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Accident compensation – a union viewpoint

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This article examines some of the issues raised during the controversial Government-initiated review of the accident compensation scheme which extended over more than 3 years. It concludes that the review failed to redress the scheme's main shortcomings and that an independent review should be conducted by somebody with concern for the interests of the injured.

The *Accident Compensation Act 1982* is both a relief and a disappointment. A relief because it was the final act in a Government review of the accident compensation scheme which, amidst widespread public controversy, extended over more than 3 years. A disappointment because it represents a lost opportunity; a failure to rectify major shortcomings in the operation of the scheme which had become apparent during its 8 years of operation.

The Quigley committee

The review began in 1979 with the appointment by the Government of a Caucus committee chaired by D. Quigley MP. Its terms of reference were a clear indication that the Government's only interest was in pruning back the present scheme. For this reason both the Federation of Labour and the Combined State Unions declined to make submissions to the committee.

The Quigley committee's recommendations, released in August 1980, confirmed the worst fears of the committee's critics. It proposed wide-ranging cuts to the scheme without offering even a limited return to the common law damages system which it had replaced in 1974.

The proposals were greeted with a storm of protest. As one commentator noted:

> this is a rare occasion when lawyers, doctors, and tradé unionists are acting in unison, not merely against Government policy, but for the complete opposite. (D. McGill, *Evening Post* 15 November 1980)

Despite strong opposition from all sections of the community, the Government went ahead and put the Quigley committee recommendations into legislative form – the *Accident Compensation Amendment Bill (No. 2) 1980.*

Following the introduction of the *Bill* the opposition steadily increased. Two of the 3 former Commissioners (Chairman Mr K. Sandford and former National Cabinet Minister Mr H. J. Walker) voiced their opposition. A deluge of submissions to the Select Committee were almost unanimously against the *Bill*. Doctors threatened to boycott the scheme and the Accident Compensation Corporation's (ACC) own Medical Director condemned some of the *Bill's* provisions as "ridiculous and ludicrous" (*Dominion* 15 November 1980).

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By mid-1981, election year, the *Bill* had become a major embarrassment to the Government. In June of that year the Government announced that the *Bill* would be referred to the ACC which would consider it in the context of a general review of the accident compensation scheme. The ACC was asked to report to the Minister of Labour by June the following year.

The Corporation review

The prospect of a review of the accident compensation scheme by the Corporation itself was viewed with guarded optimism by some observers. However, it soon became clear that the Corporation intended to conduct its review behind closed doors. In fact, the Corporation appears to have carried out its "review" without even consulting those organisations (such as trade unions) which could give a "consumer" viewpoint.

The resulting *Bill* was a major disappointment; partly because it retained some of the objectionable Quigley committee provisions, and partly because it ignored many of the most serious problems with the scheme. In short, the Corporation flagged away the only opportunity it is likely to get for a decade to make obviously needed improvements to the scheme. Mr G. Palmer MP claimed during the debate on the Bill that:

> seldom in the annals of the social institutions of this country can there have been a Corporation with such an overwhelming commitment to mediocrity. (*Hansard* 1982, p. 5573)

Although the *Bill* contained some improvements (such as increasing the rate of weekly compensation for dependants, easing time limits on occupational diseases and increasing lump sum compensation for total deafness) the Corporation persisted with the Quigley proposals to abolish lump sum compensation for pain and suffering, to cut the rate of first week earnings related compensation, to cut back claims for losses and expenses (other than earnings) resulting from an accident, and to withhold compensation or rehabilitation assistance to persons injured in the course of criminal conduct. As with the 1980 Quigley Bill, (but to a lesser extent), the Corporation's Bill became an embarrassment to the Government and substantial changes were conceded at the Select Committee.

The most significant of these were:

(1) Lump sum compensation for pain and suffering will be retained with a maximum payment of $10 000 (in addition to an increased permanent disability lump sum of up to $17 000).
(2) Lump sum compensation for dependants of fatally injured accident victims will be increased from $1 000 to $4 000 for a spouse and from $500 to $2 000 for children and others.
(3) First week compensation, although cut to 80 percent of pre-accident earnings, will take into account overtime earnings.
(4) The *Act* will now require the Corporation to "place great stress upon rehabilitation"
(5) The purpose of the *Act* has been amended to include promotion of "occupational health".
(6) The proposed limitation on the right of appeal to the High Court to the case stated procedure has been dropped in favour of a right of general appeal.

The whole saga ended rather covertly with the Government taking the second and third readings of the *Bill* under cover of broadcasting silence during the early hours of the morning. An interesting feature of the second reading debate was that, although 4 Labour MP's spoke, only the Minister of Labour on the Government side bothered to take a call.

If nothing else, the 3 year "review" aired publicly many of the issues which concern the many organisations and individuals directly involved with the scheme.

The cost of the scheme

One of the popular misconceptions about the scheme is that it is expensive. In fact, it is very cheap. One only has to look across the Tasman to see what motorists and employers would be paying for private motor and employer's liability insurance cover had the accident compensation scheme not been introduced (see Table 1).

Table 1 *Comparative costs of compensation (1981)*

	New South Wales Workers compensation premium rates	New Zealand ACC levy rate
Industry	Rate per $100	Rate per $100
Farming	9.04	1.70
Building	18.93	1.95
Freezing works	11.91	2.75
General engineering	7.03	
	10.60	1.95
	12.13	
Road transport	9.39	1.90
Logging	20.93	4.70
Coal mining	9.14	5.00
	24.44	
Motor vehicles		
New Zealand	14.20	
Melbourne	179.85	
Sydney	137.15	

Note: (a) Figures are in the currency of the country concerned.

Sir Owen Woodhouse has stated:

> I am equally satisfied that if the earlier insurance systems had continued to operate then rapidly escalating premium charges would by now far exceed the costs of the new Scheme here in New Zealand (1979).

Notwithstanding this, there has been almost constant pressure, mainly from employers groups, for the reduction of benefits and administrative costs.

Mr I.B. Campbell, Secretary of the Workers Compensation Board for 22 years and director of Safety with the ACC for 7 years, puts the employers' complaints into perspective:

> My hope is that the efforts of more employers would be channelled into positive action, that of reducing the number of cost of accidents rather than continuing to rue the cost of Accident Compensation and its alleged but unqualified abuses, views I have been hearing with some regularity since I first became involved with workers compensation more than 50 years ago.
> In the United States they call it "the management cop-out", the excuse for inactivity (*National Business Review* 28 March 1983).

Lump sum compensation

The Woodhouse Report in 1967 recommended strongly against the inclusion of lump-sum benefits in the scheme except for minor permanent injuries. However, it did recognise that there was a case for compensation for loss of physical capacity (Woodhouse, 1967, pp. 84-85), and recommended that this should be done as part of the periodic payment.

After strong lobbying on behalf of trade unions and lawyers the accident compensation scheme emerged with lump sum compensation as follows: (1) Up to $5 000 per permanent loss or impairment of bodily function assessed on the basis of a schedule which attributes a percentage loss to each part of the body (s. 119). (2) Up to $7 500 for loss of amentities or

capacity for enjoying life, including disfigurement, pain and suffering including nervous shock (s. 120). These provisions have been the subject of discussion and debate ever since.

One of the most common arguments against lump sum compensation is that it is a disincentive for injured people to rehabilitate themselves if by doing so the lump sum award is likely to be reduced. If this is true (and I am not aware of any evidence to suggest that it is a significant problem), then surely the answer is to pay the compensation as soon as possible after the accident. The value of doing so in serious cases has been recognised by Professor Ison:

> With more serious disabilities however, a lump sum award can have practical and therapeutic value in rehabilitation if it is paid during or promptly after the acute phase of injury (1980, p. 68).

Another common argument is that pain and suffering and loss of enjoyment of life cannot be measured in dollars and cents. Anybody who has handled compensation claims on behalf of seriously injured workers will know that they do regard money as some compensation for the loss of limb or other disability. It at least gives them some security, enables them to do something which may give them a new interest in life, and helps them to get on with the job of living after an often bitter and traumatic period of coming to terms with their disability.

The Quigley committee proposed abolition of all lump sum compensation for pain and suffering (s.120) and proposed a cut-off point of 15 percent for permanent disability compensation. Its concern was that the administration of section 120 "requires subjective judgments by the Commission and is a fertile field for litigation and dispute" (Report, 1980, p.18). The reason that "subjective judgments" are required is that an identical injury may have minor consequences for one person, but major for another.

This can be illustrated by taking the case of a railway shunter who loses a left arm and a station master who suffers a similar injury. Both are right-handed. The station master will return to normal employment; he will suffer no economic loss and will suffer no effect to career prospects. On the other hand, the shunter would be finished as a shunter – his prospects of promotion would similarly be lost to him. Unless he was capable of undertaking clerical work, he would fall to the level of an unskilled worker and may well not be able to obtain a job at all. There is, therefore, no justification for abolishing this head of compensation because it has given rise to "litigation and dispute".

The volume and cost of the accident compensation review and appeal system is extremely modest when compared with the cost of conducting litigation under the old system which in many cases required a Supreme Court trial with a judge and jury lasting several days. The administrators have also made it clear that they do not like lump sum payments. Although the 1980 Quigley proposals were dropped, the Corporation's 1982 Bill also proposed that compensation for pain and suffering and loss of enjoyment of life be abolished. Strong opposition from all quarters persuaded Parliament to reinstate it. So lump sum compensation remains an integral part of the Scheme.

Light duty assessments

Nothing has caused more bitterness that the Corporation's approach to injured workers it considers able to undertake "light" work. Under the old *Workers' Compensation Act* the employer of an unjured worker could only discontinue weekly compensation payments if "suitable employment" was provided or found by the employer. Under the accident compensation scheme it has been the practice, since 1978, for the Corporation to review payment of earnings related compensation as soon as an injured worker is fit for light work.

If a worker is certified by a medical practitioner as being capable of carrying out light work, the Corporation makes an assessment of what it considers the injured worker could earn if a light duty job was available and reduces the amount of earnings-related compensation accordingly.

The assessment ignores the fact that, as a lifelong manual worker, the claimant may not

be suited to light work, which usually involves a degree of skill, or that light work may not be available in the district. In many cases the result of this theoretical assessment is to reduce the weekly compensation payable to very low levels.

The use which the Corporation makes of this power, and its consequent effect on rehabilitation policy has been identified by Professor Ison:

> . . . If the agency responsible for compensation and rehabilitation is allowed to reduce the benefits payable to a claimant who is unable to find work to the same level as if that claimant were working, the effect is to remove any pressure on the agency to maintain a rehabilitation service at a level of success that will restore him to employment. The role of liaison (rehabilitation) officers will tend to focus more on benefit control and less on rehabilitation. The pressure to consider retraining is reduced (1980, p.18).

The practice was also criticised by a visiting delegation from Quebec in its report to the Quebec Government:

> Such an interpretation of notional incapacity appears to us to be much too restrictive and of a nature to lead to injustices, so much more serious given that the Corporation's discretion in this area seems to be almost unlimited (Commission, 1981, p. 28).

Notwithstanding this criticism Parliament did not see fit to make any change to the legislation and the Corporation has retained the power (s. 59 (2) of the 1982 *Act).*

Rehabilitation

The promise of an enlightened system of rehabilitation has not been fulfilled. The Woodhouse Report stated:

> The consideration of overriding importance must be to encourage every injured worker to recover the maximum degree of bodily health and vocational utility in a minimum of time. Any impediment to this should be regarded as a serious failure to safeguard the real interests of the man himself and the interest which the community has in his restored productive capacity (1967, p. 40).

The *Act* specifically requires the Corporation to "promote a well-coordinated and vigorous programme for the medical and vocational rehabilitation of injured persons".

The 1982 *Act* also requires the Corporation to "place great stress upon rehabilitation." However, claimants do not have any statutory right to rehabilitation assistance and the Corporation has, in the past, both in policy and practice, failed to meet the statutory directive. This has been particularly apparent in its policy towards claimants who have been certified as medically fit for selected light duties.

The Corporation's failure has also been apparent in the low priority which has been given to the establishment of the Corporation's own vocational rehabiliatation services. This was acknowledged by the Corporation's Managing Director (himself a former Commissioner) when he announced publicly, early in 1981, that greater emphasis would be given to provision of rehabilitation services. In practice vocational rehabilitation, in particular, is still accorded low priority within the Corporation.

This is not to suggest that rehabilitation staff are not dedicated to their job. Many of them would like to be able to do more but they are limited by Corporation policy and a lack of effective authority and training. In practice they have to persuade the Compensation Division of the merit of any assistance which they consider to be desirable, and it appears to be in the Compensation Division that a more "insurance company" attitude prevails.

The contradictions and shortcomings in the rehabilitation officer's role were commented upon by a visiting American Rehabilitation expert, Dr K. Mitchell, the Director of Rehabilitation Counselling at the University of North Carolina. In his Report he commented:

> The Rehabilitation Officer Service is designed to monitor, ensure, and facilitate

> the rehabilitation programmes of the Commission. Unfortunately this group of individuals have little or no background or professional training as a rehabilitation professional. This lack of professional rehabilitation orientation allows the liaison officer's role to be significantly diluted. In most cases the liaison officer becomes a generalist or ombudsman for the myriad of claims, benefit, and rehabilitation issues.
>
> All too often, claims personnel expressed low confidence in the Commission's rehabilitation efforts while the liaison officers expressed dissatisfaction with referral patterns of the claims people. The Rehabilitation Liaison Officer is a vital part of developing a comprehensive service to the injured individual. They are in a unique place with an administrative structure to act promptly and accurately. On the whole, the liaison officer is a dedicated, well meaning, commonsense type of person. They have a strong sense of responsibility. They also need the tools to do their job. Currently, such tools have been minimally provided. Role strain, role confusion, will exist with role conflicts without a strong rehabilitation policy and procedures implemented (1980, pp.10-11).

There is also, undoubtedly, a need for the Corporation to play a greater role in providing more of its own services in the area of vocational rehabilitation. This need was identified by Professor Ison:

> The ACC has begun to tackle these problems. In particular some liaison officers undertake job placement assistance, and some clients are sent for assessment to places other than the Rehabilitation League. With the current levels of unemployment, however, broader moves may be needed, including the ACC undertaking its own programme of job assessment and training, and engaging more of its own staff for job placement (1980, p. 147)

Dr Mitchell also made several recommendations for improvements in connection with the Corporation's rehabilitation service: (1) Develop a strong academic rehabilitation component within the medical schools and universities of New Zealand. (2) Develop ongoing rehabilitation in-service training programmes for the rehabilitation liaison officers of the ACC. (3) Identify an incentive component within the earnings loss compensation system to encourage industries to aid injured workers. (4) Have a mandatory rehabilitation plan for dealing with incapacitation from the sixth week following injury. (5) Have a special programme designed to focus on career development of disabled children. (6) Reorganise the ACC to allow the rehabilitation unit to have more direct input (1980, p. 22).

Indexation

Professor Ison has supported the principle of indexation of benefits with the following comments:

> If periodic payments to disabled people are to be maintained at a constant value, the protection against inflation must be entrenched rigidly in the originating legislation and not be left to subsequent political or administrative process (1980, p. 63).

The Gair Committee in 1972 recommended the indexation of periodic payments to "some index more closely linked to movements in wage levels than the Consumer Price Index" (1972, p.50). However, the Government has consistently refused to agree to indexation of accident compensation benefits and adjustments have been left to the uncertainties of the political and administrative process. The result has been that benefits have been eroded by inflation.

A check I carried out in September 1979 revealed that, whereas average weekly earnings between April 1974 and September 1979 (as measured by the Department of Labour) had risen by 90 percent, adjustments had increased earnings-related compensation by only 45 percent. An Order in Council in November 1979 retrospectively increased earnings related compensation to April 1974 but claimants whose files had been closed did not get the benefit of this belated inflation adjustment. Since that time the Corporation has

regularly adjusted earnings related compensation but the lump sum maxima have continued to be seriously eroded by inflation.

In the case of payments for widows, widowers, and dependants the lump sum maximum of $2 500 was not increased at all between 1972 and 1982. Even then, the 1982 *Bill* did not provide for an increase. It was only after strong submissions by several unions and other groups that the maximum was increased to $9 000. The maximum lump sum compensation for pain and suffering and loss of enjoyment of life in the 1982 *Act* remains at the 1974 level of $10 000, although the maximum payment for permanent disability has been increased to $17 000. Had they been indexed to the Consumer Price Index the combined maxima would be at least $52 000.

First week compensation

The compromise scheme which evolved from the 1967 Woodhouse proposals provided for employers to pay first week compensation direct to employees equivalent to their ordinary time earnings. Both the Quigley committee and the 1982 *Bill,* as introduced into Parliament, proposed that first week compensation be cut to 80 percent of ordinary time earnings. This was a clear concession to political pressure from employer groups.

The 1982 *Act* as it finally emerged from Parliament allows overtime to be included in the 80 percent but the fact remains that this erosion of the scheme is inconsistent with the trend in other countries. All Australian states, for example, pay compensation to injured workers at 100 percent of earnings for at least 6 months.

Permanent pension

The permanent pension payable to workers with a permanent loss of earning capacity, which (to provide an incentive) can be increased but not reduced, is the cornerstone of the accident compensation scheme. It was therefore somewhat incredible that the Commission itself should have promoted its abolition in the *Accident Compensation Amendment Bill (No. 2) 1980.* It survived that attack and remains in the 1982 *Act* although with a significant amendment which almost went unnoticed by the Select Committee. The new section 60 (which replaced section 114 of the old *Act*) precludes the Corporation from having any regard to the loss of earning capacity resulting from the loss of an injured worker's pre-accident career prospects.

In altering the section in this way, Parliament negated the effect of an Appeal Authority decision given a few weeks previously confirming the proper interpretation of section 114. Without doubt the formula in section 60 for assessing permanent pensions is a difficult one to apply but the answer is not to simply abolish the provision or erode it by stealth.

One alternative would be to consider the formula proposed in the Report of the National Committee on Compensation and Rehabilitation in Australia 1974 (which was also chaired by Sir Owen Woodhouse) of a physical impairment method using a schedule which would be a catalogue of impairments of bodily function to each of which would be assigned a percentage of total disability. The resulting percentage rate would be applied to the index of average weekly earnings rather than the previous earnings of the claimant.

Criminal court?

The red herring in the Government's review of the scheme has been the issue of compensation and rehabilitation assistance to persons injured in the course of criminal conduct. It is a red herring because the Corporation has only paid compensation to a handful of injured criminals in its 9 years of operation and it has always had the power to withhold earnings related compensation from any person in prison. Nevertheless it raises an impor-

tant issue; the question of comprehensive entitlement. The Woodhouse Report clearly stated that "wisdom, logic and justice all require that every citizen who is injured must be included" (1967, p.20) in the Scheme. It follows that any exceptions should be made with extreme caution. Payment of compensation is not intended to in any way approve the actions of a person injured in the course of committing a crime; it is simply intended to be recompense for the loss which is caused (bodily or otherwise).

There is also the difficulty of where to draw the line. Sir Owen Woodhouse has commented that "wherever the line is to be drawn it should be clear cut enough to avoid subsequent argument and discussion" (1979). His Committee's recommendation to the Australian Government was that there should be exclusions in the case of persons injured while a party in the first degree to and subsequently convicted of the crimes of murder, piracy, hijacking and wilfully doing grevious bodily harm. The proposed clause in the 1980 *(No. 2) Bill* would have included a large number of serious and comparatively petty crimes which even the Corporation itself was unable to list conclusively.

The alternative in the 1982 *Act,* which gives the Corporation a judicial discretion, is just as objectionable. It is totally inappropriate for a State corporation to be given such a discretion. If the Government genuinely believes that it has to exclude some criminals from the scheme then it should heed the advice of Sir Owen Woodhouse and limit the list of excluded crimes to murder, piracy, hijacking and wilfully doing grevious bodily harm.

It is also questionable whether it can ever be justifiable to withhold rehabilitation assistance. Surely the Corporation is not seriously suggesting that this sort of assistance should be denied even the most serious criminal. To do so would be to impose an additional, and callous punishment.

Administrative power and discretion

The 1982 *Act* also gives some disturbing additional powers and discretions to the Corporation. I have already mentioned the power to withhold compensation and rehabilitation assistance to persons injured in the course of criminal conduct. Another is the power to withhold compensation to persons who leave New Zealand after being injured in an accident. Once cover under the *Act* has been established, a claimant who is awarded earnings related compensation should be free to live wherever he or she wishes without fear of financial penalty by cessation of compensation.

In many cases, the injured worker from abroad who may have intended to spend his or her working life in New Zealand may change that intention as a result of an accident. There are many Samoans who have been employed as shunters by New Zealand Railways for a long time. Many of these Samoans may now have New Zealand citizenship and intend to remain in New Zealand. But a serious shunting accident at any time could cause them to rethink their future and undoubtedly some would decide to return to Samoa. Why should these workers whose lives have already been devastated by a serious accident injury, be further penalised by the withholding of compensation?

As Mr G. Palmer MP noted during the debate on the *Bill,* this clause: "is likely to apply to people from the Pacific Islands in a most unfortunate manner, and in its application it is likely to discriminate on the grounds of race" (*Hansard* 1982, p. 5574)

The new Act also gives the Corporation the power to deduct from a claimant's compensation entitlement any amount which is "paid in error or was not properly payable". The Corporation need not prove its claim in Court and claimants are thus deprived of legal defences which may be available (including section 94B of the *Judicature Act 1908*). This provision also offends the spirit and principle of the *Wages Protection Act 1964;* that an employer may make deductions from earnings payable to a worker only with the consent of that worker (unless by order of the Court).

Disease

It is a matter of real regret that neither the Quigley Committee nor the Corporation attempted to tackle the most glaring anomoly in the scheme; the limitations of its cover for disease. As Professor Ison has commented:

> It is difficult to see why, in the allocation of resources to compensation for human disablement, the victims of disease should be assigned a lower priority than the victims of injury . . . The needs of the disabled do not vary according to the cause of disablement (1980 p. 21).

Conclusion

The *Accident Compensation Amendment Bill (No. 2) 1980* and the *Accident Compensation Act 1982* both demonstrate the lack of wisdom in entrusting a review of the scheme to a caucus committee or to the Corporation itself. The Caucus committees paramount concern appears to have been to cut back the benefits and other entitlements; the Corporation displayed an unfortunate tendency to review the *Bill* to suit its own interests as administrator. In the words of Mr G. Palmer MP:

> There is a conflict of interest if a corporation makes policy for a scheme it is to administer. The tendency is to shape the *Bill* in the direction it will be the easiest to administer, and that suits the convenience of the administrators. Those administrators are frequently blinded to the real considerations of the policy. Of course the recommendations they make are not necessarily in the direction that assists the interests of the injured people who have to depend on the scheme (*Hansard*, 1982, pp.5572-5573).

So what is the alternative? Ideally, a review of the scheme should be conducted by somebody with proven expertise in the field and concern for the interests of the injured; somebody we can all trust. Sir Owen Woodhouse is the obvious candidate.

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