

material which could be of immense value to our legislators and Central Employer/Employee organisations.

My thanks to all members of the Committee for their loyalty and support during the past year, and a very special thanks and appreciation to Bill McNally who after many years service to the Society is retiring from the post of Secretary. Bill has given conscientious service to the Society and has at all times responded readily and willingly to the many calls placed upon him.

Unfortunately, due to pressure of commitments I regret that I am unable to seek nomination for re-election to the position of President of the Society, however, members may be assured that as circumstances permit, that I will continue in the future to support and assist the work of the Society.

In conclusion, my personal thanks to all members, Guest speakers and other participants, and in particular, a special thanks to the officials of the Wellington Branch for their sterling efforts in promoting the aims and objectives of the Society.

My best wishes to the Society members for continued success in the future.

Ken Tuxford
President of the Society

REVIEWS

A.P. Blair, **Accident Compensation in New Zealand**. Butterworths, Wellington, 1978, pp.xxiii and 195, with index.

The author of this book is certainly most adequately qualified to write on compensation for accidents. He has been the Accident Compensation Appeal Authority, a tribunal consisting of one person, since its establishment, and before that for a long time the Judge of the Compensation Court. In the preface to the book he confesses some feeling of embarrassment on analysing his own judgments, but also expresses the view that his decisions, as well as the book itself, "will be given no more respect than they deserve"; as "all will be subject to professional scrutiny and criticism". This sentiment apparently includes the author himself who reserves the right to dissent from the opinions expressed in the book.

While the introductory words in Chapter 1 characterise the Accident Compensation Act 1972 as "a radical remedial statute", a "unique code of compensation for personal injuries by accident", a few lines later it is described as "not a logical statute", but "an amalgam of an original idea and some old practices". It is, of course, well recognised that the principles put forward in the Woodhouse Report have been mixed with ideas rescued from the old common law of negligence, such as lump sum compensation for non-economic loss arising out of permanent loss or impairment of bodily function, or loss of capacity for enjoying life, or pain and mental suffering. As a result it cannot be denied that the two do not always fit together, and despite the repeated emphasis on the new social and legal framework of the compensatory notion as distinct

from the ideas and objects of the superseded negligence liability, certain principles of the common law have returned, so to say through the back door.

Chapters III, IV, V, VI and VIII, and to some extent IX, are particularly important and confirm this point. The chapter analysing the definition of "personal injury by accident" (chapter III) coupled with chapter IV, the "physical and mental consequences of an accident" and with chapter VIII, examining claims in cases of heart attacks and strokes, inevitably lead back to the question whether the concepts of the pre-compensatory common law have been, and could be at all, completely discarded. In determining whether certain "damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode" is the result "of effort, strain or stress . . . abnormal, excessive or unusual for the person suffering it" which "arises out of and in the course of employment", the events leading to the ultimate harm should be examined. The very point to find is whether the onset of the disease can be traced back to a specific incident amounting to an "accident", or whether it occurred as a mere, unfortunate medical fact arising from pre-existing conditions. Entitlement to compensation, thus, depends on establishing a chain of causative links that would connect a specific effort, strain or stress with the subsequent illness.

The appearance of the problem of causation made it necessary to search for its principles as enunciated in court judgments from the age of fault liability, including those of the House of Lords. As a result many common law decisions have been cited, not only in connection with heart and stroke cases, but also in attempts of clarifying causal relationship between an event asserted to be an "accident" and other diseases, such as tuberculosis, scarlet fever, ulcer of the eye, bronchopneumonia, blood poisoning, hernia and hepatitis.

To decide whether the causative chain has been interrupted the principle of **novus actus interveniens** had also to be brought back and applied. This principle has special importance with respect to medical, surgical, dental or first-aid misadventure, with which chapter V deals. Although the elimination of fault liability is one of the basic tenets of the Woodhouse Report, it appears that the reference to medical misadventure has, perhaps inadvertently, opened the door for the re-entry of medical negligence. A claim on such a ground, of course, is not within the competence of the Accident Compensation Commission, and as the case **T v R** (unrep. Supr. Ct. A 415/76. 1977) illustrates, it should be commenced in the Supreme Court. A difficulty lies, however, in s5(5) of the Act which provides that where any proceedings before a Court a question of accident coverage arises, the Court must refer the matter to the Commission. Though the Commission has exclusive jurisdiction to decide on the issue of coverage, the Court held in this case that on other grounds, such as "failures" and "omissions as opposed to acts" on the part of the defendant, the plaintiff could proceed with the civil action. A medical omission not amounting to negligence, however, may give rise to the statutory duty of paying compensation, as it comes under the definition of "personal injury by accident".

Mental consequences arising from an accident, such as nervous shock, neurosis, pain and mental suffering, which come under s120, are also comprehensively analysed (chapter IV). While s119 relating to compensation for impairment or loss of bodily functions is clearly tied to the Second Schedule which prescribes a specified percentage in respect of different parts of the

body and gives guidance even in quasi-schedule and non-schedule cases. s120 merely sets a maximum sum allowable, the quantum of compensation within that limit to be decided by the Commission. On what principles? As there is not much legislative guidance, despite the emphasised difference between the statutory concept of compensation and common law damages, the applicable principles are to be found in judicial dicta formulated mainly by English courts. The author when referring to a number of such judgments quotes some of these statements. It cannot be denied, as the writer of this review remarked in an article ("The Re-emergence of Common Law Principles in the New Zealand Accident Compensation Scheme", (1978) 7 **The Industrial Law Journal** 216), that "though primary concepts, like that of fault liability disappear, secondary principles, such as causation and natural justice, re-emerge. Moreover, lump sum claims for pain and suffering have overtly re-introduced some features of tortious damages." (227).

Examining all these topics and also other matters such as eligibility, demarcation problems, territorial application (chapters I and II), the effect of criminal acts (chapter VII), special rules on work accidents (chapter X), medical examination (chapter XI), self-inflicted injuries (chapter XII), the complex provisions relating to different kinds of compensation (chapters XIII, XIV, XV and XVI), formal rights and duties (chapter XVII), the appeal procedure (chapter XVIII) and finally the standard of proof (chapter XIX), the author reveals a deep and thorough knowledge of the fundamental principles as well as the intricate, and often technical, detailed rules of the Act. He explains and interprets the statute. His presentation is clear, logical, analytical, always objective and frequently critical. One, of course, should accept this as a natural corollary of the author's training and long judicial experience. Further, one must pay tribute to his modesty. He does not profess to have produced a perfect textbook but invites criticism and argument, so that the law should be tested, refined and clarified. The law, certainly, is not yet fully developed and crystallised, but the book serves as the best possible guide to the understanding and application of an imperfect statute.

Appendices showing the most important forms, the definition section of the Act and the Schedule of percentages for permanent loss or impairment of bodily functions follow the text. There is also a Note on the Accident Compensation Amendment Act 1978 passed by Parliament after the book was already printed. A good index and a table of cases, common law judgments as well as decisions of the Accident Compensation Appeal Authority, complete this work, which, no doubt, will be a great help not only to the legal profession, claimants and trade union officials, but even to persons working for the Accident Compensation Commission.

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Monroe Berkowitz, *The Economics of Work Accidents in New Zealand*, Industrial Relations Research Monograph No. 5, Industrial Relations Centre, Victoria University of Wellington and Occupational Safety Trust Board, Accident Compensation Commission, Wellington. 1979.

This book is required reading for anyone involved in the several reviews of the ACA and its operation which are currently being undertaken. The work of Professor Berkowitz is unique in providing three detailed cases assessing the total accident related costs at three plants, in different industries and using them to develop his thesis that some financial incentives should be provided to encourage safety activities at the plant level.

The ACA was a path breaking piece of social legislation which has irreversibly changed the ways in which New Zealanders deal with the hazards of the work place, the home, and or recreational and other personal activities. Five years of experience of the Act provides a useful basis to review its operation, and economists surely have a great deal to contribute to this task. However Professor Berkowitz approaches his analysis from a fairly narrow stance, focussing on "the cost of personal injuries on the one hand and the possible benefits to be derived by changing their number and type on the other."

Informing his overall approach is the economists' picture of the firm, able to vary its expenditures on safety and thereby influence the costs of its accident experience. These costs arise in three ways, those devoted to prevention activities, costs associated with particular accident events and those aimed at reducing the costs of those accidents which do occur. That firms can influence these costs is taken as an article of faith which the author clearly considers could be quantified only with great difficulty. However many of his conclusions depend on firms being able to identify procedures which can reduce the cost of accidents by at least as much as their additional cost.

In the chapter on economic theory the author correctly emphasizes safety expenditures. His case for changes in the financial incentives for firms must rest on the ability of safety expenditures to modify accident costs of the firm. In his three case studies safety expenditures are a very small item, especially if they are distinguished from the first-aid type of activities. Additions to the firm's expenditure in these two distinct areas may have quite different effects, and may alter the incidence of cost between the firm and the A.C.C. Their relative impact is clearly crucial for accident policy, and their different implications are not examined in depth in this study. While the economists' classical tools of marginal analysis serve Berkowitz well it is largely as a framework of ideas rather than a fully worked out case, and this book should be seen as a stimulus to exploring these ideas in much more depth.

Professor Berkowitz makes repeated pleas about the need for comprehensive statistical information, and the difficulties he had because the A.C.C. had no official published reports giving a detailed breakdown of accident experience. This is an area demanding urgent attention, and the Commission must make every effort to not only put this right, but also see that what is done meets the demanding standards of a data base adequate for the pioneering research on accident experience which should be possible in New Zealand.

I. D. Dick¹ has shown that data down to the individual plant level, and even within a plant, can be invaluable in constructing and guiding management's safety activities. Berkowitz makes a similar proposal, and the tantalizing glimpse of the differences between plants using data from the Nordmeyer report suggests that a great deal could be done to improve safety.

This data would have been more valuable if more than one year had been shown, for that would have provided confirmation of significant differences between sheds. I.D. Dick's work at least provides some evidence which in conjunction with that from the Nordmeyer report suggests that similar gains to the three-to-one reduction he reported in mines could be achieved in meat freezing. While Dick used some financial incentives it is not clear what role they played in the reductions achieved. Management concern and determination to do something about a major area of cost was probably much the most important single factor in the achievement. He makes it quite clear that he and his managers did not know **how** to reduce accident levels economically when they first approached this problem. Nevertheless the safety achievement in Mines department was founded on a strong information base.

Berkowitz must surely have had his tongue in his cheek when he suggested that workers would consider information about work place accident records in choosing jobs, but there is a strong case for having such information freely available to workers and other interested parties.

For promoting safety, the A.C.C. information needs to be available promptly. Delays in excess of a few weeks in having reports on claims lodged are unacceptable, for after that the events become history, and the incentive effects of good achievement do not get early reinforcement. To get the economic benefits which Berkowitz sought and Dick achieved will require a completely different level of performance in data collection, feedback and use from the Commission itself. He is completely right in emphasizing its importance.

Using his experience as an economist, and perhaps the market orientation of his home country, Professor Berkowitz urges that more attention be given to experience rating. This sounds attractive, but presents many difficulties. The Commission have already made some decisions in this area but they have a unique opportunity to explore different approaches with separate trade groups, and the value of differing levels of information feedback. They have the powers necessary for a certain amount of experimentation, and in this completely new field they should use them to help make the most rapid progress possible.

There are still many areas of interest to the economist which Berkowitz does not explore. He has not looked at the redistributive effects of the A.C.A. in depth or examined how equity has been served. He has pointed to some regularities in accident frequencies which should be explored. He gives a preliminary analysis of the way the A.C.A. has influenced the reported numbers of accidents, but one finished that analysis feeling there was much still to be told.

The book is well produced, and seems to have been well proofed, but this reader could not disentangle which part of Table 8-1 was mislabelled.

Berkowitz has made a contribution in expanding the range of tools applied to accident studies in New Zealand. But its long run impact is likely to be seen much more as one of education. It increases awareness of the factors which

1. A.C.C. report, Vol. 3, No. 4. (Sept, 1978)

can be considered in a quantitative way and raises many questions which with further research will help focus discussion of improvements in the operation of the Accident Compensation Act.

If the author had been able to stay in New Zealand for longer he would doubtless have started to fill in more details of his approach. As it stands we are indebted to him and to those who supported his visit.

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Alexander Szakats, *Introduction to the Law of Employment — Supplement No. 1. (1979)*. Butterworths, Wellington, 1979, pp. 85. \$9.50.

It is difficult to comment at length on the Supplement produced by Alexander Szakats. He has produced a thorough up-date of his principal text. Changes in legislation and recent case law are all noted. The task of any author of industrial law is difficult with the rapid changes in legislation occasioned by amendments to government's industrial relations policy. Szakats recognises this but his Supplement does provide a description of the law to the end of 1978. For the student or practitioner of industrial law, the text and Supplement now provide an up-to-date introduction to the law of the individual employment relationship in New Zealand.

Although the necessity to produce a supplement is recognised, it is of some concern to a teacher of law to note the increasing cost of texts for students. Szakats noted in this introduction that a Second Edition is intended for his principal text. This would seem to be a very sound idea but one wonders if it may have not been preferable to wait and produce a new edition rather than an up-dater to the original text. Not only could the cost hopefully be reduced in this way, but also the irritation that always accompanies the reader of text and Supplement could be eliminated. As far as law school teaching is concerned, the time may have come whereby the production of an internal casebook is the only method available for the presentation of material to the students at a reasonable cost.

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