The Woodhouse Report: Relegated to the Archives?

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> The Woodhouse Report was one of the greatest documents ever produced in the world for the breadth and liberality of its understanding... But the Report no longer has international standing except as an item for the archives because it has been bandied about among committees to see how it can be watered down enough to be acceptable to the people we elect to Parliament. — Statement by Dr. W.B. Sutch, The Evening Post, March 11, 1972.**

Introduction

When the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand was published late in 1967 it initially aroused very little public interest.[1] The Report has since then, however, been widely recognised as a document showing extraordinary insight and compassion in regard to the social ramifications of accidental injuries. When one reads the document it becomes clear that it is far more than simply a report on the accident problem. It is instead a detailed plan of action for meeting the myriad problems created by reliance on the present hit-and-miss disparate techniques for compensating losses due to accidental injuries.

The Royal Commission was established to examine the workers' compensation scheme but found it "essential to examine the social implications of all hazards which face the work force, whether at work or during the remaining hours of the day".[2] In its Report the Commission posited five basic principles upon which its recommendations were based: Community Responsibility, Comprehensive Entitlement, Complete Rehabilitation, Real Compensation and Administrative Efficiency. After an examination of those principles, the

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[1] For an explanation of this, see: Palmer, *Abolishing the Personal Injury Tort System: The New Zealand Experience,* (1971) 9 Alta. L. R. 169, at pp. 196-97.

[2] Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand,* (1967), at para. 34. [Hereinafter referred to as the "Woodhouse Report"].

Royal Commission recommended abolition of the existing structure for compensating injuries. In place of the old system would be substituted what has come to be known as the Woodhouse Plan — a comprehensive unified scheme for compensating injury regardless of where it occurred or who was at fault. This scheme would be operated by an independent administrative authority that would have wide responsibilities in the fields of accident prevention and rehabilitation.

Despite the obvious comprehensiveness of the Report, the road between it and legislation was to be a long one indeed. The Report was followed by almost five years of debate and delay with a White Paper and a Parliamentary Select Committee Report as the focal points in the process. The White Paper was commissioned by the National Party Government then in power. Published in October, 1969, the White Paper examined critically the Woodhouse Plan, with particular emphasis on its estimated cost, and suggested alternative approaches where it thought necessary.[3] The Select Committee sat for several months in 1970 and heard submissions from numerous interested groups and individuals. Its Report,[4] issued in November, 1970, recommended several significant changes in the Woodhouse Plan and served as the blueprint for the Accident Compensation Act.

In December, 1971, near the end of the 1971 Parliamentary session legislation was at last introduced. Even then, however, there were many matters of detail still to be dealt with before the legislation could be passed. Various committees continued over the Parliamentary recess and into the next Parliamentary session to work on these details. The Select Committee in charge of the Bill, after hearing many submissions, finally reported to Parliament on September 19, 1972. On October 20, 1972, the *Accident Compensation Act* 1972 [5] was at last passed by Parliament.

This short history of the Woodhouse Plan is recorded for the reader only to illustrate that the matters contained in the Royal Commission Report have indeed received the attention of numerous committees. Does this process support the pessimism of Dr. Sutch? It might be argned that this "bandying about" is simply a necessary part of the democratic process as we know it, and in no way inhe-

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[3] *Personal Injury — A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand,* (1969). [Hereinafter referred to as the "White Paper"].

[4] *Report of Select Committee on Compensation for Personal Injury in New Zealand,* (1970). [Hereinafter referred to as the "Select Committee Report"].

[5] *Accident Compensation Act* 1972, No. 43. [Hereinafter referred to as the "Act"].

rently bad. It is only bad if it produces an unsatisfactory result. The more important question, therefore, is whether the Woodhouse Plan has been "watered down enough to make it acceptable to the people we elect to Parliament".

It is the purpose of this article to examine the basic provisions of the *Accident Compensation Act* 1972 and to compare them with the basic tenets of the Woodhouse Plan.[6] In doing this an attempt will be made to evaluate the extent to which the Woodhouse Plan has survived in the Act.

I. — Comprehensive Entitlement Through Community Responsibility

The Woodhouse Plan was, to borrow two of its basic principles, a scheme designed to provide comprehensive entitlement to benefits from a sound base of community responsibility. The two principles were inextricably linked in one cohesive compensation scheme. It is then perhaps fair to presume that any legislation purported to be based upon the Woodhouse Plan which appeared to separate and/or dilute these two basic principles would necessarily be suspect. Before this evaluation can be attempted, one must be clear about the meaning attached by the Commission to community responsibility and comprehensive entitlement, respectively.

a. *Community Responsibility*

It was a fundamental tenet of the Woodhouse Plan that losses from personal injuries were a responsibility to be borne by the community. The Commission supported this tenet with two arguments — one based in morality and the other in materialism.[7] There is, on the one hand, a moral duty on the part of the community to compensate victims of accidents resulting from activities which injure a predictable number of people each year. An obvious example of such an activity is automobile driving. But the community also has, on the other hand, an economic stake in dealing with the accident problem. This argument, in turn, is of two facets. Firstly, the community accepts the fruits of production from its members and so should also accept the burden of their losses from accidental injury. Secondly, the sooner injured people are rehabilitated the sooner they

[6] The Royal Commission recognized that an adequate response to the accident problem demanded effective accident prevention. Woodhouse Report, at paras. 2, 3, and 306-353. This is obviously an important area, but one which will not be examined in this article.

[7] Woodhouse Report, at para. 5.

become productive members of society again. In this, said the Commission, the community has a vested interest.

In view of the central importance of the community responsibility principle one might well have expected the Commission to advise that the scheme be financed out of general taxation funds. This is not, however, the case. Instead the scheme was to be funded on a more limited social insurance basis. Annual levies were to be made on the following community groups: employers, self-employed persons, owners of motor vehicles and drivers of motor vehicles. Additional funds would accrue from self-insured employers and Health Department funding of medical costs. According to the Commission's estimates, the cost of the new comprehensive scheme would not differ greatly from the total cost of the present disparate approaches to the problem. If, however, additional funds were required they were to come from general taxation.[8]

The question which obviously arises in view of this method of financing the scheme is whether the Royal Commission itself was faithful to its principle of community responsibility. This question was anticipated in the Report and an answer offered.[9] The Commission observed that industry had already built the cost of two compulsory insurance schemes — workers' compensation and third party motor vehicle cover — into their products. The community was, therefore, already indirectly sharing this cost. The Commission saw little merit in shifting this cost from industry and placing it more squarely on the taxpayer. The Commission, therefore, saw its principle of community responsibility as being fulfilled by its proposed financing arrangements. The adequacy of this answer ought, perhaps, to be questioned. Is a scheme which puts the primary financial burden on one segment of the community and relies on that segment to pass the costs on to the other segments really based directly in *community* responsibility? Does the Commission's approach place too much faith in the theory of general deterrence expounded by Professor Calabresi?[10] Is the result of this scheme that poorer people — who pay a larger percentage of their income

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[8] *Ibid.*, at para. 481.

[9] *Ibid.*, at paras. 462-463.

[10] G. Galabresi, *The Costs of Accidents*, (Yale University Press, New Haven: 1970). The "Calabresi theory", developed in a series of law review articles and consolidated in his book, has generated considerable response. See, e.g., P.S. Atiyah, *Accidents, Compensation and the Law*, (Weidenfeld and Nicholson, London: 1970), at pp. 565-600; Blum and Kalven, *The Empty Cabinet of Dr. Calabresi — Auto Accidents and General Deterrence*, (1967) 34 U. Chi. L. Rev. 239.

for manufactured goods — are hit hardest by this "passing on"?[11] The White Paper did not address itself to these questions. Rather, it was "assumed for purposes of this Paper that the compensation scheme should be funded from its own levies."[12] It was observed that "the Commission's recommendation has the added virtue of being relatively straightforward and presumably more acceptable than a proposal which calls for the costs to be met entirely from general taxation."[13] In that statement are contained two reasons for favouring the Commission's version of community responsibility — one is administrative and the other is political. They are perhaps sounder reasons than the one of principle offered by the Commission. In any case, this question is certainly one which deserves further examination and analysis elsewhere.[14]

b. *Comprehensive Entitlement*

The base of community responsibility was intended to support a scheme of comprehensive entitlement to benefits. The principle of comprehensive entitlement involves an analysis of two basic issues: First, which injuries, if not all, should receive compensation and other benefits offered by the scheme; and second, which groups in the community, if not the whole, should be eligible to receive the compensation and other benefits?

The Commission attacked the group of unco-ordinated remedies [15] existing at that time, almost entirely on the basis of principle. This

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[11] For an analysis of some of the problems involved in relying on "passing on", see: Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, (1961) 70 Yale L.J. 499, at pp. 517-27.

[12] White Paper, at para. 202.

[13] *Ibid.*, at para. 201.

[14] For proposals which attempt to combine some measure of general deterrence with a more substantial reliance on general taxation funds than the Royal Commission proposed, see: T. Ison, *The Forensic Lottery*, (Staples, London: 1967); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, (1967) 53 Va. L. Rev. 774.

[15] The compensation system existing when the Commission sat was as follows. There were two compulsory insurance schemes — Workers' Compensation and third party liability insurance for motor vehicle accidents. An injury received by a worker in the course of his employment was compensated under worker's compensation. If the worker could show his employer to have been personally or vicariously negligent then an action for damages would lie. Worker's compensation did not, however, cover employers or the self-employed. An injury received in a motor vehicle accident could be the subject of a common law action for damages based upon negligence. A successful plaintiff could, however, have his damages reduced due to contributory negligence. The two compulsory schemes were supplemented, and at times duplicated, by a social security scheme offering less than generous benefits.

was due to the small amount of statistical information available concerning the operation of the system.[16] The Commission was able, however, to draw upon empirical data from other countries. After discussing a number of matters concerning the existing remedies, the Commission concluded that the disadvantages of the process clearly outweighed the advantages both from the individual and community perspectives.[17] Because this topic has been so well canvassed elsewhere,[18] there is need to say very little about it here. The Commission decided that for their scheme "[i]njury, not cause, is the issue".[19] An injury is no less a loss to the individual and the community when it occurs without identifiable blameworthy conduct; or when it occurs outside working hours.

Having decided that injuries should not be differently treated depending upon cause, the Commission had then to decide whether different treatment could be justified depending upon the segment of the community to which the injured person belongs. If the arguments upon which its general principles were based were sound then the answer was, in the Commission's view, obviously not.[20] Included in the scheme, therefore, were earners, self-employed persons, and housewives. In addition, the elderly were provided for by having no upper age limit on the eligibility for benefits. Finally, the Commission was concerned to cover young people in a way that recognised their potential contribution to the community. It is in this area that the Commission failed to live up to its principle of comprehensive entitlement in as meaningful a way as it might have done. A lower age limit of 18 years of age was

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[16] See: Palmer, *op. cit.*, at p. 185.

[17] Woodhouse Report, at para. 171.

[18] See: P.S. Atiyah, *op. cit.*, at pp. 445-77; State of New York Insurance Department, *Automobile Insurance... For Whose Benefit?*, (1970), at pp. 17-55; T. Ison, *op. cit.*, at pp. 7-30; R. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim*, (Little Brown, Boston: 1965), at pp. 1-5; Ehrenzweig, *A Psychoanalysis of Negligence*, (1953) 47 Nw. U. L. Rev. 855. In addition, see the following empirical studies: U.S. Department of Transportation, *Automobile Insurance and Compensation Study: Economic Consequences of Automobile Accident Injuries*, (1970); Conard, Morgan, Pratt, Voltz and Bombaugh, *Automobile Accident Costs and Payments*, (University of Michigan Press, Ann Arbor: 1964); Franklin, Chanin and Mark, *Accidents, Money and the Law*, (1961) 61 Colum. L. Rev. 1.

[19] Woodhouse Report, at para. 6. The Woodhouse Report chose to exclude sickness from the proposed scheme, except for industrial diseases. It did so rather more on the basis of prudence than of logic. For a scheme that would go beyond Woodhouse and include disability due to non-industrial sickness, see: T. Ison, *The Forensic Lottery*, (Staples, London: 1967).

[20] Woodhouse Report, at para. 282.

recommended [21] and the provisions for taking account of potential earning capacity were sketchy indeed. More will be said on this point when discussing the legislation. It should suffice for now to say that young people, and especially students, were given considerably less attention than were other segments of the community.

Comprehensive entitlement thus meant that all segments of the community were to be covered in respect of any injury by accident regardless of cause. In the words of the Woodhouse Report, the scheme should:

> ...provide immediate compensation without proof of fault for every injured person, regardless of his or her fault, and whether the accident occurred in the factory, on the highway or in the home...[22]

As explained earlier, this was to be done from a sound financial framework based in community responsibility.

Now that the somewhat pedestrian, but necessary, task of describing the content of the Woodhouse Plan principles of community responsibility and comprehensive entitlement has been attempted, let us examine the *Accident Compensation Act* to see to what extent these two principles are manifested in it. Where there appear to be alterations in the Woodhouse Plan, they will be analysed.

c. *The Act*

The Governmental White Paper on the Woodhouse Plan suggested various alternative ways of dealing with some of the weak points of the scheme but in general seemed to be in agreement with the scheme's basic principles.[23] The Parliamentary Select Committee, however, was guided by what it viewed as more pragmatic considerations. After stating the various social problems with which the Woodhouse Report was concerned — e.g., compensation, rehabilitation, accident prevention — the Select Committee observed that:

> ...community responsibility requires simply that the social needs be met: it does not stipulate how they should be met... We prefer to consider pragmatically how best to effect improvements...[24]

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[21] *Ibid.*, at para. 283(d).

[22] *Ibid.*, at para. 18.

[23] It should be borne in mind that "the White Paper sought to demonstrate the feasibility of the Commission's scheme from a neutral standpoint": Palmer, *op. cit.*, at p. 203.

[24] Select Committee Report, at para. 7.

The Select Committee was, in short, concerned to put forward "recommendations aimed at getting practical reforms introduced quickly".[25] In pursuit of this goal the Committee recommended two independent, but co-ordinated compensation schemes — one to cover earners (employers, employees and self-employed persons) and the other to cover all persons injured in motor vehicle accidents. These two schemes were to be separately financed on a user-pays basis through levies on employers and motor vehicle owners. Housewives and other non-earners were excluded from the schemes to the extent that their injuries did not result from motor vehicle accidents. The Committee seemed anxious to avoid any aura of social security emanating from their schemes and, therefore, recommended that in no event should general taxation monies be used.

The *Accident Compensation Act* follows the Select Committee model very closely in the responsibility and entitlement areas. The Act adopts the dual scheme approach and establishes an Earners' Scheme and a Motor Vehicle Accident scheme.

The earners' scheme offers two kinds of cover to the work force — continuous cover and work accident cover.[26] Continuous cover entitles an injured earner to compensation and rehabilitative assistance on an around-the-clock basis, regardless of whether the injury arises out of and in the course of the earner's employment.[27] An earner will be eligible for continuous cover if he or she has been ordinarily resident in New Zealand for twelve months at sometime prior to the accident. If the earner is an employee he must be employed for a minimum of ten hours per week and entitled to earnings of at least $500 per year, or have worked for at least 160 hours during the eight weeks immediately prior to the accident. If the earner is self-employed, on the other hand, he will receive continuous cover if he is found to be "carrying on a business".[28] This decision will be made on the basis of the definition given that phrase in the *Land and Income Tax Act* 1954.[29] This provision allows a self-employed person to be covered even if his business is running at a temporary loss.

Work accident cover provides cover *only* for those injuries which arise out of and in the course of the earner's employment.[30] Origi-

[25] *Ibid.*, at para. 8.

[26] Act, at section 55. Also covered, under special provisions, are members of the armed forces: Act, at sections 31(d), 61, 63 and 70.

[27] *Ibid.*, at section 56(a).

[28] *Ibid.*, at section 57.

[29] *Ibid.*, at section 2(1).

[30] *Ibid.*, at section 56(b).

nally the legislation provided that a self-employed earner who did not have continuous cover had to make special application for work accident cover. This undesirable administrative step, however, has been eliminated from the Act.[31] Work accident cover now applies alike to employees and self-employed earners who do not have continuous cover.

The motor vehicle accident scheme is much less restrictive than the earners' scheme. Everyone injured in an accident involving a motor vehicle will be covered by the scheme, regardless of fault. Vehicles included in the scheme are those licensed or required by law to be licensed, those holding a trade license, and those specified by the Act as entitled to be treated as though they were licensed motor vehicles.[32] Entitlement under the motor vehicle scheme is thus very broad and comparatively uncomplicated.

1. *Who is Not Entitled?*

Who has been left out of the schemes established by the Act? It should perhaps be recalled that the Woodhouse Plan called for "24 hour insurance for every member of the work force, and for the housewives who sustain them".[33]

In the first place, it is clear that although the earners' scheme will cover a reasonably large proportion of the work force, the scheme certainly falls short of "24 hour insurance for every member of the work force". For those earners who do not meet the criteria for continuous cover the old workers' compensation dilemma of "out of and in the course of employment" remains.[34] If they are unfortunate enough to be injured while not in employment they are left to their own devices, among which must admittedly be included the availability of meager social security benefits. For those who can pursue a negligence action the situation may not be so desperate. Indeed, they may welcome the opportunity to pursue the common law's "pot of gold". Even so it is not easy to understand why the deficiencies of the common law negligence action, which led to its partial abolition, should not logically lead

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[31] *Ibid.*, at section 58(4).

[32] *Ibid.*, at sections 92-96.

[33] Woodhouse Report, at para. 18.

[34] The cumbersome distinction between continuous and work accident cover necessitated the grafting of a whole group of sections from the old *Workers' Compensation Act* onto the new Act. See: Act, at sections 84-89.

to its total abolition.[35] Finally, for those injured outside the course of their employment who cannot successfully pursue a negligence action, the situation is indeed bleak.

Housewives and other non-earners are covered by the Act only if their injury arises out of a motor vehicle accident. Since the majority of New Zealand women are housewives, a substantial segment of the population has not been included in the Act. Because they contribute substantially to the economic productivity of the country injuries incurred by them are injuries incurred at least indirectly by the economic structure of the country. Why, with the exception of motor vehicle accidents, were they excluded from the Act? The Select Committee suggested that they, and other non-earners, be excluded because otherwise costs would be too difficult to control.[36] There is little doubt that this is why they were excluded from the legislation as well. In the words of a prominent member of the National Government, in power when the Act was passed, the Government was faced with "a choice between two basic principles of the original proposals — either (a) comprehensive entitlement, or (b) real compensation".[37] One may well be entitled to wonder why if the Woodhouse Commission's costing of its scheme was correct, both comprehensive entitlement and real compensation could not have been offered. Perhaps the reason for exclusion goes beyond mere financial considerations. Certainly, the exclusion was made easier for the Government by the relative lack of political power possessed by housewives, and other non-earners, as a group. In addition, active proponents of "women's lib" might suspect that the reason lies deeper in the male psyche.

The Government attempted to soothe its critics on this point by explaining that as time passed and the scheme "got on its feet" the excluded groups could probably be brought into the fold. Each year a substantial portion of the income under the scheme would be invested. Over a period of time reserves would be built up and

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[35] It is interesting to note that the New Zealand Law Society urged that the common law action for damages for personal injury be totally abolished. It noted in its evidence before the second Select Committee that:

> The lingering death contemplated for [the common law action] under the Bill, in the society's view, will be productive of uncertainty unfair discrimination and injustice: New Zealand Parliamentary Debates, (1972), at p. 2986.

There is no doubt that the incredible complexity of the Act is at least in part due to failure to totally abolish the common law action for damages in this area.

[36] Select Committee Report, at para. 35.

[37] New Zealand Parliamentary Debates, (1972), at p. 3006.

these could be used to finance the inclusion of new groups. The Government went further and included in the Act what has come to be known as the "conscience clause".[38] This clause requires the Commission operating the schemes to consider "the desirability, feasibility and cost of extending the scope of cover under this Act". The Commission is to do this after the schemes have been operating for at least three years, and they have up to six years to do it. On that basis it could be as late as 1980 before any change was made. Although the clause may in a loose sense be called a "conscience clause" it is quite clear that the National Government was not giving too free a reign to its collective conscience.

2. *Who is Responsible?*

Responsibility for the entitlement offered by the Act is based on what looks very much like a user-pays system. The two schemes are to be independently self-financing, with no reliance at all on general taxation funds.

The Woodhouse Plan was to be financed by a flat rate levy of 1 percent of earnings.[39] Although it has been made clear that the Act aims for an average differential levy of 1 percent, the Government apparently was of the view that it was desirable to attempt to internalise accident costs by varying the levy depending upon the risk involved in the particular employment activity. The earners' scheme, therefore, is to be financed by a differential levy ranging between .25 percent and 5 percent. The levies are to be paid by an employer in respect of the earnings of his employees and by self-employed persons up to a ceiling of $10,400.[40] In addition to the normal differential levy, the Commission is to have the power to impose penalty levies on employers whose accident records are significantly worse than average for their classification and to grant rebate levies to employers whose accident records are significantly better than average.

The motor vehicle scheme is at first to be financed by annual levies payable by owners of motor vehicles. This may be supplemented, however, by levies on drivers of motor vehicles. For this purpose, drivers may be classified to facilitate the imposition of

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[38] Act, at section 18.

[39] Woodhouse Report, at para. 500.

[40] Less than 1% of New Zealand earners have incomes in excess of $10,400. See: Palmer and Lemons, *Beyond Keeton-O'Connell: New Zealand's New Compensation Scheme*, Table 1 (compiled from various statistical data contained in *New Zealand Official Yearbook*, (1971)), scheduled for publication in [1972] Ill. L. F., Number 4.

differential levies, and also penalty levies on drivers with poor driving records.

3. *Evaluation*

The financial responsibility for the two schemes established by the Act is, it can be seen, to be borne basically by those who directly are entitled to receive benefits under them. Perhaps the most charitable thing one can say is that the principles of community responsibility and comprehensive entitlement find new definition in the Act. To proponents of the Woodhouse Plan's comprehensive approach the new definition seems restrictive indeed. Before making a judgment on the Act as a whole we should examine the extent to which the other three basic principles of the Woodhouse Plan have survived. Earlier in this article, however, it was proposed that any legislation purportedly based on the Woodhouse Plan which appeared to give less than full effect to the basic principles of community responsibility and comprehensive entitlement would be suspect. It is, I think, fair to say at this stage that the *Accident Compensation Act* is well into that category.

II. Administrative Efficiency

It is essential that a compensation scheme having the compass of the Woodhouse Plan be administered in an efficient and enlightened manner consistent with the underlying philosophy of the scheme. The Woodhouse Plan, therefore, has administrative efficiency as one of its basic principles. This principle contains three primary aspects:

1. high degree of administrative centralisation;
2. exclusion of private enterprise; and
3. absence of adversary techniques in the decision-making process.

a. *Centralisation*

The Commission's attachment to the idea of centralising the administration of its scheme stemmed primarily from its study of the administrative methods used in the Ontario Workmen's Compensation system. The Commission recommended that the Ontario system be used as a general model for the New Zealand scheme.[41] The thing which seemed most to attract the Commission to centra-

[41] Woodhouse Report, at para. 307(h).

lisation was the very low cost of administration in Ontario compared to the existing New Zealand compulsory insurance schemes.[42]

The Commission, therefore, recommended a centralised administrative structure organised around an independent Board of Commissioners. The Board was to consist of three members and chaired by a lawyer of seven years practical experience. Although independent in function, the Board was to be attached to the Department of Social Security for administrative purposes.[43] The administrative hierarchy proposed by the Commission was virtually identical to the Ontario one, except that on matters of law an appeal could be taken to the Supreme Court. The structure proposed, therefore, is this:[44]

Supreme Court (on matters of law only)
|
Board of Commissioners
|
Appeal Tribunal (consisting of three members including a doctor and a lawyer)
|
Review Committee (consisting of various specialised employees of the Board)
|
Administrative Inquiry and Assessment

b. *Private Enterprise*

The decision to exclude private enterprise, specifically the insurance companies, from this administrative hierarchy seems to have been based partly in principle and partly in considerations of cost. In principle, the Commission would have excluded insurance companies from the scheme on the grounds that:

> In the absence of personal liability and with the disappearance of any element of voluntary contribution there can be no place for insurance companies. Their purpose is to seek business from individuals who might wish to cover themselves at their own choice in respect of personal contingencies of their own definition.[45]

Private enterprise competition and profit orientation, therefore, was incompatible with the compulsory loss-sharing which characterised the Woodhouse Plan.

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[42] *Ibid.*, at paras. 213-214. See the discussion of this point, *infra*, nn. 46-47.
[43] *Ibid.*, at para. 495.
[44] Under the proposed procedures, no hearing would be held until the Appeal Tribunal stage. Both of the first two stages would be conducted on the basis of informal investigation and inquiry based upon written report forms from doctors, employers and claimants: *Ibid.*, at para. 308. See also: White Paper, at paras. 291-299.
[45] Woodhouse Report, at para. 280(d).

The Commission was not concerned solely, however, with principle. It had an ample brief in its favour based upon cost. Again the Commission called in aid the Ontario, and other Canadian, experience. After looking at the Canadian figures, the Commission was confident that its scheme could be administered for around 10 percent of the amount collected through levies.[46] When one compares this to the 30 percent[47] required for administration of the New Zealand Workers' Compensation scheme through insurance companies, it is not difficult to understand why the Commission decided against insurance company involvement.

c. *Adversary Techniques*

Once the Commission had defined the content of the administrative hierarchy, it turned its attention to the method to be employed in administration. Perhaps the best way to convey the Commission's view on this point is to offer the following from their Report:

> Informal and simple procedure should be the key to all proceedings within the jurisdiction of the Board. Applications should not be made to depend upon any formal type of claim, adversary techniques should not be used, and a drift to legalism avoided.[48]

Clearly, the bias in administering the scheme was to be toward the injured claimant and doubts were to be resolved in the claimant's favour. Beneficiaries were, therefore, to gain a dual advantage from the Woodhouse approach — an increased percentage of the funds collected were to be available for distribution to them, while at the same time requiring them to jump through fewer procedural rings to obtain it.

d. *The White Paper Contribution*

The White Paper made basically two contributions to thinking about the Woodhouse administrative concept. First, it examined the Ontario structure in detail and attempted to assess it with the particular needs of New Zealanders in mind. The White Paper offered the view that centralisation would be more difficult in New Zealand than Ontario both because New Zealand's population was less centralised than Ontario's and because that population may not like

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[46] The 10% figure includes sums to be spent on rehabilitation and accident prevention: Woodhouse Report, at para. 445 and Appendix 9, table 11.

[47] This 30:70 cost-claims ratio meant, of course, that administrative expenses consumed in excess of 40% of the amount paid out in compensation.

[48] Woodhouse Report, at para. 309(b).

dealing with a faceless central computer.[49] As a possible remedy the White Paper suggested use of local administrative offices all relying on a central computer.[50] This idea led directly to the second point we should examine. Although the White Paper specifically noted the advantages of using the existing network of Social Security offices to partially decentralise the scheme,[51] it nonetheless suggested that private enterprise might be a viable alternative. "Grounds of cost, rather than principle", it said, "may indeed be the controlling factor in the choice between private enterprise and public authority." If the insurance companies were able to administer the scheme for something near the 10 percent figure then "such an alternative could be considered".[52] One can almost hear the insurance companies come glubbing up for a gasp of air.

The difficulty with the position taken by the White Paper — albeit in the mild form of a suggested alternative — is that the Royal Commission seemed firmly to base its case first in principle and only secondarily in cost. The Commission made it abundantly clear that its proposed scheme did not belong to "a legitimate field of operation" for private enterprise.[53] Therefore, even if the insurance companies could administer the scheme as efficiently as a public entity, it is doubtful that the Royal Commission would have embraced the White Paper alternative.

e. *The Select Committee Contribution*

If the White Paper helped the insurance companies get a sustaining gasp of air, the Select Committee carried out the full rescue operation. It was on the question of insurance company involvement that the Select Committee was at its pragmatic best. The insurance companies offered expertise and facilities throughout the country for work in this field. It seems that the Social Security Department would require new facilities and 400 additional staff to administer the dual schemes suggested by the Select Committee.[54] Since the Select Committee does not tell us, we can only wonder what degree of centralisation was envisaged when this estimate was made.

The Select Committee saw two obstacles to insurance company involvement: the potential conflict between the insurance company

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[49] White Paper, at para. 288.
[50] *Ibid.*, at para. 301.
[51] *Ibid.*
[52] *Ibid.*, at para. 280.
[53] Woodhouse Report, at para. 209.
[54] Select Committee Report, at para. 39.

interest in profit and the public interest in the new schemes; and the inability of the insurance companies to administer the schemes as efficiently as was required. The solution for getting round both these obstacles was to have the insurance companies act as agents of the Board. The risk would be carried by the Board and the companies would be paid on a fee basis for work done.[55] In effect, this guaranteed that the insurance companies could not lose by participating in the schemes.[56]

f. *The Act*

Although the *Accident Compensation Act* establishes two separate schemes, rather than the unified one recommended by the Royal Commission, it provides that they be jointly administered by one independent governmental authority to be known as the Accident Compensation Commission (ACC). The ACC will consist of three members, one of which must be a lawyer of seven years experience, appointed for renewable three year terms.[57] It is charged with operating the two schemes and with wide responsibilities in the fields of accident prevention and rehabilitation. It will operate within the general responsibility of the Minister of Labour and will be required to implement the policy of the Government of the day.[58]

The ACC is the first level of the administrative hierarchy established by the Act. It will, through its individual members and other employees, conduct the initial investigation and inquiry and render a decision. It has wide powers to employ medical and other specialists and to delegate power in performing its task.[59] In the field, the ACC will act through its agents. It is provided in the Act that insurance companies may be appointed as agents and that their remuneration may consist in fees or commission or both.[60] An injured employee must if the accident occurs at work submit his claim

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[55] *Ibid.*, at paras. 40-52.

[56] There is little else of interest in connection with administration in the Select Committee Report. With an eye to later discussion of the Act itself, however, the following quotation is offered:

> ... [W]e are most conscious of the fact that workers' compensation legislation which was intended to be readily comprehensible to laymen has given rise to enormous litigation both here and elsewhere and provided a feast for lawyers. We would certainly not like to see our proposals overtaken by a similar fate...: *Ibid.*, at para. 128.

[57] Act, at sections 6-7. In order to stagger the expiration of terms, the initial appointments will be for five, four and three years: *Ibid.*, at section 7(1).

[58] *Ibid.*, at section 20.

[59] *Ibid.*, at sections 23 and 29.

[60] *Ibid.*, at section 25.

to his employer who in turn will forward it to an ACC agent.[61] If the injury is not connected with work, the claim is to be lodged directly with an agent.[62] A claim must, except in unusual circumstances, be lodged within twelve months.[63] A decision on the claim must be rendered in writing to the applicant. Agents will have whatever decision-making power the ACC sees fit to delegate to them.

If a dispute arises concerning the decision, the applicant will be given an administrative hearing before a single Hearing Officer, as opposed to the Review Committee inquiry suggested by the Royal Commission. The Hearing Officer has wide powers to hear any relevant evidence from the applicant or his representative. If the decision is against the applicant, reasons will be supplied in writing, although *only* if the applicant so requests.[64]

If the decision is against the applicant he may then appeal to the Appeal Authority. The Royal Commission proposed that this be a tribunal including a lawyer and a doctor. The Select Committee also proposed a tribunal but including one Commission member, a doctor and some other person "having no administrative association with the authority".[65] The Act, however, goes its own way and establishes a one member Appeal Authority, required to be a lawyer.[66] Both the Royal Commission and the Select Committee were concerned that a doctor be involved at this stage. The Act gives the Appeal Authority power to appoint expert assessors, medical or otherwise, as sitting members for purposes of a particular appeal.[67] While the Act offers an arrangement which may in general be less cumbersome than a tribunal, the importance of having a doctor involved may not have been given sufficient recognition.

The appeal to the Authority will be by way of a rehearing of all relevant evidence. If the applicant is successful, costs will be awarded. Costs will not be awarded against him unless it is determined that the appeal was vexatious or "ought not to have been brought".[68] Criteria for interpreting the latter phrase are not offered by the Act, and it is perhaps not unreasonable to expect the Authority to be most reluctant to make such a finding.

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[61] *Ibid.*, at section 143.

[62] *Ibid.*, at section 142.

[63] *Ibid.*, at section 149. The Royal Commission had recommended the limitation period be six years and extendible in unusual circumstances: Woodhouse Report, at para. 309(d).

[64] Act, at section 154.

[65] Select Committee Report, at Recommendation No. 27.

[66] Act, at section 155.

[67] *Ibid.*, at section 160.

[68] *Ibid.*, at section 166(2).

If the applicant is not satisfied that his case has been properly decided by the Authority, he may appeal to the Administrative Division of the Supreme Court.[69] Finally, the applicant may appeal to the Court of Appeal, although this appeal must be limited to questions of law.[70]

g. *Evaluation*

In evaluating the extent to which the Act complies with the Woodhouse Plan principle of administrative efficiency, it is perhaps best to refer back to the three primary aspects of that principle. The Woodhouse Plan sought a high degree of centralisation; the Act reflects a low degree. This may be overcome by some sound administrative techniques and wise use of computers by the ACC. The Act, however, leaves plenty of room for movement in the other direction by allowing delegation of various powers to the local agents. This delegation has the danger of creating administrative inconsistencies based upon regional or local differences in approach. It may also be more expensive than centralised administration.

The Royal Commission opted unequivocally for the exclusion of free enterprise from its scheme; the Act contains an unequivocal invitation to insurance companies to participate. It is interesting to note, however, that at the time of this writing the insurance companies have not yet agreed to play their part in the schemes. Perhaps they are not altogether convinced that they have a role to play, though no doubt for reasons different from those which moved the Royal Commission to exclude them in the first place.

The Woodhouse Plan was notable for its emphasis on avoiding adversary techniques in its decision-making process; the Act professes the same goal but may fall short of attaining it. It has been referred to as the Lawyer's Compensation Act. Partly because of the complexity of the Act as a whole and partly because of its appeals structure, it may well turn out to be a "feast for lawyers".[71] The appeals structure is more court-oriented than was the Woodhouse Plan and the use of representatives, legal or otherwise, begins earlier than under the Woodhouse approach. The use of terms such as Hearing Officer, relevant evidence, and appellant may belie "the drift to legalism" the Royal Commission cautioned against.

It seems fair to conclude, therefore, that the principle of administrative efficiency has not been fulfilled by the Act. This conclu-

[69] *Ibid.*, at section 168.
[70] *Ibid.*, at section 169.
[71] See: *supra*, n. 56, at p. 210.

sion obviously is based upon a theoretical analysis, and it might be argued that the true test of the administrative structure offered by the Act will come in practice. The question is whether society should afford a theoretically unsound structure an opportunity to prove itself. That society should do this is open to serious doubt.

III. Complete Rehabilitation

Although most proposals for reforming or replacing the common law negligence system are framed in terms of "compensating" injured persons, this should not be allowed to obscure another kind of help for injured persons. While that help can take myriad forms, it is in short, rehabilitation. If the common law system does anything, it discourages people from seeking rehabilitative aid because of the need to sustain the effects of injury during the long period leading to settlement or trial.[72]

a. *The Royal Commission Approach*

The Royal Commission was concerned throughout its Report with the impact of personal injuries both on the persons directly concerned and upon the economic structure of society generally. The Commission saw great benefits to be gained for both groups from a thoughtful approach to rehabilitation. These benefits could not be gained simply by "compensating" people for their losses; much more was required.

One of the most important tenets of the Woodhouse Plan, therefore, was the physical and vocational rehabilitation of an injured person. Adopting a definition of rehabilitation used widely in North America, the Commission advocated a total process approach to rehabilitation. That is, a total process of restoring an injured person to "the fullest physical, mental, social, vocational and economic usefulness" possible.[73]

The Commission examined the rehabilitative process both for the administrative problems it presented and for its impact on the individual. Here, as elsewhere in its Report, the Commission noted the advantage to be gained from a centralised approach to the administration of rehabilitation programs. It saw the Board as taking an active role in promoting and co-ordinating adequate programs for

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[72] See: State of New York Insurance Department, *Automobile Insurance... For whose Benefit?, op. cit.*, at p. 32; J. O'Connell, *The Injury Industry and the Remedy of No Fault Insurance*, (Commerce Clearing House, New York: 1971), at p. 18.

[73] Woodhouse Report, at para. 354.

medical and vocational rehabilitation. The Board was to secure the services of an experienced and capable physician to give attention to these matters in a "medical branch".[74] He would in turn call upon other physicians for advice and assistance where necessary. It was further proposed that the Board allocate $200,000 annually to be spent "for the general purposes of rehabilitation".[75]

From the perspective of the injured person the Commission was concerned to ensure that every possible incentive be offered to encourage good faith attempts at rehabilitation. The idea of a penalty against those who refused to participate was rejected.[76] Reluctance and apathy were to be overcome by persuasion and education. A coordinated program of expert assistance was to be offered to each injured person. All reasonable medical expenses were to be paid by the Board [77] and no reduction in compensation was to *occur due to* improvement achieved.[78]

The White Paper examined in detail some of the difficulties that might arise in putting the Woodhouse proposals into action. It found, however, little lacking in the Royal Commission approach. The Select Committee was equally receptive to the Commission's proposals in this area. It endorsed the view expressed in the White Paper that success in this endeavour depended largely upon the Board itself and that "it might not be desirable to fetter it with too much detail in advance of the scheme getting under way."[79]

b. *The Act*

The *Accident Compensation Act* incorporates the Royal Commission approach to rehabilitation while heeding the caution of the White Paper.[80] The ACC is required to take a very individualised approach to rehabilitation, with each case to be considered and worked with as its needs demand. Those persons and organisations directly involved in the rehabilitative process are expected to cooperate closely with the ACC, and unilateral action may be taken by the ACC where it considers that such action is necessary. The Act places particular emphasis upon the reinstatement of injured persons in employment.[81] This includes their previous employment where

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[74] Woodhouse Report, at para. 432(4).
[75] *Ibid.*, at para. 432(7).
[76] *Ibid.*, at para. 398.
[77] *Ibid.*, at para. 387.
[78] *Ibid.*, at para. 404.
[79] White Paper, at para. 310.
[80] Act, at sections 48-53.
[81] *Ibid.*, at section 48(2)(b).

possible or training for new employment if necessary. In addition, the Act encourages the ACC to provide special financial assistance to meet a wide variety of needs.

In order to facilitate this task the ACC is to have a special division, headed by a distinguished medical practitioner, in charge of matters relating to rehabilitation.[82] The chief aim of this division will be to work for co-operation and co-ordination among those organisations and individuals concerned with rehabilitation. There is no specific sum nominated by the Act for spending in this area but one would certainly expect the expenditure to equal or exceed the $200,000 suggested by the Royal Commission.

The more general function of the ACC in regard to rehabilitation is that of research and reporting on various aspects of the rehabilitation process. This activity presumably will lead to improved methods of rehabilitation and to lower costs in the long term.

c. *Evaluation*

The principle of complete rehabilitation is the one among the five Woodhouse Plan principles which finds perhaps the highest degree of fulfillment in the *Accident Compensation Act.* In view of the primary importance of this principle in the Woodhouse Plan this is no mean accomplishment. The reason the Act measures up so well on this point, however, is not difficult to discern. In spite of its importance, or perhaps because of it, rehabilitation is the component of the Woodhouse Plan which generates the least amount of controversy over principle. There may be differing views about practical aspects of the process, but everyone agrees that it ought to be done. Thus, while lamenting the fact that other principles may not have fared so well, one may rejoice that this one has come through the legislative process relatively unscathed.

Unfortunately, however, the rejoicing may be premature. Although the legislative process may not have launched a direct attack on the principle of complete rehabilitation, it may be that it has outflanked it. The Royal Commission was of the view that "the compensation process should always be secondary to the goal of rehabilitation . . .".[83] It is my next task to examine the compensation process offered by the Act. We will then be in a position to assess the relative integrity of rehabilitation in the Act.

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[82] *Ibid.*, at sections 51 and 52.

[83] Woodhouse Report, at para. 428.

IV. Real Compensation

It was not the primary aim of the Woodhouse Plan to provide compensation in monetary terms for accidental injury. This was, however, an important facet of the scheme. The Royal Commission thus identified "real compensation" as one of its five basic principles:

> ... [R]eal compensation demands for the whole period of incapacity the provision of income-related benefits for lost income and recognition of the plain fact that any permanent bodily impairment is a loss in itself regardless of its effect on earning capacity.[84]

a. *Moving Away From the Common Law*

It is clear from the above definition that the benefits offered by the Plan were to be income-related and to have two goals: compensation for actual loss of earnings; and compensation for loss of bodily function through permanent physical disability.

Temporary disability, on the one hand, was to be compensated according to actual loss of earnings. The relevant income was to be that coming in at the time of the accident, and benefits were to be paid at the rate of 80% of the amount remaining after taxes.[85] The payments were to be on a periodic basis commencing the day after the accident. For the first four weeks after the accident, however, it was suggested that payments be limited to a maximum of $25 per week. If the injury lasted eight weeks or longer, the Board was to go back and pay the difference, if any, between $25 and the effective rate of compensation at the 80% figure.[86] This was a device designed by the Commission to avoid the drain on funds which had occurred under the *Workers Compensation Act* due to providing compensation at the full rate for thousands of minor injuries. The Commission was confident that "no man facing some short-term incapacity would wish this situation to continue."[87] Although some stand-down period is no doubt required in view of the Worker's Compensation experience, it is possible that the Commission in its zeal to free more money for serious injuries dismissed short term injuries a bit too lightly. After the four week stand-down period was over, the ceiling on compensation was to be raised to

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[84] *Ibid.*, at para. 55.

[85] *Ibid.*, at para. 292(b).

[86] *Ibid.*, at para. 301. A different kind of stand-down period was suggested for housewives and non-earners. For them compensation would not commence until two weeks after the injury. If the incapacity lasted eight weeks or longer compensation would then be payable for the first two weeks: *Ibid.*, at para. 292(e).

[87] *Ibid.*, at para. 301(c).

$120 per week. The minimum compensation payable throughout was to be pegged at the amount paid under the social security sickness benefit for a single person.[88] In 1967, this was $11.75. It was at this rate that housewives and other non-earners were to be compensated.

Permanent disability compensation, on the other hand, was to be assessed on the basis of a schedule.[89] But this compensation was also to be earnings-related. The schedule was to be used as a flexible guide and the Board was to have discretion to deal with anomalous cases. The schedule was to list serious permanent injuries and identify a percentage of total disability to be allocated to specific injuries. This schedule percentage was then to be related to earnings in the following manner: take 80% of tax paid earnings and multiply that times the schedule percentage; the answer is the amount of weekly compensation payable. The minimum amount payable was to be $20 per week. Injuries not appearing on the schedule were to be compensated on the basis of a medical assessment. For a variety of minor incapacities, the Commission recommended lump sum payments rather than earnings-related periodic payments.[90]

There is thus no proof of general damages, as such, involved in the Commission's approach. The process is a reasonably mechanical one, on the whole, although the discretion allowed would result in a measure of flexibility. The Commission conceded that some anomalies would result from this mechanical approach. There were, however, counterbalancing advantages to be gained. Because the process was mechanical it could be done quickly and with certain results. In addition, this approach seems to be consistent with the Commission's desire to eliminate from their scheme the use of adversary techniques. There would be no need, for example, for the injured party to present evidence of how bad the injury was for him personally, in order to inflate a claim for pain and suffering.[91]

In case of death, the Commission proposed that a widow be compensated at one-half the rate her husband would have received, plus a $300 lump sum payment. In addition, for each dependent child the widow was to receive one-sixth the amount her husband would have received.[92]

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[88] *Ibid.*, at para. 300.

[89] *Ibid.*, at para. 303.

[90] *Ibid.*, at para. 304(b).

[91] For a revealing empirical study of the functioning of damages for pain and suffering, see: O'Connell and Simon, *Payment for Pain and Suffering: Who Wants What, When and Why?*, [1972] Ill. L.F. 1.

[92] Woodhouse Report, at para. 302.

There was no upper age limit for receiving compensation designated by the Commission. There was, however, a lower age limit of 18 years set. This was waived for earners making $15 or more per week. Permanent incapacity was to be assessed for a young person at 18 years of age.[93] The Commission gave very little attention, however, to the problems involved in assessing lost potential earning capacity. It was recognised as a "practical problem" but little effort was made to examine in detail how this was to be solved.

Finally, the Commission provided that all reasonable costs for medical care should be paid along with various other aids for rehabilitation. In the case of death, funeral expenses up to $200 were to be paid.

b. *Rescuing the Common Law*

The White Paper examined various aspects of the Royal Commission's proposed compensation arrangements. For our purposes, one suggestion put forward in the White Paper is most important. After observing that compensation for loss of dignity seemed to be built into the Woodhouse schedule and that the discretionary power probably allowed for extreme cases of pain and suffering, the White Paper suggested that:

> ... it might be preferred to make explicit provision for compensating pain and suffering and other common law heads of damage by allowing lump sum payments with an appropriate ceiling for each category written into the legislation.[94]

The Select Committee seized that suggestion with vigour. The result is that the compensation arrangements suggested by that Committee, and provided for in the Act, bear less resemblance to the Woodhouse proposals than to the common law. The Select Committee suggestions are for the most part found in the Act.

c. *The Act*

The *Accident Compensation Act* provides for two basic types of compensation: earnings-related compensation and compensation for non-economic loss. In addition, provision is made for compensation in the event of death and for miscellaneous expenses.

The earnings-related compensation is payable in periodic payments from the eighth day after the injury at the rate of 80% of lost earning capacity.[95] The earner's lost capacity is determined by sub-

[93] *Ibid.*, at para. 283.
[94] White Paper, at para. 123.
[95] Act, at section 113.

tracting from his previous earnings, before tax, the amount he either is earning or is capable of earning after the injury. There is a maximum limit of $160 per week and a minimum level of $40 per week plus $3 per week for a non-earning wife and $1.50 per week for each child so long as the total amount paid does not exceed 90% of previous gross earnings.[96]

The initial level of compensation payable must be reviewed once the condition of a permanently incapacitated person has stabilised. At this stage a written assessment must be made and a permanent level of compensation designated. Thereafter, the level of compensation can only be adjusted upward; no reduction of compensation is allowed.[97]

The Royal Commission was concerned to avoid too large a drain of funds to short term injuries, and therefore placed an arbitrary limit on compensation for injuries of four weeks or less duration. Similar considerations prompted the Select Committee to suggest its own form of stand-down period. Rather than adopt the Woodhouse approach, the Select Committee would pay no compensation at all for the first week of disability but the full amount thereafter. Conscious of the hardship this might cause some injured persons, it further proposed that:

> ... for the first week of disability employers should be encouraged to make direct payments to injured employees in lieu of wages; and at least in the case of injuries to employees at work, employers should be placed under a legal obligation to pay...[98]

The Select Committee encouraged employers and employees to arrange sick leave entitlements to cover the first week. It further observed that where this could not be done suitable insurance cover might be arranged by the employer.

The first draft of the legislation incorporated the Select Committee idea, and then some. It placed employers under a legal obligation to pay first week compensation for all injuries, regardless of whether they were work-connected.[99] This brought a storm of protest from employers. It seemed to be their view that they should not have to bear responsibility for injuries which occur outside work in circumstances over which they obviously have no control. Their protest did not fall on deaf ears. The legislation was altered and as enacted requires an employer to pay the first week's compensation

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[96] *Ibid.*, at section 116.
[97] *Ibid.*, at section 114.
[98] Select Committee Report, at Recommendation No. 21(c).
[99] Accident Compensation Bill, No. 46-1, at cl. 107.

only for injuries "arising out of and in the course of employment". A self-employed earner must bear the cost of the first week himself for all injuries.[100]

There are several questions which arise concerning the first week provision: Was the first draft of the legislation straining the logic behind continuous cover too much to say that employers should be responsible for all injuries, work-related or not? Will an employee who is injured outside work have a negligence action for his first week's damages? Will self-employed persons who receive no protection at all have a negligence action for the first week's damages? Will unions accept an agreement that reduces their sick leave for an on-the-job injury that may in their eyes have been the employer's "fault"? Why is there no sanction for dilatory employees in the first week provision? Answers to most of these questions await experience under the scheme. A better solution to the whole problem may be to pay the first week's compensation to everyone on a social security basis, out of general taxation funds.

The Act includes provisions for compensating potential loss of income by young persons.[101] The Royal Commission had given too little attention to this matter; and the Select Committee did no more than recommend a discretionary approach based on sound policy. The failure to give adequate attention to this area has resulted in a provision which is less than satisfactory. A person who suffers a potential loss of income may receive up to $40 per month unless the Commission exercises its power to increase the compensation by up to 50% above the prescribed amount. The highest amount of earnings-related compensation available to someone under this section, therefore, is $60 per month. This is clearly an inadequate amount. But more importantly, the section cuts out a large number of potential earners by requiring that to receive this compensation a person either be injured in a motor vehicle accident or have cover as an earner under the Act at the time of the injury. This requirement will no doubt result in barring a significant number of University students from receiving benefits under this section, meager though they are.

A person receiving earnings-related compensation will continue to do so until he reaches age 65. Arrangements can be made, however, to extend payments beyond that time if the person injured is age 60 or above.[102]

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[100] Act, at section 112.

[101] *Ibid.*, at section 118.

[102] *Ibid.*, at section 128.

The greatest departure from the Royal Commission's compensation proposals is to be found in the Act's provision for compensation for non-economic loss. The Commission recommended a substantial departure from the common law; the Act, on the other hand, incorporates many of the common law concepts. The Act offers two types of non-economic compensation. For "loss or impairment of any bodily function" lump sum compensation is to be awarded according to a schedule up to $5000.[103] The schedule, drafted by an expert medico-legal committee, lists percentage for various types of permanent injury.[104] If the injury in question is on the schedule, the amount to be awarded is the appropriate percentage times $5000. There is nothing in the Act to indicate that the schedule is a flexible guide, as recommended by the Royal Commission. Rather, the amount listed is the amount to be paid. If the injury in question is not on the schedule it is up to the ACC to determine an appropriate percentage on the basis of a medical assessment.

The second type of non-economic compensation offered by the Act is for dignitary loss. For any personal injury covered by the Act, whether or not it results in permanent disability, compensation may be paid for loss of capacity for enjoying life, including loss from disfigurement, and for pain and suffering, including nervous shock. The injured person may receive up to $7500 under this section, unless no award was made in respect of permanent disability. In that case the maximum amount payable is $12,500.[105]

If the injury results in death, the Act provides that no payment be made to the deceased's estate for non-economic loss. Earnings-related compensation will be paid to dependents at the same fractional rates recommended in the Woodhouse Plan.[106] In addition, lump sum payments may be made of $1000 to the widow plus $500 for each dependent child up to a maximum of $2,500.[107] Obviously this is more generous than what the Royal Commission had offered.

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[103] *Ibid.*, at section 119.

[104] Act, at Second Schedule.

[105] Act, at section 120. The $12,500 limit payable under the Act has been criticised, especially by members of the legal profession, as seriously inadequate. A figure of $20,000 has been suggested as adequate: Wellington District Law Society Seminar on the Accident Compensation Bill, *Reports of Group Chairmen*, (Report of Mr. H. Rennie, October 7, 1972). Although presumably aimed at helping a few very serious injuries, raising the limit to $20,000 would likely have the effect of inflating all awards under the Act. It clearly would give more scope for inflating non-economic damages under section 120.

[106] Act, at section 123.

[107] *Ibid.*, at section 124.

d. *Evaluation*

There have been in this section of the article many comparisons made between the Woodhouse Plan principle of real compensation and the compensation offered by the Act. There is very little to add at this stage. The compensation provisions of the Act are clearly based in the idea that common law damages concepts are still viable. The Royal Commission wanted a much cleaner break with the old concepts. The proof of the Act's faith in the common law will come in practice. In any case, it seems clear that real compensation as the Royal Commission defined it is not found in the Act. Compensation assumes a larger importance under the Act than it did in the Woodhouse Report. This may prove to be an improvement. There must be a danger, however, of the incentive to inflate non-economic losses overtaking the important process of rehabilitating the injured person. The Woodhouse Plan attempted to escape the former while emphasizing the latter. Whether the Act should have followed suit remains to be seen.

V. Conclusion

This article largely has been devoted to an analysis of the substance of the *Accident Compensation Act*. The Act should not, however, be considered in isolation. It must be viewed in the context of the political events which surround it. Other writing on the Woodhouse Plan has done that in detail.[108] The statement by Dr. Sutch, set out at the beginning of this article, reflects the feeling that the law and politics of accident compensation reform are closely interwoven.

On November 25, 1972, a political event occurred which is sure to have an important impact on the future of the *Accident Compensation Act*. On that day New Zealand electors brought the Labour Party into power, unseating the more conservative National Party. The Act was, to be sure, no more than a minor election issue, but the Labour Party manifesto committed the Party to altering the Act to bring it more into line with the Woodhouse Plan.

Upon coming into power the Party was faced with a rather difficult situation. It had an Act passed after years of delay and painstaking work. The Act was not, however, to come into force until October, 1973. Immediately after the election, rumours were rife; the Act was out, the Labour Party was going to make changes and this meant more delays. Delay might be worthwhile if it meant a

[108] See: Palmer and Lemons, *supra*, n. 40.

better legislative product. On the other hand, "half a loaf is better than none". Perhaps it is better to give the Act a chance and in the meantime consider changes.

The Labour Party has not, at the time of writing, made public what it intends to do. The writer was privileged, however, to get the personal views of Dr. A. M. Finlay, the new Minister of Justice. It is his view that the Act should be allowed to come into force as planned and that work should then be done from the ground up on a new compensation scheme. It should be emphasized that this is not the official policy of the Party as yet. However, Dr. Finlay must be regarded as the most able Labour party politician on matters concerning accident compensation reform. His views are likely, therefore, to be very influential in the formulation of Labour Party policy.

It is then most likely that by October, 1973, New Zealand will have in operation its accident compensation scheme. This article has taken issue with many aspects of the *Accident Compensation Act,* and on balance must be taken as supporting much of what Dr. Sutch has said. It does not appear, however, that the Woodhouse Report is relegated to the archives. Within the next three years new life should be breathed into the Woodhouse concepts, if the Labour Party is to make good its promise. Lawyers, academics and politicians around the world will no doubt await with interest developments along these lines in a country well-known for its willingness to experiment with bold social reforms.

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* Since the time of writing, the Labour Party has announced that the Act will not come into force in October, 1973 as planned. Instead, implementation will be delayed until, at the earliest, April, 1974. In the meantime, the Act will be redrafted to include housewives and other non-earners: ... Evening Post, (March 10, 1973), p. 4, col. 3.