total liability for compensation due the employee.12 Second, the Court reasoned that the lump sum agreement entered into by the employee with the second insurer was, in effect, a substitution for continuing periodic payments.13 Therefore, the Court concluded that the negotiation of the lump sum agreement should not change the result under the successive insurer rule because the lump sum agreement, which substituted for continuing periodic payments, represented the second insurer's assumption of the total liability for compensation due the employee.14 Third, the Court noted that to allow additional recovery against the first insurer in this situation would constitute double recovery and violate the statutory scheme.15 An analysis of each of these three steps in the Court's approach will serve both to highlight the extent to which the Court's opinion introduces dangerous uncertainty into the practical administration of the Workmen's Compensation Act, and to suggest an approach whereby such uncertainty can be minimized.

A. SUCCESSIVE INSURER RULE

In the first portion of its analysis, the Court applied the successive insurer rule to the facts of Carrier's Case. The successive insurer rule16 operates to allocate responsibility for payment of compensation when an employee's disability results from the combined effect of two or more injuries. The rule requires that only one insurer be chargeable for the payment of compensation for a single period of disability and allocates that responsibility to the insurer who was covering the risk at the time of the most recent injury bearing a causal relation to the incapacity.17 This allocation of responsibility is a logical extension of the basic principle that the employer and its insurer "as is," with all his weaknesses and pre-existing infirmities, thereby becoming responsible for any aggravation of those infirmities occurring as a result of another personal injury suffered during the period cov-

16 For application of the successive insurer rule, see cases collected at L. Locke, WORKMEN'S COMPENSATION, 29 Mass. Prac. § 178, at 211-15 (1968) [hereinafter cited as Locke].
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... ered by the insurance policy. The rule, therefore, holds the second insurer responsible even if the last injury contributed only in a very minor way to the subsequent disability, and even if the latest injury does not add to the physiological damage but only increases its symptoms. The first insurer, on the other hand, is responsible only in a few limited situations, primarily where there is, in fact, no second injury and the claimed disability results solely from the recurrence of the prior injury.

Before the decision in Carrier's Case, the successive insurer rule had been applied only in situations where the successive injuries involved the same part of the body and the incapacity resulted from further aggravation of the pre-existing condition. Cases involving the successive insurer rule, therefore, have tended in the past to cluster around certain physical problems particularly susceptible to recurrence and aggravation: dermatitis, emphysema, hernia, and disorders of the lung, heart, and back. More importantly, two separate factors suggest that until Carrier's Case, Massachusetts courts did not contemplate the extension of the successive insurer rule to situations where the employee had sustained injuries to different parts of the body.

First, in seeking to allocate the responsibility for compensation of a "disability" resulting from two or more injuries, the courts were using the term to mean "physical impairment" and not to connote a more generalized "impairment of earning capacity." Accordingly, the successive insurer rule, as expressed in decisions preceding

22 See Locke, supra note 16, § 178, at 214 & n.93. Footnote 93 catalogues the cases according to the various parts of the body involved in the respective claims.
23 Id.
24 Courts commonly characterize the rule as requiring that "[o]nly one insurer can be charged for the same disability, [such that] where there are several successive insurers, chargeability for the whole compensation rests upon the one covering the risk at the time of the most recent injury that bears a causal relation to the disability." Casey's Case, 348 Mass. 572, 574, 204 N.E.2d 710, 711 (1965) (emphasis added). See McConolouge's Case, 336 Mass. 396, 398, 145 N.E.2d 831, 833 (1957).
25 See e.g., Casey's Case, 348 Mass. 572, 574, 204 N.E.2d 710, 711 (1965); Tassone's Case, 330 Mass. 545, 546, 116 N.E.2d 126, 127 (1953) ("The employee... suffered disability consisting of dermatitis on her hands and arms as a result of contact with cement.").
26 "Impairment of earning capacity" is, however, the appropriate meaning of "incapacity" in G.L. c. 152, §§ 34, 34A and 35, where the Workmen's Compensation Act awards payments when the "incapacity for work resulting from the injury" is, respectively, either total, both total and permanent, or partial.
Carrier's Case, would apply only when the successive injuries had combined to cause one disability, and not merely when independent injuries to different parts of the body had combined to cause one incapacity for work. Thus, the very language used in setting forth the rule suggests that the courts did not envision its extension to situations where the employee had sustained injuries to different parts of the body.

The second factor which indicates that courts, until Carrier's Case, intended to confine the application of the successive insurer rule to cases where successive injuries to the same part of the body had created one disability, is the range of benefits which the rule made the responsibility of the second insurer. Prior successive insurer cases required the subsequent insurer to pay all the compensation provided by law for the effects of the aggravating injury. Such compensation includes not just weekly incapacity compensation, but also medical and hospital treatment, specific compensation for losses of bodily function or disfigurement, and rehabilitation programs. The very range of benefits for which the second insurer was made responsible under the successive insurer rule presumes that the employee has sustained successive injuries to one part of the body. If the employee had received different injuries to different parts of the body, there would be no logic in making the second insurer liable not only for weekly incapacity compensation, but also for medical treatment of an earlier impairment totally unrelated to the injury received during the second insurer's coverage of the risk.

Not only the courts' treatment of the successive insurer rule, but also the Workmen's Compensation Act itself would have suggested, prior to the decision in Carrier's Case, that the rule would have no application where the successive injuries were to different parts of the body. Section 15A of chapter 152 of the General Laws, the only provision of the Workmen's Compensation Act specifically addressing the problems posed by a controversy between successive insurers, presumes that the liability at issue arises as the result of successive injuries to the same part of the body. To avoid leaving the injured employee without compensation pending the resolution of the controversy, section 15A provides that "if one or more claims are filed..."
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for an injury and two or more insurers . . . may be held to be liable to pay compensation therefor” either of the insurers can be temporarily charged with the duty to pay the compensation, and then be subsequently reimbursed if a final decision should place liability on a different insurer. Thus, by referring to injury, rather than incapacity, the section suggests that only successive injuries to the same part of the body can trigger the application of the successive insurer rule.

In Carrier's Case, however, both the Supreme Judicial Court and the Appeals Court applied the successive insurer rule to an employee who had sustained unrelated injuries to different parts of the body. Although each court noted that the first injury was to the hand and the second to the knee, both opinions glossed over the distinction. The Supreme Judicial Court made no further reference to the separate character of the injuries and applied the successive insurer rule without comment. Similarly, the Appeals Court paused only to make the summary, unsupported observation that “[i]t does not matter that the second injury contributing to the incapacity is unrelated to the first injury, so long as both injuries have contributed to the same incapacity.”

The unprecedented application by the Massachusetts courts of the successive insurer rule to cases involving two injuries to different parts of the body is extremely problematic. One central difficulty arises as a result of the uncertain scope of the liability assumed by the second insurer under the rule of Carrier's Case. Although the Court's sweeping language imposes on the second insurer “the total liability for compensation due the employee,” the opinion fails to clarify exactly what is meant by “compensation due the employee.” On one hand, a literal application of the holding in Carrier's Case might create arbitrary and clearly unintended results by requiring the second insurer to be responsible for both weekly incapacity compensation and specific benefits triggered as a result of the first injury. Because “compensation due the employee” encompasses the cost of medical and hospital treatment, Carrier's Case suggests that the insurer of the later knee injury has “assumed the total liability” for bills for treatment of the previously suffered hand injury, so long as the knee injury contributes to the employee's incapacity. Thus, if the employee were to die in the course of an operation on his hand, Hartford, the second insurer,
would be compelled to pay death benefits to the dependents, despite the complete absence of a causal relationship between the death and the knee injury sustained during the period Hartford covered the risk. It is unlikely, however, that the Court would countenance such an arbitrary result.

On the other hand, a reluctance to accord a literal interpretation to the Carrier's Case language creates conceptual problems insofar as such an interpretation would necessitate an apportionment of liability among insurers. Such an apportionment of liability gives rise to precisely the situation that the successive insurer rule was designed to avoid and injects confusion into the practical administration of an Act intended to be simple and summary. In Carrier's Case, for example, the first insurer, Shelby, did not appeal from that part of the Board's award for payments for loss of function of the employee's hand and medical fees. Thus, despite the Court's sweeping reference to the second insurer's "total liability for compensation due the employee," the final result in Carrier's Case was an apportionment of responsibility between the two insurers such that Shelby, the first insurer, was liable for specific benefits causally related to the first hand injury and Hartford, the second insurer, assumed the responsibility for weekly incapacity compensation as well as specific benefits causally related to the second knee injury.

The foregoing analysis, therefore, illustrates how the imprecise language in Carrier's Case which speaks of the "total liability for compensation due the employee" suggests two possible formulations of the scope of liability thereby imposed on the second insurer, neither one of which is particularly satisfactory. However, the dangerous potential for arbitrary results created under the first, more literal approach, together with the actual result reached on the facts of Carrier's Case, indicates that the Supreme Judicial Court probably will construe "total liability for compensation due the employee" to require an apportionment of liability between the two insurers. According to this construction, the second insurer is liable for the weekly incapacity compensation, but each insurer remains responsible for the medical fees, death benefits, or rehabilitation expenses causally related to the particular injury sustained during the period in which it insured the employee.

A second difficulty inherent in the Carrier's Case extension of the successive insurer rule to cases involving two injuries to different parts

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39 G.L. c. 152, § 56 ("Process and procedure shall be as simple and summary as reasonably may be.").
41 The last insurer, however, would be liable for the payment of medical bills or death benefits connected with an earlier unrelated injury if the later injury contributes both to the incapacity and either to the necessity of the particular medical treatment in question or to the death.
of the body stems from the incentive it gives to the employee to claim compensation for a later injury in order to become entitled to higher weekly benefits when suffering from recurrence of an earlier but unrelated injury by alleging that both injuries contributed to the incapacity thus triggering application of the successive insurer rule. For example, a worker might be injured in 1966 when the maximum weekly benefit for total incapacity was $58. After a period of incapacity, the condition might improve and the worker return to work. Then, in 1975 when the weekly maximum was $95, he might sustain a second injury for which specific compensation is due under section 36 of chapter 152 of the General Laws, such as loss of a finger or loss of vision in one eye. Subsequently, this second injury could improve and the employee again return to work whereupon he suffers a recurrence of the original injury requiring hospitalization and prolonged medical care. Before the opinion in Carrier's Case, the employee would have claimed further compensation from the first insurer, receiving a maximum weekly benefit of $58. The Court's decision in Carrier's Case, however, will entitle the employee to receive compensation at the higher weekly rate of $95 a week from the second insurer for the incapacity caused by a recurrence of the earlier unrelated injury so long as he can prove that the second injury contributed to that incapacity, even to a minor degree. The second insurer, to avoid liability, would have to contend that the effects of the first injury had never cleared up, and that the later incident did not aggravate the condition. The creation by Carrier's Case of such incentives to claim that an incapacity caused by the recurrence of an earlier injury is aggravated by a subsequent unrelated injury will create further confusion and uncertainty in the administration of the Workmen's Compensation Act. It is likely to generate an influx of cases in which the Board will be forced to make nice distinctions in applying the successive insurer rule to situations where the second injury is to a separate part of the body, and apart from Carrier, unrelated to the claimed incapacity.

Strict adherence to the successive insurer rule, as previously interpreted by the Supreme Judicial Court and followed by the Industrial Accident Board since the 1938 decision in Evans's Case, would have avoided the potential for confusion and injustice created by the Court's extension of the rule in Carrier's Case. Until Carrier's Case, claims for two different injuries to different parts of the body were always treated separately. Each insurer was liable for the benefits relating to the injury sustained during his period of coverage. Thus, the

45 See text at note 21 supra.
employee received the full range of benefits to which he was entitled, while at the same time was precluded, under Mizrahi's Case, from double recovery for the same period of incapacity.47

B. LUMP SUM SETTLEMENTS

The second step of the Court's analysis in Carrier's Case concerns the scope and effect of a lump sum settlement. The Court's approach to this issue promises to create further unnecessary confusion. In most cases arising under the Workmen's Compensation Act, compensation is paid by voluntary agreement between the insurer and the employee.48 Such agreements are enforceable only if approved by the Division of Industrial Accidents of the Department of Labor and Industries, and approval is forthcoming only when an agreement's terms conform to the Act.49 Compromise is permitted only in the case of lump sum settlements authorized under section 48 of chapter 152 of the General Laws.50

Although they may be treated as payments under the Act,51 settlement agreements approved under section 48 do not represent simply the equivalent of a lump sum advance of continuing periodic compensation payments to which the employee would otherwise be entitled over a period of time. The many factors that influence the parties in arriving at the lump sum agreement indicate the difficulties in construing lump sum payments as merely representing continuing periodic compensation. Cases in which an insurer's liability for compensation is redeemed by a lump sum settlement fall into two basic

48 See Locke, supra note 16, § 551, at 669.
49 G.L. c. 152, § 6. Thus, an employee may not agree to receive less than what he is entitled to under the Workmen's Compensation Act. Locke, supra note 16, § 551, at 669.
50 Section 48 provides that:
Whenever the division deems it to be for the best interests of the employee or his dependents, and the parties agree, the liability for compensation may be redeemed by the payment in whole or in part by the insurer of a lump sum of an amount to be fixed by the division, not exceeding the amount provided by this chapter. The division, in the case of a minor who has received permanently disabling injuries, either partial or total, may, at any time before or after he attains his majority, provide that he be compensated, in whole or in part by the payment of a lump sum, of an amount to be fixed by the division, not exceeding the amount provided by this chapter.
51 Because claims under the Workmen's Compensation Act can be settled only under G.L. c. 152, § 48, lump sum settlement payments have been regarded as "compensation" in other circumstances. See Locke, supra note 16, § 551, at 672. For example, a lump sum payment may be allocated to extend the period of time in which a public employee could apply for a pension. Gannon v. Contributory Retirement Appeal Bd., 338 Mass. 628, 633-35, 156 N.E.2d 654, 658-59 (1959). Similarly, a lump sum agreement is treated as "the compensation provided" for incapacity and medical care, entitling the insurer to reimbursement from the second injury fund for payments made under the lump sum settlement. Henderson's Case, 349 Mass. 683, 685, 212 N.E.2d 455, 457 (1965).
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In the first group, the lump sum represents a compromise between the parties who dispute the insurer's liability to pay compensation. In arriving at the lump sum figure, the parties will consider issues of liability, causal relation, extent of disability, as well as the possibilities of later recurrence, further medical expense, or even death from the injury. In the second category, there is no real dispute as to the insurer's liability and the lump sum represents a commutation of the payment of benefits into a single sum. The final settlement, however, reflects not simply this agreement as to the insurer's liability, but also the parties' assessment of the possibility that the insurer may escape its full obligation as the result of a supervening injury or death. In both categories further uncertainty is introduced by the intangibles that figure into any negotiated settlement: the relative abilities of counsel, the attitude of the tribunal, and the eagerness or reluctance of the claimant to settle.

In holding that a settlement is binding even in the event of a later change of condition, courts have recognized that lump sum settlements reflect these varied factors and are not merely the equivalents of continuing periodic compensation payments. In *McCarthy's Case*, for example, an employee went blind after settling his claim under the Workmen's Compensation Act. Although this possibility was not even contemplated by the employee's doctors at the time he settled his case, the Court determined that the settlement was binding. In effect, the Court thus indicated that it did not conceive of the lump sum settlement as merely a substitute for all compensation that the employee would be entitled to receive insofar as the Court upheld a lump sum agreement that failed to account for a disability which otherwise

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52 Section 48 makes no distinction between these two functions of commutation and compromise except with respect to a minor who has received permanent disabling injuries in which case the statute contemplates an established liability and provides only for commutation. G.L. c. 152, §48. LOCKE, supra note 16, § 552, at 672-73. The minor's lump sum settlement can be set by the Industrial Accident Board and does not depend upon agreement of the parties. Id. at 672. In practice, however, most cases involve elements of both commutation and compromise.

53 The dispute may be a disagreement as to original liability, the extent of present disability, or the insurer's responsibility for further compensation for a recurrence of the original condition. See, LOCKE, supra note 16, § 551, at 669-70.

54 Nor is the life expectancy of the employee the sole factor because the lump sum settlement does not bar any rights which may accrue to the employee's spouse or dependents if they survive him. MacFarlane's Case, 330 Mass. 573, 576-77, 115 N.E.2d 925, 926-27 (1953); Cripps' Case, 216 Mass. 586, 589, 104 N.E. 565, 566 (1914). Thus, as the parties assess the insurer's potential liability to the claimant's dependents, it becomes increasingly difficult to assume that the lump sum settlement approximates compensation for any specified period of time.

55 See LOCKE, supra note 16, § 551, at 671.


57 Id.
would have increased the employee's benefits.footnote{58}

In Carrier's Case, however, both the Appeals Court and the Supreme Judicial Court characterized the lump sum settlement that the employee negotiated with the second insurer as the equivalent of "all compensation payments which the employee would be entitled to receive in the future as a result of his incapacity."footnote{59} This characterization was critical to both decisions. From it, the Supreme Judicial Court reasoned:

Both the compensation the employee has elected to receive in a lump sum from the second insurer and the payments now sought from the first insurer are based on incapacity and cover the same period of time. To allow an additional recovery against the first insurer in this situation would be to give the employee a double recovery for his incapacity.footnote{60}

The Court's mischaracterization of the nature of the lump sum settlement is disturbing because it adds to the confusion created by the extension of the successive insurer rule to cases where an employee has received injuries to different parts of the body. The Supreme Judicial Court alluded to the employee's "misapprehension that he was merely effecting a settlement of a claim with respect to his knee injury" and suggested the desirable practice of notifying the employee when a lump sum agreement is negotiated "that its effect will be as is demonstrated in this case."footnote{61} Delineation of this projected "effect" is problematic because, as noted above,footnote{62} the scope of the extension of the successive insurer rule to the Carrier situation is not clear. Thus, it is not certain whether the employee's negotiation of a lump sum settlement compromises only his rights to incapacity compensation from the first insurer, or whether it also precludes recovery for medical fees, rehabilitation costs, and death benefits causally related to the first injury.footnote{63} In light of the illogic in holding the second insurer liable for both incapacity compensation and specific benefits for an unrelated first injury,footnote{64} it would seem that the receipt of a lump sum settlement should not foreclose the employee's right to specific benefits.

footnote{58} Blindness would have entitled the employee to specific compensation benefits. G.L. c. 152, § 36.


footnote{61} Id. at 1852 n.2, 351 N.E.2d at 507 n.2.

footnote{62} See text supra at notes 31-36.

footnote{63} In Carrier's Case, the first insurer did not appeal from the Board's award of specific benefits. 1975 Mass. App. Ct. Adv. Sh. at 1184, 334 N.E.2d at 635.

footnote{64} See text supra at notes 35-41.
from the first insurer. However, uncertainty as to the effect of the lump sum payment does not only center around the distinction between incapacity compensation and specific benefits. The Court's mischaracterization of the lump sum settlement also raises the possibility that the employee might not be able to claim compensation for a future injury.65

Thus, Carrier's Case hinders the parties' ability to gauge the effect of lump sum settlements on potential claims for injuries other than the personal injury being settled. As a result, lawyers representing claimants (and the Board in approving settlements) are in a most difficult and delicate situation. Obviously, full disclosure of the possible implications of the settlement for other injuries must be made to the claimant at the time of the settlement. But employees may be understandably reluctant to enter into lump sum settlements which have such uncertain effect. Lump sum settlements play a prominent part in the processing of workmen's compensation claims, and a break down in the lump sum mechanism will leave insurers with an open-ended risk on cases that otherwise would appropriately be closed and will require the trial of hundreds of controverted cases, which otherwise would be appropriately settled, with the attendant increase in backlog of unresolved claims at the Board.

None of this confusion was necessary because the existing practice with regard to lump sums would have adequately dealt with the situation if the Court had not extended the successive insurer rule to dissimilar personal injuries. Before Carrier's Case, when a settlement was made for a second injury to the same part of the body, the redemption of the second insurer's liability foreclosed any claim for overlapping disability or medical care from any prior injuries to that part of the body.66 But injuries to other parts of the body were unaffected, and a valid claim could be made for any compensation resulting from such injury, disregarding the effect of any later injury, whether settled by lump sum or still open. That was all that was necessary before Carrier extended the successive insurer rule to dissimilar personal injuries and thereby introduced the present confusion.

C. DANGER OF DOUBLE RECOVERY

In the third step in its analysis, the Court in Carrier's Case reasoned that to allow the employee to receive incapacity and dependency compensation for his hand injury after he had lump summed his later

65 In the absence of a lump sum settlement, a future injury might entitle the employee to additional benefits if, for example, it triggered the right to specific compensation under G.L. c. 152, § 36, or if it increased the extent of a partial incapacity. Compensation for partial incapacity is computed according to "the entire difference between [the employee's] average weekly wage before the injury and the average weekly wage he is able to earn thereafter . . . ." G.L. c. 152, § 35.

66 See cases collected at Locke, supra note 16, § 178, at 211-15.
knee injury would constitute double recovery and violate the statutory scheme. As indicated by the foregoing analysis, the Court's fear of double recovery was unjustified since the payment by way of lump sum could not appropriately be allocated to any specific period of time which could be said to overlap the period for which compensation was awarded so as to constitute double recovery for such a period.

All previous cases in which the potential for double recovery was an issue involved either an identified period of incapacity or an identified benefit, such as medical care or specific compensation, with respect to which the Court justifiably sought to insure that the employee not receive duplicate or overlapping payments. The “double recovery” issue was most sharply presented in Mizrahi's Case. In that case the employee first sustained a hernia which did not immediately cause incapacity and then a second injury to his fingers which did cause temporary total incapacity for which he received compensation under the Longshoremen's and Harbor Workers' Compensation Act. While so incapacitated, he underwent an operation to repair the hernia, an operation which itself would have caused total incapacity for ten weeks. Although the insurer on the hernia case had agreed to pay his medical and hospital bills, the employee was not satisfied and sought total incapacity compensation for that ten week period under the Massachusetts Workmen's Compensation Act. The employee argued that payment by another insurer for a later injury to a separate part of the body under a different compensation act should “not be considered” in “determining the compensation payable” under the Act since such payment was a “benefit derived from” a “source other than the insurer” within the meaning of section 38 of chapter 152 of the General Laws. Otherwise, the employee maintained, the

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62 1976 ANNUAL SURVEY OF MASSACHUSETTS LAW §3.1


68 See, e.g., Casey's Case, 348 Mass. 572, 574, 204 N.E.2d 710, 711 (1965); Evans's Case, 299 Mass. 435, 437, 13 N.E.2d 27, 29 (1938).

Specific benefits are awarded under G.L. c. 152, § 36, which provides for weekly payments for certain specified injuries "in addition to all other compensation." Section 36 provides that "[n]othing in this section shall adversely affect the employee's right to any compensation which is or may become due under the provisions of this or any other section." Thus, it would not constitute double recovery for an employee to receive both incapacity compensation and specific benefits for the same period.

69 The statute provides for double recovery only "[i]f the employee is injured by reason of the serious and willful misconduct of an employer . . . ." G.L. c. 152, § 28.


72 G.L. c. 152, § 38 provides that "[n]o savings or insurance of the injured employee independent of this chapter shall be considered in determining the compensation payable thereunder, nor shall benefits derived from any other source than the insurer be considered in such determination." The Court, however, concluded that this section was not "intended to save to the employee the fortuitous advantage of receiving double compensation for the same injury or incapacity." 320 Mass. at 737, 71 N.E.2d at 385.
result would constitute a windfall to the insurer.\textsuperscript{73} The Court, however, brushed aside these arguments as mere "technicalities" and concluded that the employee was not entitled to further recovery "[s]ince both the compensation which [he] had received under the Federal Act and that [sought] under the State Act are posited upon total incapacity and not upon specific injury and cover the same period of time . . . ."\textsuperscript{74} Thus, the decision in Mizrahi's Case would seem "to bar two simultaneous awards of total compensation, even though based on two separate injuries."\textsuperscript{75}

In Carrier's Case, however, the lump sum settlement could not constitute a basis for finding that allowing recovery against the first insurer would give rise to "two simultaneous awards of total compensation" since the agreement could not properly be considered the equivalent of periodic incapacity compensation over a specified period of time.\textsuperscript{76} Only by mischaracterizing lump sum payments as the equivalent of the receipt of weekly payments over a specified period could the Court conceive that the prospect of the employee's recovery from the first insurer presented the danger of double recovery. Furthermore, the Court's reference to the danger of double recovery was gratuitous and unnecessary to the decision. Once it had extended the successive insurer rule to the situation where the employee had sustained different injuries to different parts of the body, there was no need to advert to the danger of double recovery since the lump sum settlement of the second injury itself barred any recovery of additional incapacity compensation so long as the second injury played some slight part in the claimant's incapacity.\textsuperscript{77}

The Court's mischaracterization of the nature of lump sum settlements together with its gratuitous reference to the danger of double recovery combine to create a potential for an unwarranted extension of the rationale of Carrier's Case. Some insurers have suggested that the case would bar claims for incapacity compensation, or even possibly specific benefits, for a subsequent injury to another part of the body for a defined period\textsuperscript{78} after the execution of a lump sum settlement. Otherwise, according to this argument, receipt of such benefits during that defined period would constitute double recovery.

In effect, the Court in relying on "double recovery" in Carrier's Case has evinced its willingness to enlarge a concept the impact of which

\textsuperscript{73} See 320 Mass. at 735-37, 71 N.E.2d at 384-85.
\textsuperscript{74} Id. at 735, 71 N.E.2d at 384 (emphasis added).
\textsuperscript{75} LOCKE, supra note 16, § 341, at 398.
\textsuperscript{76} See notes 51-60 and accompanying text supra.
\textsuperscript{78} The proponents of this argument would compute this period by taking the net proceeds of the lump sum, deducting attorney's fees, medical expenses, specific benefits and amounts attributable to the release of the inchoate rights of a dependent, and dividing this figure by the weekly compensation benefit to which the claimant otherwise would have been entitled.
should be narrowly confined. The concept of double recovery stands in direct opposition to the collateral source rule\textsuperscript{79} usually applied in personal injury claims. Furthermore, it impacts with undue harshness on employees who must forego their common law rights against their employers.\textsuperscript{80} Finally, it overlooks the reality "that the Workmen's Compensation Act ordinarily affords the employee rather slim recovery . . . ."\textsuperscript{81} While it is no doubt too late to argue that the concept of double recovery as applied to workmen's compensation should be discarded, it can be said with emphasis that it certainly should not be enlarged. In particular, the concept certainly should not be applied to situations not involving an identified period or benefit, such as that presented by a lump sum settlement which redeems the insurer's liability for compensation for that one injury only, for an amount which must protect the employee from the consequences of that injury, known or unknown, for the rest of his life.

It is important to state, in conclusion, exactly what the Carrier doctrine means. Carrier's Case holds, first, that where an employee sustained two or more injuries, whether to the same part of the body or to separate parts of the body, the insurer on the risk at the time of the latest injury which contributes to the incapacity is liable for the payment of compensation for the resulting incapacity.\textsuperscript{82} It does not hold that where the injuries are to different parts of the body, the last insurer is liable for the payment of medical bills for treatment of an unrelated earlier injury, even though the later injury contributes to the incapacity, unless the later injury also contributes to the necessity of the medical treatment in question.\textsuperscript{83} Similarly, it does not hold that the later insurer is liable for the payment of specific compensation for any loss of bodily function or disfigurement resulting from an unrelated earlier injury, even though the later injury contributes to the period of the incapacity, unless it also contributes to the specific loss.\textsuperscript{84}

It does not hold that where the injuries are to different parts of the body, the last insurer is liable for the payment of death benefits under sections 31, 32, and 33 of chapter 152 of the General Laws for death resulting from the earlier injury, even though the later injury contributed to a period of incapacity, unless the later injury also is causally related to the death. Although these latter consequences may seem to follow from the logic of the case, it is highly unlikely that our Court

\textsuperscript{79} The collateral source rule "requires a tortfeasor to pay in full the damages suffered by the injured person, without credit for amounts received by the injured person from other sources such as an employer or an insurer . . . ." Pemrock, Inc. v. Essco Co., 252 Md. 374, 378, 249 A.2d 711, 713 (1969).

\textsuperscript{80} Meley's Case, 219 Mass. 136, 139, 106 N.E. 559, 560 (1914); Young v. Duncan, 218 Mass. 346, 349, 106 N.E. 1, 3 (1914).

\textsuperscript{81} Boardman's Case, 365 Mass. 185, 193, 310 N.E.2d 593, 598 (1974).

\textsuperscript{82} 1976 Mass. Adv. Sh. at 1852, 351 N.E.2d at 507.

\textsuperscript{83} See text at notes 37 and 41 supra.

\textsuperscript{84} Id.
§3.2 WORKMEN'S COMPENSATION LAW

will permit them to be drawn.

Second, Carrier holds that the liability of the first insurer in the above situations is no different whether the liability of the last insurer has been redeemed by a lump sum settlement or whether it remains open. Accordingly, whatever liability the first insurer would have had, it will still have even if the liability of the last insurer has been redeemed by a lump sum settlement under section 48.

Third, Carrier holds that redemption by lump sum settlement of the liability of the insurer of a later injury wipes out the liability of the insurers of prior injuries, even to dissimilar parts of the body, for a subsequent period of incapacity where the later injury contributes even to a minor degree to such subsequent incapacity. But the lump sum does not wipe out the liability of insurers of prior injuries for specific compensation, medical care or rehabilitation, or death benefits when the right to such compensation results solely from the prior injuries, without regard to the injury which has been settled. Further, Carrier does not speak to, nor can it have any bearing on rights and liabilities for any subsequent personal injury arising out of and in the course of employment, occurring after the liability of the latest insurer has been redeemed by lump sum settlement.

The dramatic extension of the successive insurer rule and the unexpected effect on prior injuries given to lump sum settlement of a later unrelated injury have the potential for great harm and confusion. Such harm and confusion will be greater if implications, never intended by the Court, are drawn from its sparse language. It is essential that Carrier's Case be given the narrowest possible construction, so that damage be kept to a minimum. In addition, it is to be hoped that the Court will be given an early opportunity to consider the ramifications of Carrier and perhaps to clarify and confine its meaning, particularly with regard to the successive insurer rule. It is also to be hoped that the Massachusetts General Court will look at the ruling on lump sums and decide that it does not represent the intent of the Legislature. In that event, a simple amendment would be in order, declaring that an employee's right to compensation under chapter 152 of the General Laws shall not be affected by the lump sum settlement of any other injury.

§3.2. Arising Out of and in the Course of Employment: Emergency Public Service: "Zone of Special Danger Concept." During the Survey year, in D'Angeli's Case, the Supreme Judicial Court upheld an employee's right to recover workmen's compensation when injured in the course of his endeavor to alleviate an

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87 See text supra at note 64.
imminent danger to the public. The Court thus continued its unwavering adherence to a broad construction of the statutory requirement that the claimant have “receive[d] a personal injury arising out of and in the course of his employment.” D’Angeli’s Case is a landmark decision in the developing law which uses workmen’s compensation as a vehicle for compensating the good samaritan.

The employee in D’Angeli’s Case was a diesel mechanic who, in addition to his work at corporate headquarters in Allston, repaired engines outside the employer’s premises. On November 8, 1966, he was returning to headquarters from a repair job in North Wilmington. Traveling south on Route 93, the most direct route to headquarters, he noticed an obstruction on the roadway—a tightly wound coil of heavy rope about three feet in diameter and six inches high. Believing it to be dangerous, he pulled into the breakdown lane and then proceeded on foot to the travel lane and removed the obstruction. While returning to his car, he was struck by an oncoming car and sustained severe injuries. The employee was totally disabled by the accident.

The single member of the Industrial Accident Board dismissed D’Angeli’s claim, finding that he had not sustained a personal injury arising out of the course of his employment, and that his attempt to retrieve the rope constituted “a serious and substantial deviation from his employment.” Thus, the single member determined that the employee, injured by reason of his “serious and willful misconduct within the meaning of Section 27 of [the Workmen’s Compensation Act],” was not entitled to compensation. However, the reviewing board reversed the single member’s decision on the ground that the “injury arose out of and in the course of ... employment.” Furthermore, the Board noted that “although the employee used poor judgment in retrospect in going onto Route 93 ... it did not amount to serious and willful misconduct.”

4 1976 Mass. Adv. Sh. at 585, 343 N.E.2d at 369. As authorized by the employer who reimbursed his mileage expenses, the employee was driving his own motor vehicle. Id.
5 Route 93 is a six-lane limited access highway with a breakdown lane on the right of each side of the road and various signs prohibiting pedestrians. At the time of the accident, there was a sixty mile per hour speed limit. Id.
6 Id. at 586, 343 N.E.2d at 370.
7 Id.
8 1976 Mass. Adv. Sh. at 586-87, 343 N.E.2d at 370. See G.L. c. 152, § 27, which provides, in part, that “[i]f the employee is injured by reason of his serious and willful misconduct, he shall not receive compensation . . . .”
10 Id.
employee be paid total incapacity compensation.\textsuperscript{11}

Noting that the Board's decision should stand unless it is unsupported by the evidence or tainted by an error of law,\textsuperscript{12} the Supreme Judicial Court declined to follow Burgess's Case\textsuperscript{13} and rejected the insurer's argument that the statutory term "course of employment" should be narrowly construed as not embracing the facts of D'Angeli's Case.\textsuperscript{14} Instead, the Court emphasized that it would not require that the employee be engaged in the actual performance of his duties at the moment of injury in order to recover compensation, but only that his activity be incidental to and not inconsistent with his employment.\textsuperscript{15} Accordingly, relying primarily on O'Leary v. Brown-Pacific-Maxon, Inc.,\textsuperscript{16} the Court announced its "present view that when a conscientious citizen is in the course of his employment and per-

\textsuperscript{11} This award subsequently was affirmed by the superior court and then reversed by the Appeals Court. 1975 Mass. App. Ct. Adv. Sh. 888, 330 N.E.2d 499.

\textsuperscript{12} 1976 Mass. Adv. Sh. at 588, 343 N.E.2d at 370. See Demetre's Case, 322 Mass. 95, 98, 76 N.E.2d 140, 142 (1947); Locke, supra note 3, § 583, at 690-93.

\textsuperscript{13} 1976 Mass. Adv. Sh. at 589, 343 N.E.2d at 371. The insurer had relied on Burgess's Case as precedent for denying compensation to an employee allegedly far more deserving of recovery. 1976 Mass. Adv. Sh. at 588, 343 N.E.2d at 370. In that case the employee was a salesman who was injured when he pursued a robber who had shot an employee of the bank that the salesman was visiting when the crime took place. 331 Mass. at 90, 117 N.E.2d at 148. The Court denied compensation on the ground that the employee had departed from the duties of his employment. Id. at 92, 117 N.E.2d at 149. In D'Angeli's Case, the Court, citing Locke, supra note 3, § 241, at 293-94 n.67, and A. Larson, The Law of Workmen's Compensation § 28.32, at 5-292-5-293 (1972), noted that Burgess's Case had come under rigorous criticism and announced that "[i]n so far as that case might be said to govern the application of the law to the facts in this case, we do not choose to follow it." 1976 Mass. Adv. Sh. at 589, 343 N.E.2d at 371. For further discussion of Burgess's Case, see Locke, Workmen's Compensation Law, 1974 Ann. Surv. Mass. Law § 4.3, at 75-76 and 1973 Ann. Surv. Mass. Law § 5.3, at 138-39.


\textsuperscript{15} 340 U.S. 504 (1951). In O'Leary, the United States Supreme Court ordered reinstatement of an award of compensation to an employee of a government contractor in Guam who had drowned while attempting to rescue two men from a dangerous channel which ran alongside a recreation center the employer maintained for its employees. Id. at 505, 509. The Court noted that recovery was not conditioned on the existence of a "causal relation between the nature of employment of the injured person and the accident," nor was it "necessary that the employee be engaged at the time of the injury in activity of benefit to his employer." Id. at 507. Instead, "[a]ll that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." Id. Thus, the Court concluded that injuries sustained in the course of a reasonable rescue attempt were not necessarily excluded from the coverage of the Longshoremen's and Harbor Worker's Act which authorized payment of compensation for "accidental injury or death arising out of and in the course of employment." 340 U.S. at 506-07, quoting 33 U.S.C. § 902(2) (1970).
ceives an imminent danger to the public, ... his endeavor to alleviate the danger should be considered incidental to his employment."17 Furthermore, the Court indicated that the principles that authorize compensation when "the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose"18 are not limited to cases involving the rescue of identifiable persons in imminent danger of harm, or emergency assistance to law enforcement officers effecting an arrest.19 Rather, the Court went on to state that such principles are also "applicable to an employee seeking to alleviate an immediate danger to the public safety."20

Applying the principles underlying the grant of compensation to an employee injured in a "zone of special danger" created by the obligations of his employment to the facts in D'Angeli's Case, the Court upheld the employee's right to recovery.21 The Court determined that the employee's travel in the course of his employment brought him into the position where he encountered the coil on the highway, which he reasonably viewed as posing a threat to the public safety.22 Thus, the employee's attempt to eliminate that dangerous condition was "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen, and so covered by the statute."23 Furthermore, the Court agreed with the reviewing board that while the employee's action in going out onto Route 93 might have constituted poor judgment, it did not amount to "serious and willful misconduct" so as to preclude recovery under section 27,24 especially when viewed in light of the Board's specific finding that the employee acted in an "emergency and dangerous situation."25

In D'Angeli's Case, the Supreme Judicial Court has considerably expanded the workmen's compensation rights of an employee injured while "seeking to alleviate an immediate danger to the public safety."26 The Court's decision is a landmark in the developing law applying the Workmen's Compensation Act to protect workers injured while engaged in activities of benefit to others. Previous cases have generally allowed recovery where the employee sustained an injury in the course of an activity that had some connection with his employment.27 Thus, efforts to rescue

18 Id. at 590, 343 N.E.2d at 371, quoting O'Leary, 340 U.S. at 507.
19 1976 Mass. Adv. Sh. at 591, 343 N.E.2d at 371. The Court recognized, however, that most cases from other jurisdictions sustaining the employee's right to compensation had presented either one or the other of these fact situations. Id.
20 Id.
21 Id. at 590, 343 N.E.2d at 371.
22 Id. at 591-92, 343 N.E.2d at 371-72.
23 Id. at 592, 343 N.E.2d at 372, quoting Babington v. Yellow Taxi Corp., 250 N.Y. 14, 17, 164 N.E. 727, 727 (1928).
24 G.L. c. 152, § 27. See note 8 supra. See also Locke, supra note 3, § 243, at 296-97.
26 Id. at 590, 343 N.E.2d at 371.
co-employees, or other persons owed some duty by the employer were generally conceded to arise out of and in the course of employment. Similarly, recovery has generally been allowed for injuries sustained in an emergency peculiarly associated with the character of the employment. While these fully accepted cases all predicate recovery on establishment of some type of particular work-connection, in *D'Angeli's Case* the Supreme Judicial Court has impliedly accepted the so-called “positional-risk” doctrine which would allow compensation to an employee for all rescue actions, or even those of good citizenship, so long as his employment has brought him to the position from which he was moved to act. This trend was established in the Supreme Court's decision in *O'Leary v. Brown-Pacific-Maxon, Inc.*, relied on by the Supreme Judicial Court. While the employee on *O'Leary* was injured in the course of an attempt to rescue an identifiable stranger, *D'Angeli's Case* carries this concept further by awarding compensation to an employee injured in the course of a reasonable act of good citizenship for the protection of the public at large. Thus, *D'Angeli's Case* reflects the underlying social policy of workmen's

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28 See, e.g., Peter's Case, 362 Mass. 888, 888, 291 N.E.2d 158, 158-59 (1972) (rescript) (upholding award of compensation to an employee who ran in search of police in aid of a fellow employee who was assaulted).

29 E.g., Canavan's Case, 364 Mass. 762, 763, 308 N.E.2d 534, 536 (1974) (rescue efforts to assist strangers on employer's premises); Chapman's Case, 321 Mass. 705, 710, 75 N.E.2d 433, 436 (1947) (employee departs from regular duties in order to accommodate employer's customers); Stilson v. Littlewood, 244 App. Div. 858, 279 N.Y.S. 781 (1955) (per curiam) (hotel cook warns hotel guests on discovering a fire).

30 See, e.g., Egan's Case, 331 Mass. 11, 15, 116 N.E.2d 844, 847 (1954) (upholding award of compensation to cabdriver who sustained cerebral hemorrhage resulting from fright when called upon by a police officer who was holding three men at bay with a gun to go to the police station to get help); Locke, supra note 3, § 241, at 293.

31 Larson, *The Positional Risk Doctrine in Workmen's Compensation*, 1973 DUKE L.J. 761. The “positional risk” principle as formulated by Dean Larson posits that an injury 'arises out of' the employment if it would not have occurred but for the fact that the conditions or obligations of the employment placed the claimant in the position where he was injured by a neutral force, meaning by "neutral" neither personal to the claimant nor distinctly associated with the employment.

32 340 U.S. 504 (1951). See note 16 supra. For subsequent cases employing its analysis, see Reilly v. Weber Eng'r Co., 107 N.J. Super. 254, 259-62, 258 A.2d 36, 39-40 (Essex County Ct. 1969) (fire captain injured in attempting to rescue child on high tension wire whom the captain discovered in the course of investigating an emergency); Edwards v. Louisiana Forestry Comm'n, 221 La. 818, 826, 60 So.2d 449, 451 (1952) (Forestry Commission worker stationed in observation tower injured while rushing down stairway to rescue child being attacked by rabid dog).

33 340 U.S. at 505. See note 16 supra.

34 See 1976 Mass. Adv. Sh. at 589, 343 N.E.2d at 371 (“When a conscientious citizen is in the course of his employment and perceives an imminent danger to the public, . . . his endeavor to alleviate the danger should be considered incidental to the employment.”).
§3.3. Specific Compensation: Parent’s Right to Award for Specific Losses Suffered by Minor Son who Died within Twenty-Four Minutes of Injury: Evidence: Hypothetical Question: Statutory Construction. Section 36 of the Massachusetts Workmen’s Compensation Act provides “specific compensation” for specified permanent handicaps suffered by an injured employee. From the outset, the Massachusetts Act has recognized that certain injuries constitute additional losses deserving extra payments over and above compensation for the loss of earning capacity to which all injured employees are entitled. Payments under section 36 are not measured by the effect of the impairment on the employee’s earning capacity. Instead, the statute specifies a set award for each impairment, which award is not related to the employee’s average weekly wage. Recognizing that the specific compensation authorized by section 36 is an attempt to compensate the employee for his real loss, the Legislature enacted section 36A to provide that the right to specific compensation shall survive the death of the injured employee.

In the event that an injured employee who has become entitled to compensation under section [36] dies before fully collecting [such

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§3.3. 1 G.L. c. 152, § 36. E.g., Loss of vision; loss of hearing; amputations or crippling injuries to hands, feet, arms or legs; disfigurement; loss of bodily functions or sense.

2 Payments under G.L. c. 152, § 36 are explicitly made “in addition to all other compensation.” Compensation for total incapacity is provided by § 34. G.L. c. 152, § 34. Partial incapacity compensation is awarded under § 35. Id. § 35.


4 Although one factor in the provision of specific compensation is recognition of the presumed effect of the permanent handicap on the employee’s ability to compete in the labor market, its “main purpose to provide more adequate compensation for the employee’s real loss, in a system which has taken away [his] common law right of action against his employer for personal injuries.” L. LOCKE, WORKMEN’S COMPENSATION, 29 MASS. PRAC. § 345, at 413 (1968) (footnote omitted).


6 Before the statute specifically made provision for the survival of claims for specific compensation, courts held that the right to specific compensation was for the personal relief of the injured employee and therefore ceased with his death when it was “displaced” by death benefits awarded under G.L. c. 152, § 31. Cherbury’s Case, 251 Mass.
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compensation], the balance remaining shall become due and payable in a lump sum to his dependents, or if none, to his surviving issue, or if no surviving issue, then to surviving parents . . . .

Section 36A has been held to authorize specific compensation when the claim is filed after the death of an employee who has not himself received payments under section 36. In a leading decision, Henderson's Case, the Supreme Judicial Court upheld an award of specific compensation to the widow of an employee who died as the result of his injuries without regaining consciousness. The Court determined that an employee becomes entitled to compensation under section 36, thus triggering the rights of his surviving dependents under section 36A, as soon as he suffers the injury compensable under section 36. The insurer, stressing the statutory language which refers to an employee who dies "before fully collecting" and makes provision for the payment of the "balance remaining," had argued that section 36A contemplates that some payment be made to the employee in his lifetime. Faulting the section for its lack of clarity, the Court, nonetheless, concluded "that a reasonable and intelligent purpose to § 36A must be given by interpreting [the phrases quoted] by the insurer as meaning 'any unpaid amount,'" which unpaid amount could be the entire sum available as compensation under section 39.

Since the decision in Henderson's Case, the Supreme Judicial Court has further broadened the rights of claimants under section 36A, while at the same time affirming its policy of deference to Industrial

397, 398-99, 146 N.E. 683, 683-84 (1925); Burns's Case, 218 Mass. 8, 13, 105 N.E. 601, 603 (1914).

7 In the event that none of these described persons survive the employee, the balance shall be paid into the special fund established by Mass. G.L. c. 152, § 65. G.L. c. 152, § 36A.


9 Id. at 495-96, 131 N.E.2d at 927. Among other injuries, the employee suffered a rupture of the right eye which would have resulted in its enucleation had he survived and would have entitled him to weekly payments of $20 for a period of two hundred weeks. Id. at 492, 131 N.E. at 925. See G.L. c. 152, § 36, as appearing in Acts of 1949, c. 519. No claim was filed on behalf of the employee before his death. 333 Mass. at 492, 131 N.E. at 925-26.

10 333 Mass. at 494-95, 131 N.E. at 927 ("One meaning of the word 'entitle' is to give a claim to. It seems to us that that is the meaning here and that the reference in § 36A is to the time of the happening of the event upon which the employee bases his claim.")

11 Id. at 495, 131 N.E. at 927.

12 Id. at 494, 495, 131 N.E. at 926, 927. Furthermore, the Court noted that "[i]f our interpretation of [the section] be one unintended by the legislature, a corrective amendment may be enacted." Id.

13 Id. at 495, 131 N.E. at 926.

14 It has been evident that the board's determination in section 36A cases will be affirmed so long as there is medical evidence which would allow the board to determine the specific losses of bodily function with which the employee might have been saddled had he survived. See Locke, Workmen's Compensation Law, 1970 ANN. SURV. MASS. LAW § 20.5, at 517.
Accident Board decisions in appeals brought in section 36A cases. Refusing to draw the distinctions advocated by the insurer, the Court, for example, has sustained awards where the employee lived for only a few hours after receiving the injury, and where the employee has not regained consciousness. Nor has the Court limited recovery to cases where the insurer conceded the specific loss or where the medical end result had obtained before death. In keeping with this practice, the Court, in Bagge's Case, upheld an award under section 36A after first accepting the Board's conclusion that the testimony of claimant's expert in response to hypothetical questions was sufficient to establish the nature of the specific losses sustained by the employee. Furthermore, the Court refused to distinguish between cases involving direct injuries to the brain or specific body members for which awards are made under section 36 and cases where the specific loss results from the operation of a "secondary mechanism," such as the deprivation of the blood supply to the brain for a critical period of time. Thus, the Court's sweeping decision in Bagge's Case has now defeated the ingenuity of insurers' counsel in seeking to establish new lines of defense to claims under section 36A.

In Bagge's Case, the employee was fatally injured when the raised bed of a dump truck he had been working with collapsed, pinning him between the bed and the frame. Extricated within minutes, he was still conscious, but died before reaching the hospital. An autopsy revealed "multiple fractured ribs, probable tear of the great vessels around the heart, and hemothorax; that is blood in the chest." In addition, there were scars across the chest and X-rays indicated that his lungs had collapsed.

The parents of the decedent received death benefits under section

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15 The flood of appeals reflects the fact that claimants are encouraged to file claims under § 36A by the prospect of recovering substantial sums particularly where the employee has suffered a devastating injury resulting in multiple specific losses compensable under § 36.
18 Lauble's Case, 341 Mass. 520, 523-24, 170 N.E.2d 720, 722-23 (1960) (Held: Board entitled to base its award on physician's testimony with respect to the probability of disfigurement and loss of use of legs even if skin grafts were successful).
20 Id. at 3344, 338 N.E.2d at 352.
21 Id. at 3348, 338 N.E.2d at 353.
22 Id. at 3339, 338 N.E.2d at 350.
23 Id.
24 Id. at 3342, 338 N.E.2d at 351, quoting testimony of Plymouth County medical examiner at the hearing before the single member of the Industrial Accident Board.
25 Id.
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31 of chapter 152 and then claimed specific compensation under sections 36 and 36A. The single member of the Industrial Accident Board found that the employee, had he lived, would have been entitled to compensation in the amount of $57,375, representing the combined awards for total loss of vision in both eyes, total loss of hearing in both ears, total loss of function in both arms and legs, loss of "all other bodily functions," and disfigurement. This decision was affirmed by the reviewing board and sustained by the superior court.

In the Supreme Judicial Court, the insurer first argued that the expert opinion of the claimant's medical witness, given in response to a hypothetical question, was impermissible speculation as to the nature of the specific losses that the employee would have experienced and therefore was insufficient to sustain the finding of the Board. The Court, however, concluded that its function in passing on the admissibility of expert testimony was limited to answering two inquiries: "(1) Was the expert warranted in his conclusion on the basis of direct evidence or inferences reasonably drawn therefrom or from the evidence as a whole? and (2) Was the trier of fact warranted in its conclusion on the basis of the expert testimony and permissible inferences drawn therefrom?" After noting that it was not its role to say whether an expert's testimony was technically sound as long as the proffered opinion was consistent with common sense and free from conjecture, the Court reviewed the evidence and determined that claimant's expert was warranted in concluding that the injuries impaired the blood supply to deceased's brain for a critical length of time, leading to permanent and near total function and sense losses. In answering the second question, the Court noted that while the Board might have been justified, based on all the evidence, in denying

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26 G.L. c. 152, § 36(a).
27 Id. § 36(f).
28 Id. §§ 36(t), (q), (n).
29 Id. § 36(i).
30 Id. § 36(h).
32 After the insurer's appeal was entered in the Appeals Court, the Supreme Judicial Court, on its own initiative, transferred the case for direct review. G.L. c. 211A, § 10.
34 In particular, the insurer claimed there was no evidence as to when death actually occurred or whether the brain had been deprived of oxygen for more than four minutes. 1975 Mass. Adv. Sh. at 3340-41, 338 N.E.2d at 350.
35 Id. at 3343, 338 N.E.2d at 351-52.
36 Id. at 3344, 338 N.E.2d at 352.
37 Id. at 3345, 338 N.E.2d at 352. The "evidence as a whole" that formed the basis for the claimant's expert's conclusions consisted of a post-mortem X-ray report taken shortly after the accident; the testimony of the medical examiner who performed the autopsy, as well as of the co-employee and police officer concerning immediate post-trauma events; direct testimony that the injury caused internal hemorrhaging and collapse of both lungs and that the entire episode involved less than 24 minutes. Id.

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some of the claims presented, it nevertheless would sustain its award in keeping with "the well established principle that we must accept the board's decision as final if it is supported by the evidence and not wrong as a matter of law." 

Secondly, the insurer sought to distinguish earlier cases sustaining awards under section 36A where the employee died shortly after the injury as all involving either direct, irreparable injuries to certain limbs or sense organs, or direct trauma to the brain or central nervous system. In Bagge's Case, by contrast, the award was based on expert testimony concerning the operation of a "secondary mechanism"—deprivation of the brain's blood supply for a critical period of time resulting in irreversible brain damage. For two reasons, however, the Court refused to adopt this distinction. First, the Court noted that refusing to allow recovery for specific injuries caused by "secondary mechanisms" would contravene the precedent of Henderson's Case. In Henderson's Case, the Court construed section 36A as allowing recovery by the widow of an employee who died as the result of his injuries without regaining consciousness despite the Court's recognition that this construction created the potential for the incongruous result of awarding large sums of specific compensation "for a group of miscellaneous injuries resulting in death." Secondly, the Court re-
jected the insurer's argument on the grounds that the insurer's suggested demarcation would amount to judicial legislation. Nevertheless, the Court recognized that recovery under section 36A may depend on arbitrary and illogical factors, and again suggested the need for possible legislative revision.

Bagge's Case, therefore, underscores the Court's policy of deference to awards by the Industrial Accident Board whose function in claims brought under section 36A is "to find 'as a fact for present award the future state of health and bodily function of living claimants.'" The Court's posture is designed to stem the tide of appeals from Board decisions under section 36A, as well as to confine the controversy in claims brought under that section to where it belongs—before the Board. Thus, the Court has indicated that a claimant's right to recover under section 36A should revolve around factual inquiries: Had the injured employee become entitled to compensation for specific losses under section 36 before he died? If so, what were the losses? Furthermore, the determination of these questions must be based on sound factual evidence and the opinion of the medical ex-

employee's death has prevented the parties from ascertaining whether the employee, as a matter of fact, suffered specified injuries that would have entitled him to an award of specific compensation. Since Henderson's Case, however, the Court has drawn "no distinction between the Board's function in determining future health where an injured employee happens to survive with his injuries and those seemingly rare instances... where he does not survive." Bagge's Case, 1975 Mass. Adv. Sh. at 3347-48, 338 N.E.2d at 353.

Where the employee has died as the result of his injuries, recovery under § 36A is likely to turn on the certainty of specific bodily function losses or the sufficiency of the medical evidence that formed the basis for the hypothetical expert testimony. See 1975 Mass. Adv. Sh. at 3348 n.7, 338 N.E.2d at 353 n.7. Compare Morris's Case, 354 Mass. 420, 423-24, 238 N.E.2d 35, 37 (1968) with Bagge's Case, 1975 Mass. Adv. Sh. at 3344-46, 338 N.E.2d at 351-52. The contrasting results in these two cases may not be an occasion for criticism, as suggested by the Court, 1975 Mass. Adv. Sh. at 3349, 338 N.E.2d at 354, but rather may demonstrate the discretion of the Board in making factual distinctions on the basis of the evidence before it.

Our action in this case should make plain that cases of this nature do not turn on such arbitrary matters as the time lapse between injury and death, ... or the fact that no autopsy was performed, ... or that medical testimony indicates that the injured employee could not have survived with the injury sustained. Id. (citations omitted).

The Court notes that on the three occasions it has upheld denials of § 36A awards, it relied on the "uncertainty as to specific bodily function losses or, what is perhaps the same thing, insufficiency of the medical evidence on which hypothetical expert testimony was based." Id. at 3348 n.7, 338 N.E.2d at 353 n.7. See Chin's Case, 357 Mass. 772, 258 N.E.2d 925 (1970); Machado's Case, 356 Mass. 720, 249 N.E.2d 242 (1969); Morris's Case, 354 Mass. 420, 426, 238 N.E.2d 35, 39 (1968).
pert must be found to be based on medical probability, and not speculation, conjecture, or surmise. More importantly, the Court has emphasized that awards premised on sufficient evidence will not be reversed because they contravene nice distinctions of law not expressed in the statute. Thus, there need be no occasion for further judicial appeals on presumed questions of law lurking behind the statutory facade. This result, especially in light of the Legislature's failure to alter section 36A since it was first criticized by the Court in Henderson's Case, comports with the policy behind specific compensation of providing additional payment to compensate the real loss of the employee.

§3.4. Miscellaneous Decisions. Two cases decided during the Survey year clarified an employee's right to workmen's compensation for psychoneurosis or anxiety reactions resulting from physical trauma. In Hale's Case, the Appeals Court upheld a finding of permanent and total disability on the basis of testimony by the employee's psychiatrist that a work-related arm injury had resulted in a psychiatric condition—a depressive reaction which had developed into a condition of paranoia. Reviewing the offered medical evidence, the court determined that the evidence demonstrated "more than the 'possibility or chance of the existence of a causal connection'" between the claimant's work experience and medical condition and therefore justified the finding of compensable disability.

Similarly, in McEwen's Case, the Supreme Judicial Court affirmed an Industrial Accident Board award of total and permanent incapacity compensation to an employee unable to work because of a "psychoneurosis-anxiety reaction" directly attributable to a hand injury he had sustained on his job. The case was of particular interest since the Court held that the claimant had sustained the burden, as required by Foley's Case, of

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49 333 Mass. at 494, 495, 131 N.E. 2d at 926, 927. No bill had been proposed to alter the result of Henderson's Case prior to the decision in Bagge's Case. Although such failure to file amendatory legislation cannot be construed as indicating satisfaction by employers and insurers with the state of the law, it at least is some indication that even those interests against whom the trend of decision weighs most heavily concede that it accurately reflects the intent of the legislature.
50 See note 4 supra.

2 Id. at 76-77, 340 N.E.2d at 922-23.
5 Id. at 642-43, 343 N.E.2d at 871. The Court noted that "we have long since recognized that mental and nervous disorders resulting from physical trauma are compensable under the Workmen's Compensation Act." Id., citing L. Locke, Workmen's Compensation, 29 Mass. Prac. § 196, at 234 n.79 (1968).
proving that his condition had changed between a prior hearing, where he was found not to be permanently and totally disabled, and the hearing on the present claim. In *Foley's Case*, the Court dismissed an employee's claim for permanent and total disability due to the absence of any “evidence to indicate any change in [his] condition . . . not due to advancing age” since the prior hearing which had resulted in determination of partial incapacity. In *McEwen's Case*, however, there was medical testimony that the employee's condition had deteriorated because even though his “feelings were similar to those following the accident,” they were “made worse because it [was] now eleven years later.” Thus, while advancing age, in the case of a physical ailment, may be insufficient to sustain the burden of proving a change of condition as required by *Foley's Case*, the passage of time may be sufficient to show the requisite deterioration in the case of an anxiety-neurosis.

Another interesting decision—*Capozzi's Case*—involved the application of estoppel principles to third party suits under the Workmen's Compensation Act. The decision, however, has limited significance because it will apply only to causes of action arising before January 12, 1972, the effective date of the 1971 amendments to section 15 of chapter 152 of the General Laws. Prior to the amendments, an injured employee was required to elect between an action at law against the third party and a compensation claim brought under the Act. In *Capozzi's Case*, the Appeals Court applied estoppel to soften the rigors of the procedural requirements that section 15, prior to the amend-

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7 At a hearing that ended on April 17, 1970, a single member of the Board denied the employee's claim on the ground that he had failed to sustain the burden of proving that he was totally and permanently disabled as required by G.L. c. 152, § 34A. This decision was affirmed by the full Board, although both the single member and the Board reserved the question of the employee's rights for compensation after April 17, 1970. The employee did not appeal this decision, but instead filed another claim for disability benefits, under section 34A, dating from April 17, 1970. A single member ultimately awarded him total and permanent incapacity compensation in a decision, dated May 30, 1972, which decision was the subject of the present appeal. 1976 Mass. Adv. Sh. at 642, 343 N.E.2d at 871.


9 358 Mass. at 232, 263 N.E.2d at 472.


11 In Foley's Case, for example, the employee had suffered an injury to his right shoulder and arm. 358 Mass. at 231, 263 N.E.2d at 471.

12 In McEwen's Case, the physical effects of the employee's initial hand injury had disappeared, but he continued to suffer from a condition diagnosed as "psychoneurosis-anxiety reaction" whose symptoms were lightheadedness, dizziness, weakness in the legs, nervousness, and tenseness. 1976 Mass. Adv. Sh. at 641, 343 N.E.2d at 870-71. At the second hearing, the doctor testified that the employee's feelings were "only made worse because it is now eleven years later" and that the last several years had witnessed a "hint" of a worsening condition based on the employee's "discouragement, low morale and feelings of not being much good." Id. at 644, 343 N.E.2d at 871-72.


15 G.L. c. 152, § 15, as in effect prior to Acts of 1971, c. 888, § 1 and c. 941, § 1.
ments, had imposed on an employee who initially elected to pursue his third party action, but subsequently decided to abandon that action in favor of his compensation remedy. The former version of section 15 allowed the employee to avoid that election only by a formal discontinuance of his action at law. In Capozzi's Case, however, the employee had not discontinued the third party action because the self-insurer had urged the claimant not to do so “since the Statute of Limitations will very shortly run, and you will run a substantial risk of prejudicing the self-insurer's third party's [sic] rights under sections 15 and 18, which could well prove an absolute defense to your compensation claim.”

Noting that there were no cases either explicitly permitting or precluding the assertion of an estoppel in these circumstances, the court affirmed the Industrial Accident Board's conclusion that the self-insurer should be estopped from asserting the discontinuance requirement. The court distinguished Broderick's Case where the employee had not attempted to discontinue his action at law until almost a year after the running of the statute of limitations. Furthermore, the Court reasoned that the purposes of section 15—to compel the employee's election of remedies and to preserve the cause of action against the third party for the benefit of the insurer—would not be defeated by the application of estoppel when an employee's attempt to choose his compensation remedy by discontinuing his tort action was thwarted only by the insistence of the self-insurer.

In LeBlanc's Case, the Appeals Court reviewed a decision of the superior court involving the computation of the employee's average weekly wage for compensation purposes. The court concluded that the evidence, as a matter of law, did not support the single member of the Industrial Accident Board's finding of $45 a week for tips as an increment of the employee's average weekly wage. The court concluded, however, that the judge erred in denying the employee's motion for recommittal to the Board for further findings of fact with respect to the average weekly wage.

In Flaherty v. The Travelers Insurance Co., the Supreme Judicial Court held that a truck driver who was entitled to payment of benefits under the Workmen's Compensation Act was precluded from personal

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16 Id.
18 Id. at 644-45, 647, 650, 347 N.E.2d at 687-88, 689.
23 Id. at 1368, 338 N.E.2d at 365.
24 Id.
injury protection ("no-fault" or PIP) benefits from the insurer of the truck that he was operating when it overturned on the highway.\textsuperscript{26} The employee's average weekly wage on the day of the injury was $220 per week, and he was out of work for eight and one-half weeks. He received incapacity compensation benefits of $95 per week, whereas his PIP benefits would have been 75 percent of his average weekly wages.\textsuperscript{27} The plaintiff sought PIP benefits up to the 75 percent maximum including the payments previously received from workmen's compensation.\textsuperscript{28} The Court, however, concluded that section 34A of chapter 90 of the General Laws removed entirely from the class of injured persons entitled to protection under section 24A any person entitled to workmen's compensation benefits.\textsuperscript{29}

\textsuperscript{26} Id. at 100, 340 N.E.2d at 889.
\textsuperscript{27} G.L. c. 90, § 34A.
\textsuperscript{28} The claimant argued that the language in G.L. c. 90, § 34A that refers to workmen's compensation benefits was designed only to prevent double recovery of "medical expenses incurred" and therefore did not preclude the injured party's right to reimbursement of wages up to 75% of his weekly wage. 1976 Mass. Adv. Sh. at 102-04, 340 N.E.2d at 890-91.
\textsuperscript{29} Id. at 104, 340 N.E.2d at 891.