COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND

REPORT OF THE ROYAL COMMISSION OF INQUIRY

DECEMBER 1967

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THE ROYAL COMMISSION OF INQUIRY

CHAIRMAN

The Honourable Mr JUSTICE WOODHOUSE, D.S.C.

MEMBERS

H. L. BOCKETT, Esquire, C.M.G.

G. A. PARSONS, Esquire.

SECRETARY

J. L. WRIGHT

TABLE OF CONTENTS

APPENDICES

Royal Commission to Inquire into and Report upon Workers' Compensation

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ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, New Zealand, and Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith:

To Our Trusty and Well-beloved the Honourable ARTHUR OWEN WOODHOUSE, D.S.C., a Judge of the Supreme Court of New Zealand; HERBERT LESLIE BOCKETT, Esquire, C.M.G., of Wellington, Retired Secretary of Labour; and GEOFFREY ARNOLD PARSONS, Esquire, of Wellington, Public Accountant:

GREETING:

KNOW YE that We, reposing trust and confidence in your integrity, knowledge, and ability, hereby nominate, constitute, and appoint you, the said

The Honourable ARTHUR OWEN WOODHOUSE,
HERBERT LESLIE BOCKETT, and
GEOFFREY ARNOLD PARSONS

to be a Commission to receive representations upon, inquire into, investigate, and report upon the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons in employment and the medical care, retraining, and rehabilitation of persons so incapacitated, and the administration of the said law, and to recommend such changes therein as the Commission considers desirable; and, in particular, to receive representations upon, inquire into, investigate, and report on the following matters:

1. Any need for change in the law relating to claims for compensation or damages in respect of persons incapacitated or killed in employment.

2. The institution and administration of a scheme for the payment of compensation or damages, in whole or in part, by periodic payments, in respect of persons incapacitated or killed in employment.

3. The desirability of adopting, in whole or in part or with suitable modifications, any scheme or system of compensation, medical care, retraining, and rehabilitation in operation in any other country which the Commission feels justified in investigating.

4. The relationship between money payable by way of compensation or allowances or damages in respect of persons incapacitated or killed in employment and money payable pursuant to legislation concerned with social security or welfare or pensions.

5. The desirability of amending the legislation to conform with the International Labour Convention (No. 121) Concerning Benefits in the Case of Employment Injury, and the International Labour Recommendation (No. 121) Concerning Benefits in the Case of Employment Injury.

6. The provision of facilities for medical examination of persons injured or incapacitated in employment, and their treatment, retraining, and rehabilitation.

7. Any amendment that should be made in the legislation to implement any changes recommended in respect of any of the above matters.

8. Any associated matters that the Commission may deem to be relevant to the objects of the inquiry.

And We hereby appoint you, the said

The Honourable ARTHUR OWEN WOODHOUSE

to be Chairman of the said Commission:

And for the better enabling you to carry these presents into effect you are hereby authorised and empowered to make and conduct any inquiry or investigation under these presents in such manner and at such times and places as you deem expedient, with power to adjourn from time to time and place to place as you think fit, and so that these presents shall continue in force and the inquiry may at any time and place be resumed although not regularly adjourned from time to time or place to place:

And you are hereby strictly charged and directed that you shall not at any time publish or otherwise disclose, save to His Excellency the Governor-General, in pursuance of these presents or by His Excellency's direction, the contents or purport of any report so made or to be made by you or any evidence or information obtained by you in exercise of the powers hereby conferred upon you except such evidence or information as is received in the course of a sitting open to the public:

And it is hereby declared that the powers hereby conferred shall be exercisable notwithstanding the absence at any time of any one member hereby appointed so long as the Chairman, or a member deputed by the Chairman to act in his stead, and one other member are present and concur in the exercise of the powers:

And we do further ordain that you have liberty to report your proceedings and findings under this Our Commission from time to time if you shall judge it expedient so to do:

And, using all due diligence, you are required to report to His Excellency the Governor-General in writing under your hands not later than the 30th day of June 1967 your findings and opinions on the matters aforesaid, together with such recommendations as you think fit to make in respect thereof:

And, lastly, it is hereby declared that these presents are issued under the authority of the Letters Patent of His late Majesty King George the Fifth, dated the 11th day of May 1917, and under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908, and with the advice and consent of the Executive Council of New Zealand.

In witness whereof We have caused this Our Commission to be issued and the Seal of New Zealand to be hereunto affixed at *Wellington this 14th day of September 1966.*

Witness Our Right Trusty and Well-beloved Cousin, Sir Bernard Edward Fergusson, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Grand Cross in the Royal Victorian Order, Companion of the Distinguished Service Order, Officer of the Most Excellent Order of the British Empire, Brigadier on the Retired List of Her Majesty's Army, Governor-General and Commander-in-Chief in and over New Zealand; acting by and with the advice and consent of the Executive Council of New Zealand.

BERNARD FERGUSSON,
Governor-General.

By His Excellency's Command—

J. R. MARSHALL, for the Prime Minister.

Approved in Council—

T. J. SHERRARD, Clerk of the Executive Council.

Extending the Time Within Which the Royal Commission to Inquire into and Report Upon Workers' Compensation May Report

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ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, New Zealand, and Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith:

To Our Trusty and Well-beloved the Honourable ARTHUR OWEN WOODHOUSE, D.S.C., a Judge of the Supreme Court of New Zealand; HERBERT LESLIE BOCKETT, Esquire, C.M.G., of Wellington, Retired Secretary of Labour; and GEOFFREY ARNOLD PARSONS, Esquire, of Wellington, Public Accountant:

GREETING:

WHEREAS by Our Warrant dated the 14th day of September 1966, issued under the authority of the Letters Patent of His Late Majesty King George the Fifth dated the 11th day of May 1917, and under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908, and with the advice and consent of the Executive Council of New Zealand, you were appointed to be a Commission to inquire into and report upon the matters in Our said Warrant set out being matters concerning workers' compensation:

And whereas by Our said Warrant you are required to report to His Excellency the Governor-General, not later than the 30th day of June 1967, your findings and opinions on the matters aforesaid, together with such recommendations as you might think fit to make in respect thereof:

And whereas it is expedient that the time for so reporting should be extended as hereinafter provided:

Now, therefore, We do hereby extend until the 31st day of December 1967, the time within which you are so required to report without prejudice to the continuation of the liberty conferred upon you by Our said Warrant to report your proceedings and findings from time to time if you should judge it expedient to do so:

And We do hereby confirm Our said Warrant and the Commission thereby constituted save as modified by these presents:

And it is hereby declared that these presents are issued under the authority of the said Letters Patent of His Late Majesty, and under the authority of and subject to the Commissions of Inquiry Act 1908, and with the advice and consent of the Executive Council of New Zealand.

In witness whereof We have caused these presents to be issued and the Seal of New Zealand to be hereunto affixed at Wellington this 14th day of June 1967.

Witness Our Right Trusty and Well-beloved Sir Bernard Edward Fergusson, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Grand Cross of Our Royal Victorian Order, Companion of Our Distinguished Service Order, Officer of Our Most Excellent Order of the British Empire, Brigadier on the Retired List of Our Army, Governor-General and Commander-in-Chief in and over New Zealand; acting by and with the advice and consent of the Executive Council of New Zealand.

BERNARD FERGUSSON,
Governor-General.

By His Excellency's Command—
KEITH HOLYOAKE, Prime Minister.

Approved in Council—
T. J. SHERRARD, Clerk of the Executive Council.

Letter of Transmittal

To His Excellency Sir Arthur Espie Porritt, Baronet, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Royal Victorian Order, Commander of the Most Excellent Order of the British Empire, Governor-General and Commander-in-Chief in and over New Zealand.

May it please Your Excellency

Your Excellency's predecessor by Warrant dated 14 September 1966 appointed us the undersigned Arthur Owen Woodhouse, Herbert Leslie Bockett, and Geoffrey Arnold Parsons, to report under the terms of reference stated in that Warrant.

We were originally required to present our report by 30 June 1967, but this date was extended to 31 December 1967.

We now humbly submit our report for Your Excellency's consideration.

We have the honour to be

Your Excellency's most obedient Servants,

A. O. Woodhouse, Chairman.
H. L. Bockett, Member
G. A. Parsons, Member

Dated at Wellington this 13th day of December 1967.

PART 1 - SUMMARY OF REPORT

1. The Problem—One hundred thousand workers are injured in industrial accidents every year. By good fortune most escape with minor incapacities, but many are left with grievous personal problems. Directly or indirectly the cost to the nation for work injuries alone now approaches $50 million annually.

This is not all. The same work force must face the grave risks of the road and elsewhere during the rest of every 24 hours. Newspapers up and down the country every day contain a bleak record of casualties.

The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole. They receive this only from the health service. For financial relief they must turn to three entirely different remedies, and frequently they are aided by none.

The negligence action is a form of lottery. In the case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers' Compensation Act provides meagre compensation for workers, but only if their injury occurred at their work. The Social Security Act will assist with the pressing needs of those who remain, provided they can meet the means test. All others are left to fend for themselves.

Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough. No economic reason justifies it. It is a situation which needs to be changed. This is the general theme of this report and the short summary of it which follows in the next 17 paragraphs.

2. Prevention, Rehabilitation, and Compensation—Injury arising from accident demands an attack on three fronts. The most important is obviously prevention. Next in importance is the obligation to rehabilitate the injured. Thirdly, there is the duty to compensate them for their losses. The second and third of these matters can be handled together, but the priorities between them need to be stressed because there has been a tendency to have them reversed. No compensation procedure can ever be allowed to take charge of the efforts being made to restore a man to health and gainful employment.

3. Safety—This needs no elaboration. Any modern compensation scheme must have a branch concerned solely with safety. Effective education, adequate inspection, and firm enforcement must all be

backed up by the allocation of funds and the stimulus of central direction. By these means the risk of injury will constantly be tackled in advance of the accident.

4. Five General Principles—We have made recommendations which recognise the inevitability of two fundamental principles—

First, no satisfactory system of injury insurance can be organised except on a basis of community responsibility:

Second, wisdom, logic, and justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment. There must be comprehensive entitlement.

Moreover, always accepting the obvious need to produce something which the country can afford, it seemed necessary to lay down three further rules which, taken together with the two fundamental matters, would provide the framework for the new system. There must be complete rehabilitation. There must be real compensation—income-related benefits for income losses, payment throughout the whole period of incapacity, recognition of permanent bodily impairment as a loss in itself. And there must be administrative efficiency. The five guiding principles can be summarised as—

Community responsibility
Comprehensive entitlement
Complete rehabilitation
Real compensation
Administrative efficiency.

All five principles are discussed in more detail in paragraphs 55 to 63 of the Report.

5. Community Responsibility—If the well-being of the work force is neglected, the economy must suffer injury. For this reason the nation has not merely a clear duty but also a vested interest in urging forward the physical and economic rehabilitation of every adult citizen whose activities bear upon the general welfare. This is the plain answer to any who might query the responsibility of the community in the matter. Of course, the injured worker himself has a moral claim, and further a more material claim based upon his earlier contribution, or his readiness to contribute to the national product. But the whole community has a very real stake in the matter. There is nothing new in this idea. It is something which for 30 years in New Zealand has been recognised for every citizen in the country in the area of medical and health services.

6. Injury, not Cause, is the Issue—Once the principle of community responsibility is recognised the principle of comprehensive entitlement follows automatically. Few would attempt to argue that

injured workers should be treated by society in different ways depending upon the cause of injury. Unless economic reasons demanded it the protection and remedy society might have to offer could not in justice be concentrated upon a single type of accident to the exclusion of others. With the admirable exception of the health services this has occurred in the past. There has been such concentration upon the risks faced by men during the working day that the considerable hazards they must face during the rest of each 24 hours (particularly on every road in the country) have been virtually disregarded. But workers do not change their status at 5 p.m., and if injured on the highway or at home they are the same men, and their needs and the country's need of them are unchanged.

7. The Self-employed and the Housewives—Exactly similar considerations clearly apply to every other gainfully employed person such as independent contractors and others who are self employed. The same considerations must apply, also, to the women in the population who as housewives make it possible for the productive work to be done. The need is for an integrated solution with comprehensive entitlement for every man and woman, and coverage in respect of every type of accident. This is the central recommendation of our Report.

8. Incentive—Incentive must be the driving purpose of any effective scheme. Incentive offered by effective rehabilitation to get well; incentive to return to work by leaving to each man a fair margin for independent effort; incentive which is not restricted by averaging benefits or begrudging help for long-term incapacities. Real compensation must be the aim, tailored to the severity of the injury and to the needs of citizens at all levels of employment and every normal level of income. By the avoidance of easy help for the minor problem the major effort can be made where it is really needed (and the few real passengers discouraged). By such means the system will be able to provide a thrust and purpose for each individual which will never justify the gibe of paternalism; instead it will be recognised as a return on personal investment.

9. The Cost—It will be asked, we do not doubt, whether we have kept in mind the need to balance the ideal with the practical. Even if the country were entirely free from current economic pressures, the money argument would weigh heavily upon an inquiry concerned, as this is, with systems of social insurance. The proposals we make for unifying and widening the scope of present arrangements must, of course, pass the economic test. And although difficulty has arisen from a dearth of statistical information, our proposals do this.

In fact it seems that in overall terms the rationalisation put forward avoids new large expenditures and yet permits at the same time greatly increased relief where it is needed most—for the losses which are greatest. That such a result is possible may seem surprising. The reason has been hidden in the past by its very simplicity. The great number of minor claims have absorbed the great part of the funds at the expense of those whose injuries and needs have been most pressing. The various calculations are contained in Appendix 9.

10. Financial Provisions—In summary it is calculated that for coverage of the whole population in respect of industrial, highway, and domestic accidents of every kind the scheme recommended would need to be serviced by much the same amounts in total as are absorbed at present by various systems operating independently, and which have a duplication of expense and assistance. Annual sums totalling no more than $38 million are required.* If the scheme had to be operated on a 30:70 cost ratio, as with the present workers' compensation system, this figure would have to be increased by $11 million. But the figure can be kept down by streamlined administration and by avoiding unnecessary increases in assistance for minor cases. This cost includes all money compensation and expense of administration, an allocation of $600,000 for accident prevention and specialised types of rehabilitation, the sum of $6 million for contingencies, and also the full cost of hospital and medical services. It is proposed that this total amount should be financed thus:

From—	*Proposed $(millions)*	*Present $(millions)*
Insured employers	15.0	15.0
Self insurers—		
Government	3.5	3.1
Other	0.8	1.0
Self-employed	3.5	.....
Owners of Motor Vehicles	9.0	9.0
Drivers of Motor Vehicles	2.0	.....
Social Security Fund	.....	2.0
Health Department	8.0	6.5
	41.8	36.6

(The various calculations can be found in Appendix 9.)

*For costing purposes periodic payments have been commuted throughout at 4 percent interest.

The first four items in this table depend upon a levy equal to 1 percent on all wages or earnings and will increase as total wages or earnings increase. The next two items depend upon uniform per capita levies and will increase as the population increases. The level of these proposed assessments can and should be pegged. This we recommend for reasons given in Part 8 of the Report. We recognise that the total of contributions from the various groups exceeds estimated expenditure by $3.8 million. But the margin is on the side of income as it should be: and it is more important at this stage to balance the equities than to attempt an exact and final balance of accounts.

11. The Level of Benefits—New Zealanders are not so dependent that they must have maximum outside assistance for every minor setback; we are satisfied that most people will readily accept our proposal that for minor or for short-term incapacities approximately the help at present available under the Workers' Compensation Act is sufficient. And we believe they will certainly do so if they know that it will enable their seriously injured fellow workers, without proof of fault, to be provided with compensation at levels approaching common law damages. In any event no one can know in advance into which category he or she might fall. These considerations form the basis of the new approach to all assessments of compensation. The emphasis is upon incapacities which take a man away from his work for longer than three or four weeks; or which leave him with some material permanent disability. An automatic award will be made in respect of every injury at a level for total incapacity of 80 percent of previous tax-paid income, and proportionate awards for partial incapacity. Moreover, it will be possible to provide payments for so long as the incapacity lasts, and if necessary for life; and also to lift the maximum weekly payments from the present ceiling of $23.75 to a new maximum rate of $120. No longer should artificial barriers be allowed to work injustice in particular cases. A realistic ceiling at such a level is necessary today, and it is possible (as Appendix 7 discloses) because it involves so insignificant a drain on the fund.

12. Periodic Payments—Because these are periodic payments they can and should be increased if the condition deteriorates following assessment. But the converse would not apply. Periodic payments must not introduce uncertainty or put a brake on personal initiative and an early return to work. On the other hand they should not be adversely affected by inflation. Accordingly we have recommended suitable automatic adjustments at two-yearly intervals to accord with changes in the cost of living.

13. Examples of Benefits—To illustrate the proposed benefits four of the simplest examples will suffice. First, a totally incapacitated worker of about 30 whose tax-paid income has been approximately $2,500 per annum would receive regular payments free of tax for the rest of his life totalling $2,000 per annum, and having an equivalent capital value of about $40,000.* In addition he would be provided with a full-time attendant should this be necessary. Then there is the older man of 45 who has lost a hand. If his tax-paid income had been about $42 per week he would be paid weekly compensation of approximately $17 for life—a sum equivalent to a damages award of $14,750. Then there is the housewife of 35 injured in some domestic accident and left with a permanent disability equal to about 35 percent of total incapacity. She would receive payments having a capital value of about $7,250. Finally, a widow whose husband had earned a tax-paid income of $5,200 would be entitled to receive weekly compensation of $40 increased by one-third of this amount or $13.33 for each of her first three dependent children.

14. The Need for Change—During the course of our inquiry questions were asked as to the need for any change at all. It is not so remarkable, however, that compensation for injury has failed to attract the crusading interest of people. The average man is not greatly stimulated by potential difficulties: until they actually beset him he remains an optimist and a sturdy supporter of what is familiar. Nevertheless, there is clear dissatisfaction with the present level of benefits provided under the Workers' Compensation Act, and the very severe limitation put upon their duration; and despite some approval there is also penetrating criticism of the erratic achievements of the damages action. The arguments concerning these various matters are mentioned in Parts 3 and 4. Taken together with the clear need for community-wide responsibility in any comprehensive scheme of occupational insurance, they have led to what we regard as an inevitable recommendation. In our opinion the time has clearly come for the common law action to yield to a more coherent and consistent remedy in the whole area of personal injury. We recommend, therefore, that the Court action based on fault should now be abolished in respect of all cases of personal injury, no matter how occurring.

15. The Insurance Companies—For three major reasons it would not be appropriate to permit the new scheme to be administered by the insurance companies. The principal reason is that such a comprehensive and compulsory scheme of social insurance could not reasonably be handed to private enterprise. Even in the case of more

*Commuted at 4 percent interest.

limited schemes for industrial injuries 70 countries have already acted upon this principle including, for example, the Netherlands and Ireland in the last 18 months. Nobody would suggest that the administration of universal superannuation or the system of health benefits should be undertaken by business organisations. The scheme is founded upon the principle of community responsibility. Directly or indirectly everyone must contribute to it, and clearly it should be handled through an agency of the Government. We have thought, however, that the administrative authority should have independence and autonomy; and for this reason we recommend that the scheme should be handled by an independent authority within the general responsibility of the Minister of Social Security and attached to his Department for administrative purposes. The next reason is the need to ensure that the assessment of benefits and the administration generally should be free from dispute and contention. Such an adversary atmosphere could be avoided by an independent administrative authority set up by the State and determined to act upon the principle that wherever there was a doubt the benefit of it should go to the injured person or his dependants. We do not think it could be avoided in the area of private enterprise. The third reason relates to the cost of administration. Over recent years an amount equal to 40 percent of the amounts actually paid out in benefits under the Workers' Compensation Act has been required by the insurance companies to cover their various expenses and leave some reasonable margin for profit. The evidence is conclusive that the figure could be reduced to approximately 10 percent if the scheme were handled by a single independent authority, and an amount of $3 million each year could be saved at present for the group of work-connected injuries alone.

16. Opinion Overseas—The principles outlined in paragraph 4 have begun to receive some attention in countries overseas, and we do not doubt that before long they will begin to be acted upon. They are part of an important and even radical reappraisal of social planning resulting from increased productivity and the rapidly changing attitudes and aspirations which productivity has encouraged. There are clear signs in several countries that limited forms of social security are giving way to wider and realistic methods of what might be called occupational insurance. Nevertheless, we believe the proposals we make have no direct parallel elsewhere, and they have been designed in New Zealand to meet New Zealand conditions. This is an area in which New Zealand has previously led the world. In our opinion real and meaningful protection for the entire working population, including housewives, and covering the risks of the whole 24 hours of each day, is certainly within New Zealand's capacity immediately.

17. Sickness and Disease—It may be asked how incapacity arising from sickness and disease can be left aside. In logic there is no answer. A man overcome by ill health is no more able to work and no less afflicted than his neighbour hit by a car. In the industrial field certain diseases are included already. But logic on this occasion must give way to other considerations. First, it might be thought unwise to attempt one massive leap when two considered steps can be taken. Second, the urgent need is to co-ordinate the unrelated systems at present working in the injury field. Third, there is a virtual absence of the statistical signposting which alone can demonstrate the feasibility of the further move. And finally, the proposals now put forward for injury leave the way entirely open for sickness to follow whenever the relevant decision is taken.

18. Summary—On the basis of the principles outlined, the scheme proposed—

would 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;

would entitle that person to compensation both for permanent physical disability and also for income losses on an income-related basis;

would provide for regular adjustment in the level of payment to accord with variations in the value of money;

would provide benefits, if necessary, for life, and in certain circumstances they would be commutable in whole or in part to lump sum payments;

would lift the present weekly maximum rate of compensation to $120 and thus safeguard the interests of persons on every normal level of income;

would be geared to urge forward their physical and vocational rehabilitation;

and in all these ways it would provide them with effective insurance for all the risks of the day. If the scheme can be said to have a single purpose it is 24-hour insurance for every member of the work force, and for the housewives who sustain them.

PART 2 – INTRODUCTORY SURVEY

I – PROCEDURE

19. The terms of reference were first advertised in September 1966 in metropolitan newspapers, and organisations and persons wishing to make submissions were invited to do so. At a preliminary public sitting on 29 September 1966 consideration was given to the procedure to be adopted, and we were addressed by the Solicitor-General and by counsel and by others representing various organisations.

20. It was explained that the Commission would conduct its inquiries on a wide front, and proposed at public hearings to provide adequate opportunity for all those wishing to make submissions. It was announced that necessarily the Commission reserved the right to make investigations other than by means of public hearings, and that in particular the members of the Commission would travel overseas in order to make a further study in other countries of the various matters in issue. It was arranged to commence public hearings in Wellington on 1 November, and an announcement was made that the Commission would sit in other cities should it become clear that this was desirable; and that further hearings would be held following the overseas visit.

21. The first section of our public sittings lasted from 1 November to 7 December 1966. During this period we sat in public on 15 days of which two days were occupied at sittings in Auckland and one day at Christchurch. No request was received that we should sit in any other cities than these. Forty-seven organisations or persons accepted the invitation to present submissions before the Commission, in person or by a representative. Appendix 1, Part I, provides a list of the organisations and persons who made public submissions during the first section of our hearings.

22. On 17 February 1967 the Chairman and Mr G. A. Parsons left New Zealand in order to proceed with investigations in selected overseas countries. At this time it was not possible for the third member of the Commission, Mr H. L. Bockett, to leave New Zealand, but fortunately he was able to join the other two members in New York on 7 April. During this period the Commission visited Vancouver, Chicago, Toronto, Montreal, Rome, Geneva, Stockholm, London, New York, Washington, San Francisco, and Sydney. In

all of these cities we were given advice and assistance which has been most valuable to us, and we wish to express our sense of great indebtedness to all those concerned. Appendix 2 provides a list of those who assisted us so generously during this important and rewarding part of our investigations.

23. These inquiries overseas were completed by the beginning of May, and arrangements were then made to conduct the second part of the public hearings in New Zealand. At this stage all those who had expressed any interest in our inquiry were advised by letter (Appendix 3) that we would be glad to have some further assistance with regard to the matters therein mentioned. On 24 June advertisements were placed in the metropolitan newspapers advising that public hearings would be recommenced on 4 July at Wellington.

24. In the event this second part of the public hearings occupied three days, and during that time 19 persons or organisations appeared to make initial or further submissions. Appendix 1, Part II, contains a list of those who made public submissions on this occasion. In addition to submissions made during the public hearings a number of written communications were received from time to time. Wherever these appeared to amount to submissions they were treated by us accordingly. A list is contained in Appendix 1, Part III.

25. Copies of public submissions were received (usually in advance of the hearing) and were made available to those interested. In addition a verbatim record of the proceedings during all public hearings was kept. A copy of all this material will be deposited in the General Assembly Library at Wellington.

26. In addition to the submissions received by us we have supplemented our inquiries by recourse to a great deal of written material published both overseas and in this country. A bibliography is contained in Appendix 4.

27. We wish to express our thanks to all who presented submissions to us and also to many others who have provided us with information together with much constructive advice and useful criticism.

28. We have received the loyal assistance of our small staff throughout the period of this inquiry, and for this we are grateful. In particular we must record our high appreciation of the services of our Secretary, Mr J. L. Wright. His understanding of administrative problems and his conscientious attention to all aspects of the inquiry have been of great assistance to us.

II–PLAN OF THE REPORT

29. It seemed useful to prepare a short summary of the more important considerations which have guided us, and some of the broad conclusions we have reached. For easy reference this has been placed before the commencement of the Report itself and comprises the whole of Part 1.

30. There are eight parts to the Report proper. Part 2 contains a reference to the nature and scope of the inquiry, a short survey of the general position as it stands today, and an outline of the principles which we believe should direct the form of any modern scheme of compensation for personal injuries. Parts 3, 4, and 5 provide some analysis of the achievements of the common law action based on fault, the workers' compensation legislation, and the social security system. Part 6 of the Report contains our proposals for a new and comprehensive scheme together with an account of the reasons which have led to the various recommendations. Part 7 deals with accident prevention and the physical and vocational rehabilitation of injured persons. In Part 8 there is an outline of the financial implications of these proposals. Part 9 brings our general conclusions and recommendations together in a convenient form.

III–SCOPE OF INQUIRY

31. The opening words of the Warrant appointing this Royal Commission require us to survey and report upon "the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons in employment". But the evaluation of existing or proposed processes is not to depend upon these economic factors alone. The reference to them is followed immediately by specific mention of an issue of prime consequence which is repeated in the sixth paragraph of the Warrant. This anticipates that any balanced system of compensation must be organised to accelerate and promote in every way the physical well-being and the vocational rehabilitation of injured workers. And so we interpret our general responsibility.

32. The Commission is furthermore required to investigate and report upon "the relationship between money payable by way of compensation or allowances or damages" in respect of injured workers, and money payable to them "pursuant to legislation concerned with social security or welfare or pensions". The question involves problems which previously have been given only piecemeal attention under systems working independently; and usually with little reference to allied difficulties or the wider issues of principle which should control related processes. There are questions, for example, as to whether it will be possible by liaison alone to solve existing and avoid new anomalies; or whether it remains sensible to have several approaches thrusting off independently into this general field. Today any rational solution seems to demand a willingness to reconsider in a comprehensive way the current validity of several apparently established theories and ideas.

33. The Commission is directed also to investigate and report upon any associated matters deemed by it to be relevant. Some of the wide issues mentioned in the preceding paragraph are clearly relevant by reason of their close identity with or the pressure they bring to bear upon matters contained in the detailed terms of reference. And it is important to consider, so far as it can be done, the needs which may not yet have matured but which are evolving rapidly. The rate at which social institutions and ideas are being turned upside down is not merely dramatic—it is accelerating every year in a fashion which demands a great deal of mental energy to keep pace. It cannot be good enough, therefore, to adjust merely to contemporary needs. Some deliberate attention should be given to the foreseeable demands of the years immediately ahead. And if there may seem to be a weight of tradition against change, at least it

is worth remembering that the apparent heresies of one generation become the orthodoxies of the next. The ultimate validity of any social measure will depend not upon its antecedents but upon its current and future utility.

34. For the foregoing reasons we have found it essential to examine the social implications of all the hazards which face the work force, whether at work or during the remaining hours of the day. Only by doing this have we been able to make recommendations which we believe can be handled comfortably by the country in terms of cost, and which will provide a co-ordinated and sensible answer to a series of interrelated and complex problems. Our decision that it was impossible to resolve the problem of industrial injuries in isolation was reinforced by the findings and recommendations of the recent inquiry conducted by the Committee on Absolute Liability. These are referred to in paragraphs 137 to 141 of this Report. This inquiry supplements our own. We acknowledge the assistance which the Report of the Committee has been to us.

IV–THE PRESENT POSITION

35. Unlike the position in several other modern countries, the victims of industrial accidents in New Zealand are able to turn for relief to three distinct but overlapping processes. No consistent design or purpose has produced this situation. It has arisen over the years, without organisation, and as the result of differing social attitudes. We have become accustomed to it, and as it seems to work it is in a general way accepted.

36. The first of the processes to appear was the common law action of negligence. It is a judge-made remedy which has a history, as an independent civil wrong, going back over the last century or so. Increasing industrialisation produced social pressures which demanded some enlargement of the rather rigid forms of action available, and in the absence of any move by Parliament the Judges applied the simple concept that even inadvertent fault, if it could be proved, would enable an innocent victim to shift the burden of his loss by receiving an indemnity in the form of damages. By the end of the nineteenth century damages were also available to those who could show that their injury had resulted from a breach of a section of one of the industrial statutes, and whether or not the breach could be labelled as negligent.

37. However, there are three possible results of a damages action. First, if negligence is proved, or alternatively, a breach of the duty imposed by one of the industrial statutes, then the Court will award a complete indemnity. Second, if the injury resulted from the fault of both parties the losses will be apportioned between them. Third, if there was no fault at all the Court will do nothing. For example, it ignores the not illogical thought that a person who is the innocent cause of a loss might reasonably be asked to share with his equally innocent victim the loss he has caused.[1]

38. Then in 1900 came the Workers' Compensation Act. For vast numbers of persons the common law remedy had proved to be no remedy at all. Either they were unable to prove any negligence, or they were defeated by one of several overgenerous defences which had been allowed as a shield for those under attack. Accordingly this new Act enunciated the downright principle that, regardless of fault, employers must share some of the losses of employees who suffered injury from accident arising out of and in the course of employment. This remedy, which provides a rather limited form of

[1]See para. 86 *infra*.

compensation, is regarded generally as the oldest form of social insurance to appear in modern societies. In New Zealand the enactment was modelled on similar legislation passed three years earlier by the United Kingdom Parliament, and this in turn had its origins in German legislation dating from 1884.

39. There are criticisms of the common law and compensation processes which stem from the limitations under which each must operate. Because the damages action equates responsibility with fault the damages are reduced for contributory negligence, and what is more important, the action provides no relief for large numbers of people who either lack the proof of fault or who are the victims of what lawyers pleasantly call "an act of God". On the other hand, although the compensation system fills a gap by assisting a whole general class, its benefits are averaged out at levels considered to be inadequate as true recompense; it also ignores the interests of that class for two-thirds of each day. The one process ensures overall economy by limiting the beneficiaries, and the other by restricting the benefits.

40. The third process is the general system of social security which received a great push forward in the years before the Second World War. On a flat rate basis it provides modest insurance against need for those able to qualify within the income-related means test. When earnings have been interrupted, for example, by physical incapacity, an application can be made for a sickness benefit, or in some circumstances for an invalidity benefit. But the social security system does not attempt to compensate for losses. It provides a basic income for subsistence.

41. In the case of work-connected injuries the first and second of these remedies are available as alternatives. The third, however, can often be found to have supplemented lump sum awards by providing subsequent periodic benefits. This fact, congenial enough to the recipients, invites criticism that the system as a whole permits anomalous double payments. Lord Beveridge noted the point in his famous report for the United Kingdom Government upon social insurance and allied services, written in 1942. In referring to a similar situation which then existed in the United Kingdom he said that—

> "an injured person should not have the same need met twice over. He should get benefit at once without prejudice to any alternative remedy, but if the alternative remedy proves in fact to be available, he should not in the end get more from the two sources together than he would have got from one alone."[2]

[2]Cmd. 6404, para. 260.

But this anomaly is not the only or indeed the most serious difficulty which arises from a fragmented method of handling the whole problem of adjusting the losses which follow upon injury.

42. In contrast to the situation of those who suffer work-connected injuries, workers who have the misfortune to be injured outside the course of their employment must take their chance of proving negligence, or if they fail, depend upon qualifying for the much more slender assistance provided by the social security programme. And many fail in both respects. There will be confident assertions that this is an entirely suitable state of affairs and that if people fall victim to the hazards of modern living, then in general they should battle along unaided by community responses. We do not agree. We regard it as an entirely anomalous situation, and we think that the present discordant methods of handling it are now obsolete. Indeed it is the feature of this inquiry that, at the outset, we are faced by a problem that no longer can be swept easily to one side if any just and coherent solution is to be found to the reasonable claims of incapacitated workers upon the community which has been prepared to accept the benefit of their work.

43. Once it is accepted that it is in the national interest to provide for deserving groups of workers some form of comprehensive insurance which in the long run the public is to support, then any discrimination between people in the same general situation could hardly be justified. In the case of the Workers' Compensation Act it is true that in an immediate sense compensation is provided by compulsory levies upon all employers in the form of insurance premiums. Nevertheless, as the New Zealand Law Society has recognised in its general submissions, it is not difficult to demonstrate that in the end it is the community as a whole which pays. Clearly the premiums are built into the costs of industry and automatically become part of the price to be paid for the product. Since the insurance scheme is a compulsory one the premiums can be regarded as a sort of indirect tax borne finally by us all.

44. This compulsory insurance extends also to cover the negligence action which frequently is used by employees to recover damages from their employer. And because it does, the cost of all successful claims falls not upon individual employers but is similarly shared by industry as a whole, and finally by the community, in the fashion outlined in the preceding paragraph.

45. Social security benefits, too, are provided by all citizens, although by means of direct taxation. It is unnecessary at this point

to describe in detail the level of benefits but they do not pretend to be a substitute for common law damages or for the compensation provided by the Workers' Compensation Act.

46. It is obvious enough that a worker does not cease to be a worker as he leaves his factory at 5 o'clock. But existing processes refuse to accept his continuing status. If he slips and is disabled in the factory shower-room as he prepares to go home, he will be entitled to all the advantages of the Workers' Compensation legislation and may even succeed against his employer in a negligence action. Yet if he suffers the same accident upon his arrival at his home he will receive nothing at all, or at best the assistance provided by the Social Security Fund. From the point of view of the injured workman these inconsistent results develop from a diagnosis by causes and a disregard of their similar effects. When it is recognised that in each case it is the community which pays, the discrimination assumes an air of unreality.

47. If one can ignore tradition it would seem far better for the work force to be able to look forward to a uniformly generous treatment of all injuries regardless of cause; and far better for society to deal with the whole problem on a basis both comprehensive and consistent. In 1942 Beveridge discussed some of these matters in his report. In the course of doing so he accepted the need for a unified scheme, but then he provided three arguments which he considered would support the situation described in the last paragraph. We know of no other arguments which can be advanced in its favour, and today these are generally rejected; and rightly so, we think. These matters are mentioned in the following paragraphs 48 to 54.

V—THE BEVERIDGE REPORT

48. In paragraph 80 of the Beveridge Report[3] there is the blunt statement that the Workers' Compensation Act (upon which the New Zealand legislation is modelled) "was based on a wrong principle and has been dominated by a wrong outlook." The reasons for this statement follow and then it is said—

> "There should be no hesitation in making provision for the results of industrial accident and disease in future, not by a continuance of the present system of individual employer's liability, but as one branch of a unified Plan for Social Security. . . . If a workman loses his leg in an accident, his needs are the same whether the accident occurred in a factory or in the street; if he is killed the needs of the widow and other dependants are the same, however the death occurred. Acceptance of this argument and adoption of a flat rate of compensation for disability, however caused, would avoid the anomaly of treating equal needs differently and the administrative and legal difficulties of defining just what injuries were to be treated as arising out of and in the course of employment. . . . *A complete solution is to be found only in a completely unified scheme for disability without demarcation by the cause of disability.*" [The italics are ours.]

49. This is a strong statement by a man who was regarded at the time as the foremost expert in the field. And the conclusion he expressed a quarter of a century ago may be a surprise to many in this country who have become sufficiently accustomed to the system (which still is operating here) that they accept it even now as part of an unchanging order of things. Subject to the reference to a flat rate system of benefits (which we consider to be an inappropriate form of compensation for workers whose varied earnings have suddenly been cut off through injury) we accept the conclusion reached by Beveridge as the inevitable result of any detached analysis of the position today.

50. Yet it will be said that in an important respect Beveridge ignored his own opinions. He certainly proceeded to recommend a unified scheme of national insurance; but it was one which would retain all the demarcation problems of the old system because under it work-connected injuries would be compensated on a more favourable basis than incapacities arising from other causes. This recommendation, however, he explained, not on pragmatic grounds or

[3]Cmd. 6404.

for the likely economic reasons that at the time all pensions could not be raised together, but on the basis of three arguments which have since been much criticised.

51. In the words of the report[4] these arguments are—

(1) "Many industries vital to the community are also specially dangerous. It is essential that men should enter them and desirable, therefore, that they should be able to do so with the assurance of special provision against their risks."

(2) "A man disabled during the course of his employment has been disabled while working under orders."

(3) "Only if special provision is made for the results of industrial accident and disease, irrespective of negligence, would it appear possible . . . to limit the employer's liability at Common Law to the results of actions for which he is responsible morally and in fact, not simply by virtue of some principle of legal liability."

THE FIRST ARGUMENT

52. Although Beveridge described the first argument as a strong one, it cannot stand against three principal criticisms. First, the daily acceptance of greater risks may well justify additional earnings by way of danger money. Nevertheless, the degree of risk does nothing to aggravate the degree of subsequent injury should the risk materialise, nor can it fairly affect the level of compensation which should be paid for that injury. To adapt a classical dictum the argument attempts to equate the greater risks of injury with the actual fact of greater injuries. Then there is a second criticism. It concerns the use which was made of the argument. One might ask, if it is the case that workers in dangerous occupations deserve higher levels of compensation, then why did Beveridge not suggest that the lesser hazards of farm hands or chefs would oblige them to accept a lower level of compensation for their similar injuries than steel workers or steeplejacks. He used the argument to support preferential treatment for every work-connected injury, and yet it is applicable only to the claims of those in specially hazardous industries. Finally, there is the criticism that the claim for preference disregards the multiple and dangerous hazards which are increasingly affecting everyone during the hours outside the working day. It ignores the unchanged status of every productive workman during those extra hours, together with the unchanged responsibilities which remain with him if he is injured during that time.

[4]Para. 81.

53. Beveridge himself regarded the second and third arguments as weaker than the first.[5] The second, like the first, is open to the criticism that it concentrates upon the environment within which the injury might occur. Negligence aside, special recompense cannot be justified by the fact that some workers might suffer injuries while accepting normal directions. The third argument has no contemporary significance in New Zealand. If the common law action is to remain there would appear to be no good reason why the present responsibility of employers should be limited in any way, and no suggestion has been made during the course of our inquiry that this should be done. And if the common law action is to disappear the point has no relevance.

54. Accordingly we are left in no doubt that the original conclusion reached by Beveridge must be accepted because it was correct. The solution does in fact lie "in a completely unified scheme for disability without demarcation by the cause of disability"[6]; and if real effect is to be given to such a scheme then clearly no class within it could be marked out for preferential treatment.

[5]Para. 83.
[6]See para. 48 *infra*.

VI–THE OBJECTIVES FOR A COMPENSATION SYSTEM

55. In the final analysis any change in present methods must depend upon whether it can be afforded; and whether the need for it is clear. The first severely practical question is dealt with in Part 8 of this Report. The other involves an analysis of the system in operation. To make an effective analysis it is desirable at this point to decide what should be the role of any modern system of compensation for injured persons. Unless the target is identified it is unlikely that present achievements will be evaluated on any rational basis or the key be found to something better. It is possible to lay down five guiding principles for such a system.

First, in the national interest, and as a matter of national obligation, the community must protect all citizens (including the self employed) and the housewives who sustain them from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity;

Second, all injured persons should receive compensation from any community financed scheme on the same uniform method of assessment, regardless of the causes which gave rise to their injuries;

Third, the scheme must be deliberately organised to urge forward the physical and vocational recovery of these citizens while at the same time providing a real measure of money compensation for their losses;

Fourth, real 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;

Fifth, the achievement of the system will be eroded to the extent that its benefits are delayed, or are inconsistently assessed, or the system itself is administered by methods that are economically wasteful.

These principles can be summarised as—

Community responsibility
Comprehensive entitlement
Complete rehabilitation
Real compensation
Administrative efficiency.

We proceed to examine them in turn.

COMMUNITY RESPONSIBILITY

56. This first principle is fundamental. It rests on a double argument. Just as a modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity. And, since we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on a basis of equity by the community.

COMPREHENSIVE ENTITLEMENT

57. The second principle involves an acceptance of the argument advanced in paragraphs 42 to 46. It cannot be regarded as just that workmen sustaining equal losses should be treated unequally by society. The productive section of the community must sustain the elderly and the young, and the latter groups cannot reasonably expect to be provided with a form of social insurance on the same level. But subject to this consideration there can be no justification for providing from community funds for the same class of worker entirely inconsistent awards for precisely similar incapacities merely because fortuitously the causes which gave rise to them have at different stages of our social development been the subject of conflicting responses.

COMPLETE REHABILITATION

58. The third principle would seem to state the obvious. Nevertheless, although it is always remembered that injury losses must be quantified in money terms, it is often overlooked that the rehabilitation of incapacitated workers cannot be achieved by money payments except to the extent of money losses. 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.

REAL COMPENSATION

59. Clearly if compensation is to meet real losses it must provide adequate recompense, unrestricted by earlier philosophies which put forward tests related merely to need. Such an approach may have been appropriate when poverty was a widespread evil demanding considerable mobilisation of the country's financial resources. But

average modern households, geared to the regular injection of incomes undreamed of at the turn of the century, have corresponding commitments which do not disappear conveniently if one of the hazards of modern life suddenly produces physical misfortune. Increasing affluence has brought with it additional social hazards for every citizen; but fortunately, at the same time, it has left society better able to afford their real cost.

60. To the individual concerned, the cost will include any permanent physical deprivation which he might have to endure following an accident. Such disabilities can have damaging effects upon the ordinary activities of both young and old, regardless of their influence upon a capacity to work in any given occupation.

61. Accordingly, we are in no doubt that in modern conditions a compensation system of the type under discussion should rest upon a realistic assessment of actual loss, both physical and economic, followed by a shifting of that loss on a suitably generous basis. If there might seem to be an issue as to whether the compensation due to injured workers should be restricted to meet their current needs or be assessed on a uniform flat rate basis, then these are propositions which we reject as entirely unacceptable. These are the considerations which support the fourth principle.

ADMINISTRATIVE EFFICIENCY

62. This final principle needs no elaboration. It speaks for itself in terms which are clear enough. It looks to evenness and method in every aspect of assessment, adjudication, and administration. The collection of funds and their distribution as benefits should be handled speedily, consistently, economically, and without contention.

CONCLUSION

63. Against the background of these principles it is convenient to bring forward the general conclusion we have reached concerning the present processes. For all the reasons which follow we are satisfied that no useful, logical, or economic purpose remains in this categorised system; that it gives rise to injustice; that it perpetuates anomalies; and that the time has clearly arrived for its replacement. We consider the various arguments in the next parts of this Report.

PART 3 – THE COMMON LAW ACTION

64. In the following six chapters the common law action is discussed in the following way:

Chapter VII—its general form.

VIII—argument concerning it.

IX—the position overseas.

X—previous discussion in New Zealand.

XI—submissions made to us.

Our conclusions concerning the common law action are set out in paragraphs 170 and 171, but have been brought forward in short form into paragraphs 82 and 83.

VII – GENERAL FORM OF THE ACTION

THE HISTORY OF NEGLIGENCE

65. There is a widely held belief that the negligence action has an age-old authority which extends back over the centuries. The submission was made to us, for example, that it would be wrong to interfere with a principle which had enabled justice to be done between citizens in many countries of the world for hundreds of years. An argument which relies upon the apparent mystique or antiquity of an institution could never be decisive in its favour; and certainly not if there seemed to be good practical reasons for discarding it. But actually the development of negligence as an independent tort is comparatively recent. Indeed it is characteristic of the way in which, despite the influence of precedent, the law has been prepared to respond, sometimes slowly, to changing social attitudes.

66. In earlier times actions for compensation looked to the interest harmed, with little or no regard for the quality of the conduct which caused the harm. The event determined liability. Winfield traced the evolution of the fault principle in a well known essay entitled *The History of Negligence in the Law of Torts*.[7] In his

[7] 42 Law Q.R. 184.

view its history goes back for something more than a century. But even in 1860 the great American judge Holmes abruptly dismissed the first attempt to classify remedial actions under the general heading of torts by writing: "We are inclined to think that torts is not a proper subject for a law book."[8] The New Zealand jurist Sir John Salmond as recently as 1924 still ignored the existence of negligence as an independent cause of action.[9]

67. In his book on torts Professor John G. Fleming has described the rise of the fault principle as broadly coinciding with the industrial revolution, and he has said that the negligence concept in little more than a century's development completely transformed the basis of tort liability. He went on to say, nevertheless, that "Neither society nor law is static. The forces that moulded nineteenth century thought have long been spent, and the assumptions underlying the negligence concept are increasingly subjected to challenge. The individualistic fault dogma has been replaced by the mid-twentieth century quest for social security."[10]

THE STANDARD OF CARE

68. The concept of negligence depends upon an objective standard of reasonableness. The conduct complained of is compared with the conduct to be expected of the reasonable man of ordinary prudence in the same circumstances. A reasonably foreseeable risk of harm to others must therefore be the subject of precautions reasonably adequate to the risk and to the circumstances generally. It is not a standard of perfection. If it were, every conceivable risk of community living would have to be guarded against to the point of bringing to a halt many activities that seem to have a considerable social utility. The common law recognises that the inseparable risks of these activities are accepted by the community as part of the bargain which must be paid for them. On the other hand the standard requires care to be taken which is reasonably proportionate to the risks involved, and if injury occurs by an act or omission which fails to measure up, then the fault system takes charge, liability for the injury follows, and damages must be paid.

THE DUTY OF EMPLOYERS

69. Like everybody else, employers are liable for their own personal negligence, but they have a further vicarious responsibility for the negligence of their employees acting in the course of employment. Accordingly they have a responsibility for the overall system

[8]Seavey, 56 Harv. L. R. 72.
[9]Salmond, *Law of Torts*, 6th Ed.
[10]Fleming, *Law of Torts*, 3rd Ed., p. 108.

of work including the working conditions, the plant and machinery provided, the methods of supervision, and the way in which the work is carried on. Where responsibilities are delegated to managers or foremen or other employees, the employer himself must face the consequences if the delegated responsibility is discharged negligently. Where industry is organised and concentrated in large undertakings, the vicarious responsibility of the employer is naturally a matter of considerable significance. The body of shareholders, who are the real owners of large companies, must act through various levels of employees from management downwards. In these cases the Court is obliged, therefore, to examine their responsibility, not as employers in the real sense, but in terms of the acts or omissions of various employees who carry forward the undertaking.

70. Obviously enough, an employee acting in the course of his employment, who happens to be involved in an accident which can be attributed to the fault of some third person is entitled to recover damages from that person. In this event the employer is entitled to recover from his employee any amounts which may have been paid to the latter in terms of the Workers' Compensation Act.

CONTRIBUTORY NEGLIGENCE

71. But, of course, a plaintiff must take reasonable care for his own safety, and if he fails to do so he will be negligent himself. In this event, if he has succeeded in proving negligence against a defendant, whether it be his employer or some third party, the damages will be apportioned in such a way that an appropriate deduction will be made from the damages otherwise payable, because of his own negligence.[11]

BREACH OF INDUSTRIAL STATUTES

72. There has been a volume of legislation designed to improve safety and health in factories and other industrial undertakings. This legislation frequently contains provisions obliging the occupier or the employer, as the case may be, to fence the dangerous parts of machinery, to provide scaffolding of designated construction for particular types of work, to provide a safe means of access to places of work, to place guard rails in certain circumstances, and general matters of this description. Sometimes the duty is qualified by the reasonable practicability of its performance, and sometimes it is not. In any event a failure to comply with the duty as laid down involves liability on the basis that the employer has failed to meet his duty and so is at fault without need to prove negligence.

[11]Contributory Negligence Act 1947, section 3.

73. At one time there was much argument as to whether the breach of such a statutory duty gave rise to a civil action for damages. It was said that provisions of this description could be enforced only by penalty in the criminal courts, and it was claimed that a civil action based upon a breach of such a regulation could not succeed unless the breach was accompanied by negligence. In 1898, however, it was held by the courts in England that a breach of statutory duty, irrespective of negligence, would in fact give rise to an award of damages because enactments of this sort are intended by Parliament to be of benefit to workmen, and penalties received by the Crown obviously could not compensate them in any way for their injuries.

THE NATURE OF DAMAGES

74. Damages are awarded by the court as an indemnity. They are designed to put the injured person in the same relative position as he was in before the harm was done to him. In the assessment of damages certain recognised heads of damage are taken into account. They can be described as—

(1) Actual economic losses including future losses by reason of diminished earning capacity;

(2) Pain and suffering;

(3) Loss of capacity to enjoy life.

75. On the principle that there must be an end to litigation the damages are assessed finally at the trial of the action and without possibility of subsequent review, no matter how greatly any of the relevant circumstances might alter in the future. And the assessment itself is supposed to be made with a detachment which disregards both the financial position of the parties and the degree of fault which caused the loss, whether it be slight or whether it be gross. Clearly enough the assessment as to future losses is an entirely conjectural exercise, and precision is impossible. In the case of future pain and loss of capacity to enjoy life, the difficulty is greatly increased by the need to put money values on physical disabilities. The disparity which occurs in awards of damages throughout the country is undoubtedly a reflection of all these difficulties.

76. If an injured person should die as the result of the injuries, his personal representatives are entitled to make a claim on behalf of any dependants for the losses which they have suffered. The measure of the losses is the extent to which it can be shown that the dependants would have been assisted by the deceased had he lived. This assessment is, of course, fraught with the same difficulty

mentioned in the preceding paragraph, since estimates must be made not only of the future earnings of the deceased had he lived and the length of his working life, but also the extent to which each of his dependants might have received regular or other benefits from him; and in the case of the widow, whether or not she might marry in the future and cease to need or be entitled to part of the award.

77. In all cases assessment of income loss must take into account the likely incidence of income tax. It is not the taxable income which is the significant figure but that income after tax has been paid.

VIII–DISADVANTAGES OF THE COMMON LAW PROCESS

78. There are four principal criticisms of the common law action. They describe the philosophy upon which it depends as illogical, the verdicts as entirely uncertain and affected by mere chance, the procedure as costly and slow moving, and the nature of the award and the whole process as an impediment to rehabilitation. On the other hand those who defend the remedy claim that only by this process can a complete indemnity be obtained for losses, that awards reflect current public opinion, that the nature of the action has a deterrent effect, and that capital sums can do much to help successful plaintiffs. These arguments must all be examined, but it needs to be emphasised that this remedy has significance for only a very limited number of persons.

79. During the 12-year period to 1965 the statistics show that no more than eight-tenths of 1 percent of persons injured in industrial accidents were successful in consequent claims at common law.[12] Moreover, a considerable number of the successful claims have involved contributory negligence and a consequent deduction from the damages on that account. And often it is the more serious and consequently the larger claim which is contested. An example of what can happen is disclosed by reference to the fate of all 61 of the claims for personal injury which reached a hearing in the Supreme Court at Wellington during the two years 1962 and 1963.[13] The plaintiff succeeded outright in only 22 of these cases. Three were settled during the hearing. In as many as 20 others the verdict went either to the defendant outright (10 cases) or the Judge ordered a new trial (which did not take place) or the plaintiff was non-suited or the jury disagreed. In the remaining 16 cases the plaintiffs concerned had their assessed general damages of £43,879 reduced by £17,666 to £26,213. On average, therefore, each of them was left to bear himself 40 percent of the loss which the Court considered he had suffered in the accident. These deductions ranged in individual cases from 10 percent to 90 percent, and from £45 to £4,875.

80. In addition it seems from other figures produced by the insurance companies[14] that over 90 percent of all successful claimants prefer to compromise their claims by accepting the offer made to settle out of Court.[15] The same figures disclose that 25 percent of all claimants in the group finally abandoned their claims altogether,

[12]See Appendix 5.
[13]See Appendix 6; and paras. 102 and 107.
[14]See para. 101.
[15]See also Appendix to Report of Committee on Absolute Liability (1963), p. 46, paras. 11, 12.

or were unsuccessful in the Court action. If social justice is the quest, as Fleming has said in his book on torts,[16] then these figures are enough in themselves to show that the damages action falls far short of providing any satisfactory solution to the problems of those who are injured.

81. Nevertheless the debate concerning the common law process continues, and whenever suggestions are raised that something should be done about the position the old arguments are put forward by some of the proponents of the system, regardless of figures like these, and unaffected by any earlier findings of inquiries such as our own. For example, the Committee on Absolute Liability which reported so recently upon the matter reached the important conclusion that—

> "There is a case for an accident insurance scheme which would cover all persons who are injured in any way without negligence on their part, provided the community can afford to bear the cost on an equitable basis."[17]

Yet this finding is virtually ignored. Accordingly it is necessary for us to embark upon a further analysis of the whole issue; and in the hope that the argument might finally be laid at rest we do so at some length. At this point, therefore, it may be helpful to provide a short summary of our conclusions.

SHORT CONCLUSIONS

82. The statistics apart, we have no doubt where the balance of argument must lie. The moral basis for the application of the fault principle cannot be explained in terms of the legal conception of negligence because the test of negligence is objective and impersonal. Moreover, it becomes quite irrelevant in a system which requires through compulsory insurance that the loss be borne not by individual defendants but by the whole community. All this might not matter if the principle was justified by the achievement, but it is not. Nobody can predict with any assurance the outcome of a damages action. There are long delays inseparable from the very nature of the process. The investigatory procedure and the trial of the action in Court are costly. And throughout the plaintiff is not only left in some considerable suspense, but he is also left to carry his loss without assistance. Finally, during all this period there is not merely an absence of any encouragement for him to minimise his potential damages by returning to work: in fact the converse applies. Many plaintiffs are reluctant to return to work until their claim is finalised lest the damages be reduced in proportion to their effort.

[16] See para. 67 *supra*.
[17] Op. cit. para. 40; and see paras. 137 to 140 *infra*.

83. The common law action has performed a useful function in the past, but without doubt it has been increasingly unable to grapple with the present needs of society and something better should now be found. We turn to consider these various matters in more detail.

THE FAULT PRINCIPLE

84. The critical question in the common law action is whether or not the defendant was at fault. If fault is not proved, then no matter how innocent the plaintiff, the common law will leave him to bear the whole burden of his losses, even though they might have been catastrophic. Those who have grown up with a legal doctrine which ignores positive arguments for one party because it can only operate upon the shortcomings of the other may think that this is just. It happens to be the law, but it is nonetheless a negative process, and it is a negative process because it has adopted the fault theory as its justification. It is supported by feelings that those at fault deserve to pay, even if they have not intended the consequences of their actions. The attitude is described by Lord Atkin in the famous case of Donoghue *v.* Stevenson. He said:

> "The liability for negligence, whether you style it such or treat it as in other systems as a species of *'culpa'*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay."[18]

85. However, it is a curious fact that this attitude stops short of attempting to see that the damages do not become disproportionate to the conduct which is said to justify them. The extent of liability is not measured by the quality of the defendant's conduct, but by its results. Reprehensible conduct can be followed by feather blows while a moment's inadvertence could call down the heavens.

86. On the other hand the plaintiff's conduct is entirely disregarded until the defendant is shown to be legally responsible. There is no thought that a person who is the innocent cause of an injury might reasonably be asked to share with his equally innocent victim the loss he has caused. To common lawyers such a thought approaches heresy, but we observe that in the Eighteenth Series of Hamlyn Lectures, delivered in November 1966, Lord Kilbrandon was not unattracted by its logic. In discussing the development of the Soviet conception of responsibility he said:

> "Paragraph 403 of The Soviet Civil Code was interpreted by a commentator in 1924 as follows: 'The plaintiff must show that the injury was caused by the defendant. Beyond that he need

[18] (1932) A.C. 562, 580.

not show anything.' The whole idea of allowing a defendant to escape liability by showing that he was not at fault, as of course our requirement that the onus of proving fault lies upon the plaintiff, was dismissed on the perfectly intelligible ground that 'the innocent injured is still more innocent than the innocent injurer'."[19]

87. The fact should be faced that despite the moralising which has enabled the fault theory to develop it is really not possible to equate negligence as an independent tort with moral blameworthiness. Negligence is tested not in terms of the state of mind or attitude of the actual defendant, but impersonally against the (occasionally remarkable) performance of a theoretical individual described as "the reasonable man of ordinary prudence". If in all the circumstances which surrounded the defendant it is likely that the reasonable man would have avoided the accident, then the defendant's failure to measure up will be regarded as negligence, irrespective of his mental attitudes or even his ability to reach the required standard.[20] It is for such reasons (as the textbooks usually are at pains to point out)[21] that the use in law of the word "negligence" to describe an independent civil wrong has created a good deal of confusion even among lawyers. Because the word carries in its ordinary application overtones which seem to warrant some disapproval, the name of the remedy tends to become its vindication.

88. But apart from the fact that conduct can hardly deserve moral censure unless it reflects a subjective and moral attitude (which the objective standard of the reasonable man displaces) there is a further reason why the damages action cannot find its justification in theories concerning fault. The fact is that through compulsory insurance (at least for industrial and highway risks) society has considered in New Zealand that it is appropriate to spread the economic consequences of negligent conduct over the whole community. Everybody must share in the losses whether characteristically inclined to this sort of negligence, or whether marked by the uniform prudence of the reasonable man. Against this background the search for negligent defendants who might deserve to pay is really a search to control the aggregate sum that will become payable. In a modern world of many accidents and community-wide insurance to cover them the fault theory has developed into a legal fiction.

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[19] Kilbrandon, Other People's Law, 22; Goikhburg and Koblents, *Commentary on Civil Code*, 1924, p. 87.
[20] See for example Street, *The Law of Torts*, 2nd ed., p. 125.
[21] Fleming, op. cit. p. 108.

89. Nor is the philosophy behind the fault theory currently accepted by the man in the street. People have begun to recognise that the accidents regularly befalling large numbers of their fellow citizens are due not so much to human error as to the complicated and uneasy environment which everybody tolerates for its apparent advantages.[22] The risks are the risks of social progress, and if there are instinctive feelings at work today in this general area they are not concerned with the greater or lesser faults of individuals, but with the wider responsibility of the whole community. It is for these reasons that compulsory insurance for highway and industrial accidents is generally acceptable.

DETERRENT EFFECT

90. Some who favour the retention of the common law action have argued that it plays an important part in industrial safety. Similar arguments have been advanced in opposition to proposals that there should be automatic compensation, regardless of fault, for the victims of road accidents.[23] It is claimed that the threat of damages provides a financial incentive to be careful, and also that employers or motor drivers are influenced by the stigma which attaches, so it is said, to negligent defendants. We find it impossible to accept these views. The second point has no validity for the reasons we have set out when discussing the concept of fault in the preceding paragraphs; and the claim that the prospect of damages has a financial implication loses all its force against a background of compulsory insurance by means of which these losses are so widely shared. Indeed, in the case of the employer the expensive disruption in the pattern of work which usually accompanies injury at work is incentive enough, if a cost incentive of this sort is needed at all.

91. The contribution which financial incentives could make to industrial safety was considered to be insignificant on three separate occasions in the United Kingdom during the past 63 years.[24] And we have found no evidence either in New Zealand or elsewhere which provides any affirmative support for the so-called deterrent effect of the common law action. In any event other factors are clearly far more important. On the highway, for example, motorists who are not deterred from dangerous driving by the instinct for self-preservation or the chance of a cancelled driving licence will not be

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[22] See Report of Committee on Absolute Liability (1963), para. 40; and para. 15 at p. 47.

[23] Ibid. para. 35; and see also paras. 328 to 336 *infra*.

[24] See Report of the Minister of Reconstruction (U.K.), 1944 (Cmd. 6551) on Social Insurance, Part II, para. 31 (ii) and the Reports of the Departmental Committees of 1904 (Cmd. 2208) and 1920 (Cmd. 816).

greatly moved by the passing thought that damages might have to be paid, not by themselves but by their insurers. If conscience, safety education, enforcement by inspection, and self-interest all fail, then the sanctions of the criminal law still remain, and in our view at this point they should be applied. Employers and motorists cannot insure against fines, cancelled driving licences, or in the final resort, imprisonment.

THE RISKS OF LITIGATION

92. Those who support the common law action claim that by this process alone can an injured plaintiff recover a complete indemnity for his losses. It is not argued that the system can produce absolute justice, but it is certainly expected that awards will reflect with reasonable accuracy the losses they are supposed to indemnify. The truth is that often the result of an action is far removed from doing so.

93. In the first place whenever there is contributory negligence the damages must be reduced, and not infrequently unhappy plaintiffs have discovered that the final figure they must accept for damages is well below the assessed losses. But of more significance (because it cannot be controlled) is the evident disparity which occurs in awards for similar incapacities.

94. Disparities arise from all the risks of the adversary system—from difficulties of proof, the ability of advocates, the reactions of juries, and unquestionably mere chance itself. Some plaintiffs achieve successes which seem quite dazzling; others are dismayed by failures which surprise even the defendant. In fact the uncertainty which inevitably must surround such a contest has prompted the comment that the system has the attraction of a lottery with every hopeful plaintiff satisfied that in his case the result must certainly be a major prize. Accidents occur, however, in circumstances which frequently defy the subsequent disembodied attempts to recapture them; and indeed there may be no eye-witnesses able to come before the Court to give evidence. In every common law jurisdiction there is growing criticism of all this.

95. In the United States observers have been led to describe the system as one which—

> ". . . is loaded with unfairness. Some get too much—even many times their losses—especially for minor injuries . . . Others among the injured, as we have just suggested, get nothing or too little, and most often it is the neediest (those most seriously injured) who get the lowest percentage of compensation for their losses."[25]

[25] R. E. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim* (1965), p. 2

The authors go on to remark—

> "Because of the role of fault in the present system, contests over the intricate details of accidents are routine. Often these contests are also exercises in futility, since all drivers must continually make split-second judgments and many accidents are caused by slight but understandable lapses occurring at unfortunate moments. Such contests, and all the elaborate preparations which must precede them, wastefully increase the costs of administration."[26]

96. When Fleming wrote the Law of Torts (regarded generally as one of the important modern works on the subject) he was still in Australia. From this vantage point he criticised the fault system as one—

> "which is content to leave the compensation of casualties to the fortuitous outcome of litigation based on outdated and unrealistic notions of fault. What is required is to assure accident victims of compensation and to distribute the losses involved over society as a whole or some large portion of it."[27]

And he later refers to the accelerating obsolescence of tort doctrines resulting from the pressure of modern social forces.[28]

97. We have been privileged to read in advance of publication an admirable book by a Canadian author who has wryly given it the title of *The Forensic Lottery*. He has referred to "the complex problems of causation" which are inherent in the system and which carry "their inevitable toll of mistakes and injustices."[29] In his view "liability for negligence is a capricious and unsatisfactory method of compensating the victims of injury or disease."[30]

98. In the United Kingdom, too, there has been criticism, led in fact by the Lord Chief Justice of England, Lord Parker of Waddington, who proposed when delivering the presidential address to the Bentham Society in London on 16 February 1965 that the fault concept should be abolished in relation to claims arising from road accidents and a comprehensive insurance scheme should take its place. He said—

> "The law and its administration in this field is out of date, lacking in certainty, unfair in its incidence and capable of drastic improvements."[31]

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[26] Ibid. pp. 2–3.
[27] 3rd Ed. pp. 9–10.
[28] Ibid. p. 13.
[29] T. G. Ison, *The Forensic Lottery* at p. 22 (to be published, Staples Press, London).
[30] At p. 28.
[31] 1965 Current Legal Problems, pp. 1, 5; and see A. L. Goodhart, Address to the 27th American Assembly published in 1966; 39 Aust. L. J., p. 400.

And later in the address he added—

> "Surely in these circumstances the time has come when we should recognise that the present methods, even if capable of improvement, are no longer adequate and that some other method is called for. It is not a lawyer's problem: it is a social problem, and I venture to think an urgent social problem of ever-increasing extent. Is compensation of victims to continue to be administered under the present outmoded methods by which recovery depends on the proof of fault, or is it to be recoverable regardless of fault under a comprehensive insurance scheme?"[32]

99. The author of a book widely used by practising members of the legal profession when dealing with aspects of employer's liability for work accidents provides some interesting comment upon the whole matter in the opening chapter.[33] There is reference to the "striking fact that many accidents seem to be due to impersonal causes". Then he has described how in his view the negligence concept is applied by the courts in England where today juries are rarely used—

> ". . . The workings of the concept of 'negligence' have been brought into the open, because, with the disuse of juries in civil actions, the verdict is now given by a judge who has to disclose his reasons. 'Negligence' as the criterion of liability involves the further test of 'reasonable foreseeability', which has been shown up as vague, capricious and subjective when applied to anything much more complex than bows and arrows, or horses and carts. Some learned Judges are able to foresee very little; others, by taking a complex succession of events step by step, are able to foresee almost anything. This difference of mental approach may be seen even when cases reach the House of Lords. Thus the common law is in the position which used to be a standing reproach to Courts of equity, where justice varied 'according to the length of the Chancellor's foot'. It may be doubted, indeed, whether the question of fault or blame has any legitimate place in the law of compensation for civil injuries: it is a concept which is properly associated with punishment for wrong doing, and therefore belongs to the criminal law."

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[32] Op. cit. p. 11.

[33] John Munkman, *Employer's Liability at Common Law*, 6th ed. (1966), p. 24.

100. The problem of proof was discussed by the present Chief Justice of New Zealand, Sir Richard Wild, when Solicitor-General. In the appendix to the report of the Committee on Absolute Liability, July 1963, he said—

> "Irrespective of whether the trial is before a jury (as in New Zealand) or a Judge alone, the rules of negligence developed in the days of the horse and buggy are not suited to the situations produced by speedy modern traffic. The fallibility of witnesses asked months afterwards to relate the events of split seconds is too great. The sheer amount of time and money spent by assessors and lawyers in seeking to reconstruct the course of a collision illustrates the difficulty of attributing fault and apportioning blame. It is too difficult to be sure of the truth."[34]

We entirely agree.

101. Potential litigants themselves are not unaware of the hazards they face in the court. At our request 40 of the private insurance companies in New Zealand obtained details of all common law claims made to them in respect of industrial accidents in the year 1964.[35] The claims made total 608, and of these as many as 394 (64.8 percent) were settled out of court. A further 143 (23.3 percent) were never proceeded with at all, and only 47 (or 7.7 percent) of the actions actually went to trial. Of these 38 produced verdicts for the plaintiffs concerned, and seven were unsuccessful. There is a disparity in the figures, but it could not be explained when the information was provided to us. In any event it is clear that a very large number of plaintiffs were not prepared to face a trial and preferred to abandon their claims or to settle out of court.

102. These figures can be compared with the analysis to which we have already referred,[36] made of all the personal injury actions commenced in the Wellington Registry of the Supreme Court during the years 1962 and 1963. It was necessary to go back as far as this in order to take a sample of actions which probably would have been brought to finality by now. No more than 61 of the 364 actions were brought to trial, and outright victories were achieved by plaintiffs in only 22 cases or 6.1 percent of the cases dealt with in court. All the others resulted in verdicts for the defendants or were settled or abandoned or (in 16 cases) involved deductions for contributory negligence. If any of these cases are still outstanding then they have been hibernating, not for months, but for years.

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[34] Page 44, para. 5.
[35] See also para. 80 *supra*.
[36] See Appendix 6; see also paras 79 and 107.

103. Despite the uncertainties of litigation there are those who argue that unduly strict or legalistic applications of the fault principle can be avoided because of the part still played in New Zealand by juries. Decisions, it is claimed, are kept in tune with current social attitudes. This may be true, but juries do more than fix the quantum of damages. Implicit in the argument, as critics like to point out, is the feeling that on occasions even the verdict might properly be influenced against the legal merits of the case by lay notions of equity. In regard to this matter Professor G. Sawer has said—

> "Various forms of strict liability tend to be established, *de facto* if not *de jure,* in a manner which makes loss distribution unnecessary. Thus in New South Wales, it is an almost irrebuttable presumption that a motorist is liable to a pedestrian he injures, since there is compulsory third-party insurance, and this is known to the juries which try all such claims."[37]

The fault principle can scarcely be said to be in harmony with such a departure as this from it. Nor can the administration of justice gain by adherence to a system which needs to be kept so regularly in touch with the community conscience.

104. There have been suggestions that juries should be disposed of in favour of some other tribunal—a judge sitting alone, for instance. As long ago as 1936 in the course of the debate on the Judicature Amendment Bill of that year the Attorney-General (the Hon. H. G. R. Mason) was prompted to deal with such a suggestion in the following terms—

> "I may say that I believe that the real solution is not to alter the tribunal that deals with road accidents, but to alter the nature of the claim. There is no logic in having a road accident claim based on the negligence of the vehicle driver. What is the basis for giving a right to proceed against a man that is negligent? The logical justification for the remedy in tort is that . . . the loss is shifted if it has been due to someone's guilt and it becomes a form of punishment . . . If the driver of the vehicle is indemnified by the insurance pool he is not punished, and consequently the logical basis for the law confining the remedy to the case of negligence is gone. If, then, the jury is diverting from the law through considerations of sympathy, it is because the logical basis of the law is gone, and the jury is using instinctive common

[37] Geoffrey Sawer, *Law in Society,* 1965, p. 145.
See to the same effect Fleming, op.cit. pp. 12–13.

sense. . . . It is inevitable that the law is what requires alteration. We should not seek a new tribunal to sustain the present law, which is illogical. All injuries on the road should be compensated, irrespective of whether the driver was negligent."[38]

105. If, as we think likely, substantial numbers of plaintiffs actually do deserve contact with the public conscience, it is difficult to find any answer to the view expressed 30 years ago by the then Attorney-General. It is Ison's opinion that to deal with these general problems by procedural reform alone ". . . would, at best, only enable us to pursue the wrong objectives more efficiently".[39] We agree with this crisp assessment. The only consistent reaction to the situation is to provide a system which will ensure on grounds that are valid and in accord with the law the uniform application of the general public attitude in every case.

DELAYS AND SUSPENSE

106. Apart from the hazards of litigation plaintiffs encounter other serious practical disadvantages. For example, until the claim is finalised a plaintiff will receive nothing from the defendant, and the delay which follows his accident may last a very long time. The process demands careful investigation before the action can be commenced formally in the Court; then attention must be given to procedural problems, preparation for trial, and perhaps negotiations for settlement.

107. In the Wellington group of 364 cases to which we have referred[40] there was an average time lag of between 13 and 14 months before the first formal step was taken in Court. And then a further period elapsed which averaged six months before those cases which came to trial were ready and a fixture available. Clearly there can have been no difficulty in obtaining these fixtures during the two years concerned, and the time which elapsed between accident and decision can therefore be regarded as due to the normal requirements of the process.

108. But even cases which are settled are frequently not finalised until the parties make their bargain at the very door of the courtroom; and the larger the amount at stake the more likely it is that the settlements will be delayed. During all this period of suspense and anxiety the injured litigant is left unaided to carry the whole

[38] 246, N.Z. Parl. Debates, p. 56.
[39] *The Forensic Lottery*, at p. 30.
[40] See Appendix 6, and paras. 79 and 102.

strain of his losses; and in addition as time goes on he becomes increasingly responsible for expense associated with the investigations being carried out on his behalf, and finally for the costs of the trial of the action itself.

109. In New Zealand people are accustomed to such a situation and take it for granted. We think it would soon become entirely unacceptable if it were realised that such a laggard achievement could be replaced by a modern system able to provide immediate financial assistance for all who might be injured as an instalment of compensation that in every way was fair and adequate.

110. It is not difficult to make the point by example. As this part of our Report goes to the printer we take the two most recent cases to be heard before juries. They followed one another in the Supreme Court, at Hamilton, in the same week of October 1967:

(A) The first case concerned a young man, aged 23, left a paraplegic in an industrial accident which had occurred two years earlier. His annual income loss (tax paid) was considered to be $2,020, rising perhaps to $4,500 in about 20 years. He refused to accept $50,000 paid into court, and the jury assessed his lossess at $60,000. This sum included $2,000 for special damages. But 35 percent (or $21,000) was deducted for contributory negligence, and as a result he received the reduced sum of $37,700 for general damages and $1,300 for special damages. Under the proposal made in Part 6 of this Report there could be no deduction for contributory negligence; the income prospects would influence the assesment of compensation; and provision would be made for the cost of an attendant. It is clear that the capital value of the resulting pension could exceed by as much as $12,000 the reduced award of damages for which this young man had waited two years.

(B) The next two days were occupied with a claim concerning a road accident which had taken place three years earlier. It was brought by a young Maori labourer. He had spent a year in hospital and was left with a shortened right leg, restricted knee movement and developing arthritis in the right ankle. General damages were assessed at $4,000, but they were then reduced by 85 percent to $600 for contributory negligence. He had run on to the highway from behind a car. Whether or not $4,000 may seem a modest enough sum in itself, certainly $600 will not go far to aid this young plaintiff.

111. The ordinary observer would expect that payments of damages to successful plaintiffs would absorb a high percentage of the total sums needed by the common law system. We do not think that this is so. It is not possible on the evidence at present available to us to determine with precision the overall expense associated with the process, but we think it likely that more than 40 percent of the amounts which are paid into the system are for various administrative and legal charges. If this be so, it means that an overall sum equal to two-thirds of the amounts finally received by plaintiffs is swallowed up in administration, despite the reasonable control which we believe is exercised in regard to all the individual items incorporated under this general heading of administration.

112. In paragraphs 213 to 215 there is reference to the amounts needed by the insurance companies handling the compulsory insurance scheme for work-connected injuries. It is beyond doubt (despite the long-distance reservations of some New Zealand observers) that the annual charges of the comprehensive Ontario scheme are only one-fourth of the administration expenses of the insurance companies in New Zealand. The latter require an amount equal to 40 percent of payments to claimants, even when all the less contentious claims made under the Workers' Compensation Act are included.

113. But successful plaintiffs do not receive the whole of the costs of litigation from the defendant as part of the award. Accordingly there are deductions from the amounts paid over to them for various expenses which cannot be claimed in the judgment, and also for legal fees—modest though these seem to be in New Zealand when compared with similar charges made by the legal profession in certain other jurisdictions. Ison has conducted a survey in England from which he has concluded that—

> " . . . about 48.91 percent of the total amount of money flowing into the system is absorbed by the cost of its administration. Thus the administrative cost is equal to about 95.75 percent of the total amount received by injury victims as net compensation . . . Although some margin of error must be allowed for in the figures, it is indisputable that the cost of administration of tort liability is extremely high compared with the total amount flowing into the system, or with the total amount flowing out as net compensation."[41]

Although the precise figures may differ in New Zealand in a number of respects we believe that the position probably justifies a somewhat similar comment.

[41] Ison, op. cit. p. 28.

114. It is necessary to refer to two other matters. The first is concerned with what has been called lump sum finality. Related to it is the important question of rehabilitation.

LUMP SUM AWARDS

115. Although loss of future income is the substantial head of damages in most cases, the assessment must of necessity be made at once and it is then paid over as a present capital sum. If suitable administrative arrangements were made an alternative method of handling the matter would be by way of periodic payments.

116. The question generally has provoked conflicting arguments which can be found in the reports of previous inquiries and in the literature extending back over the past 60 years. They were repeated before us. After considering them we are left in no doubt that in general lump sum payments are not in the best interests of injured plaintiffs. In certain special circumstances and for minor disabilities there is a case for them, but subject to this we consider that a better system can and should be devised. The general arguments on the one side and the other are set out in the following paragraphs.

117. The argument in favour of lump sums refers to the attraction of capital in hand, and the claim that with an award which is available and waiting plans can be made ahead. For example, in the area of rehabilitation, wise investment might enable the establishment of a small business; or the fund could be applied with advantage to the purchase of a home or repayment of a mortgage.

118. It is said, too, that there is administrative convenience in bringing a claim to finality—something that would be lost in the alternative method of payment by periodic instalments for an uncertain time ahead. Other arguments relate to the difficulty of ending an anxiety condition if damages or compensation were to be paid at intervals; and the stimulus of self-help which would come with the knowledge that the lump sum was a final settlement would be lost.

119. Most criticisms of lump sum payments are concerned for the interests of the injured plaintiff and his future security. Comment has been made in paragraphs 75 and 76 upon the impossibility of forecasting the future with any real accuracy. To the extent that inaccuracies must occur, whether small or great, they can never be adjusted in favour of the plaintiff because the assessments are made with absolute finality; and the occasional good fortune of some plaintiffs can bring no solace to others whose problems turn out to have been badly underestimated.

120. But other arguments support the view that the attraction of the capital sum is illusory. The award represents aggregated amounts which in the ordinary way could never have been obtained in this form, but which would have been received at regular intervals as income. The risk which the situation is said to carry is the temptation to mortgage the future.

121. We believe that most people are provident and attempt to handle their affairs with prudence; but many would find it difficult to resist the immediate and quite routine financial pressures which often bear upon families, particularly if earnings have been interrupted for any length of time. The present use of future income in the circumstances could, of course, result in much subsequent hardship.

122. Those in favour of lump sum awards argue that even if *plaintiffs were unwise enough to squander the capital amounts paid* over to them, nobody could object as the matter should be regarded as one entirely for themselves. We do not doubt that people are entitled to handle their affairs as they themselves might decide, but we do not think this is the real issue. The question is the form which the damages should take. There could be no injustice to plaintiffs if their future periodic losses were reimbursed to them as they arose, and the problem is simply whether this should be done. In any event it can reasonably be said that if the community as a whole must stand behind a man who is injured and once again when his damages have gone, it has some sort of claim to determine the method of paying him.

THE ISSUE OF REHABILITATION

123. We have referred in paragraph 118 to the suggestion that an anxiety condition might be prolonged unless final damages were provided in the form of a lump sum payment. There is, however, a divergent opinion (which we accept) expressed by the Department of Health.

124. The argument is really to the effect that if the cause rather than the condition is examined it will be found that in most cases this form of anxiety neurosis is created by the uncertainty, delay, and suspense associated with litigation. The remedy, it is claimed, is to substitute a system which would remove the cause of the trouble by enabling payments to commence at an early date and which would permit review of the assessment to be made in favour of the injured worker, if necessary.

125. The Health Department declared itself opposed to lump sum payments (except perhaps for minor disability) because until settlement the workman was concerned about the amount he would finally receive and had little encouragement to return to work or restore himself at the earliest moment to maximum health. In a matter of such importance any administrative convenience which might result from bringing claims to finality through the payment of capital sums could not balance the interests of the many individuals concerned.

PERIODIC PAYMENTS

126. It is necessary to mention at this point two important arguments by those who support the payment of lump sums. They criticise the proposal for periodic payments on the basis—

First, that an award in the form of periodic payments would leave the plaintiff concerned, anxious, and uncertain lest the amount be reduced following subsequent review; and

Second, that the value of the payments would inevitably be eroded by the gradual fall in the purchasing power of money.

127. Both matters are more conveniently dealt with in Part 6 where we consider the question of periodic payments within the general context of a comprehensive compensation scheme. For reasons provided there we consider that if a scheme of permanent periodic payments is adopted—as we think it should be—then any subsequent review should never be used to reduce the payment to the injured workman. As to the second point, we consider that the risks of inflation should be provided against by the automatic adjustment at two-yearly intervals of the regular periodic payments to accord with changes in the cost of living.

IX–THE ATTITUDE OVERSEAS TO THE DAMAGES ACTION

THE UNITED KINGDOM

128. Contrary to some opinions expressed before us, other countries have tended to eliminate or at least to restrict the civil liability of employers to their employees for industrial accidents. The United Kingdom was cited as a large industrial country (and as an example which New Zealand should follow) which has retained the common law action in this general area. In fact, however, it is an exceptional case, the reason probably being that the rather low level of benefits available under the new scheme of compensation introduced in 1946 made it impossible to withdraw the right of action from injured workers.

129. The matter was referred to by Beveridge in the following way—

> "Retention of the employer's common law liability unchanged, in spite of the development of workmen's compensation, marks a departure in Britain from the practice of other countries, where the making of provision for the results of industrial accident and disease by way of social insurance has normally been accompanied by restriction of the employer's liability to cases of wilful or gross negligence. It is obviously desirable as a matter of social policy to remove provision for the consequence of industrial hazards from the arena of litigation and conflict between the parties to production, so far as this can be done without condoning reprehensible carelessness by the employer."[42]

130. A number of reasons for the opinion that these issues should be removed "from the arena of litigation and conflict between the parties to production" are given later in the Beveridge report where it is said:

> "If what is judged to be adequate compensation is provided from a Social Insurance Fund for industrial accidents, irrespective of any negligence causing them, there is no reason why this compensation should be greater because the employer has in fact been negligent. The needs of the injured person are not greater. With the inevitable uncertainties of legal proceedings, suits for heavy damages on the ground of negligence cannot escape having something of the character of a lottery. In so far as danger of such proceedings is a penalty for negligence, it is more effective

[42] Op. cit. para. 98.

to make the penalty a direct one—of criminal proceedings undertaken by the public department responsible for securing industrial safety. Employers can and normally will insure against civil liabilities; they cannot insure against criminal proceedings."[43]

CANADA

131. These same opinions were held by the Provincial Government of Ontario in Canada as long ago as 1914. On 1 May of that year the Workers' Compensation Act was passed. It introduced a new system of compensation for industrial injuries following a report of the Chief Justice Sir William Meredith, who had been appointed as a sole Royal Commissioner to study the question. In framing his recommendations he had emphasised the necessity "to get rid of the nuisance of litigation"[44] which he considered to be totally unsuited to the needs and interests of both injured workman and employer. He stated that the whole purpose of a compensation system was "to have swift justice meted out to the great body of men"[45] who might be injured in the course of their employment. As a result he recommended that in this area the common law action should disappear and that administrative processes be used to handle all aspects of the compensation scheme to replace it.

132. This view was accepted by the Government and the lead thus provided was soon followed by all the other Canadian provinces. For 50 years, therefore, in a considerable Commonwealth country the damages action has been abolished for work-connected accidents. What is more important, it has the evident approval of all concerned. And there is complete acceptance, too, of the fact that even to the point of final appeal the ordinary Courts have no part in the assessment of claims.

133. An interesting comment upon this last point is made by Mr Justice Roach, who as Royal Commissioner reviewed the Ontario scheme in 1950. He wrote—

"Labour and management disagreed on other matters but they were unanimous on this, namely that there should not be even a limited right of appeal to the Courts."[46]

[43] Op. cit. para. 262.
[44] Minutes of Evidence taken before the Commissioner, January 28, 1913, pp. 511–512.
[45] Ibid. p. 512.
[46] Report on the Workmen's Compensation Act dated 31 May 1950, p. 78.

And 27 years later another Royal Commissioner in Ontario was able to refer to this statement in the following way:

> "The situation as it appeared in the briefs and evidence before me has changed very little since that time and many briefs affirmed the view that the privative section of the Act, 72 (1), is necessary and desirable in the interests of speedy and efficient adjudication."[46a]

UNITED STATES

134. The position concerning the common law action has been much the same in the State of New York during the last 57 years. In 1909 the Legislature set up a Commission to make inquiry into the state of compensation law, and this Commission which became known by the name of its Chairman, Senator Wainwright, produced a report which was outspokenly critical of the common law process.[47] It stated that only a small proportion of workmen injured in their employment were able to obtain any relief at all. It criticised the economic waste associated with the system. It complained that because the process could not produce speedy solutions there was considerable delay in payment (whether by way of recovery or as the result of settlement) for men "who stand in immediate need of funds". And it expressed the opinion that litigation and the whole adversary process tended to breed antagonism between employers and employees.

135. The Wainwright Commission proposed that for the future there should be a workmen's compensation law which would take care of injured workmen; and that as a part of the change to be made the damages action should no longer be available. This recommendation was acted upon by the State Legislature in 1910. Since then all the other States of the Union have followed suit. There are in addition four other Acts which affect the District of Columbia, Puerto Rico, Federal employees, and Longshoremen.

136. In 31 of these Acts employees in most employments are brought automatically inside the scheme concerned, and in these jurisdictions the common law action by such employees has completely disappeared. Under 23 Acts employers may elect to accept the Act or reject it and most exercise this option by accepting the Act. It is estimated that 80 percent of all employees in the United States are embraced by Workers' Compensation legislation and thus have no rights at common law against their employers.[48]

[46a] Report of Mr Justice McGillivray on The Workmen's Compensation Act (15 September 1967), p. 56.

[47] See Gellhorn and Lauer, Administration of the New York Workmen's Compensation Law (1962) 37 N.Y. Univ. L.R., pp. 3, 7.

[48] Summary of State Workmen's Compensation Laws, U.S. Department of Labor, Labor Law Series No. 10, Jan. 1967, pp. 2–3.

X—PREVIOUS DISCUSSION IN NEW ZEALAND

137. Dissatisfaction with the achievements of the common law action led to the adoption in New Zealand of the new principle contained in the Workers' Compensation Act 1900. The Act discarded fault as the test and replaced it with employer responsibility. From time to time since then there has been criticism of the fault system for the general reasons outlined in the foregoing paragraphs, and also because of anomalies relating to the social security scheme. But in addition, for 40 years past, particular attention has been given to it at intervals on behalf of the victims of road accidents. In 1962 the Minister of Justice, the Hon. J. R. Hanan,[49] appointed the Committee on Absolute Liability which was directed to report on the desirability of the introduction of some form of absolute liability for deaths, and for bodily injuries, arising out of the use of motor vehicles.

THE COMMITTEE ON ABSOLUTE LIABILITY

138. The Committee was under the chairmanship of the present Chief Justice, Sir Richard Wild, then Solicitor-General. In July 1963 the Committee presented a majority report which recommended that "it would be unwise to make fundamental changes in our present system until definite recommendations can be made that such changes will bring improvements". The Chairman dissented from the general conclusion—in his opinion something should be done at once—but he joined his colleagues in a number of important findings directly relevant to our own task.

139. The findings as extracted from the Report can be tabulated in the following way:

"On analysis of the problem it can readily be seen, first, that the toll of the roads is a very alarming one."[50]

"Death and injury on the road seem to be as inevitable as casualties in war, and it can be fairly argued that the community which has the benefits of modern transport should also bear the responsibility for the harm it causes."[51]

"The common law right for damages for accidents on the road as administered in New Zealand is open to serious criticism."[52]

"Many persons who are injured cannot recover under the present system."[53]

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[49] See para. 147 *infra*.
[50] Para. 39.
[51] Para. 40.
[52] Para. 52.
[53] Para. 39.

"There is a case for an accident insurance scheme which would cover all persons who are injured in any way without negligence on their part, provided the community can afford to bear the cost on an equitable basis."[54]

140. In deciding that no present change in the law could be recommended, the majority of the Committee certainly did not cast these important findings aside. The majority was influenced by three principal considerations. First, it felt that the whole matter required further detailed examination, and accordingly it recommended, "That a more detailed investigation of overseas systems should be carried out".[55] The second and third reasons are related to one another. The Committee considered that, "It is clear that to meet the social problem of misfortune which follows accident the whole basis of the present system should be reviewed".[56] And it felt that, in particular, attention must be given to the position of those injured in industry. In this regard the whole Committee agreed that, "It would not be logical or acceptable to introduce a system which would mean that persons injured in industrial accidents would be in a much worse position than those injured on the road".[57] On this ground it was felt that road accidents and industrial accidents should be considered together.

141. The general findings of the Committee on Absolute Liability made so recently as the result of an inquiry into the special position of road accident victims and which we have set out in paragraph 139 of this Report are significant and of particular importance when we approach our own task. They should be read together with the conclusions which we have reached. In every respect they appear to confirm our conclusions.

EARLIER CONSIDERATION

142. The same Report refers to earlier consideration of these general questions in New Zealand, and it is worth while to make some reference to this here.[58]

143. Even 40 years ago the number of casualties on the roads was causing increasing alarm. As a result the whole process of obtaining damages through the Courts and the ability of defendants to pay them began to receive critical attention. This resulted in the passing

[54] Para. 40.
[55] Para. 51.
[56] Para. 52.
[57] Para. 47.
[58] Para. 7–16.

of the Motor-vehicles Insurance (Third-party Risks) Act 1928. Its object was the compulsory insurance by owners of motor vehicles against their liability to pay damages on account of deaths or bodily injuries which might be caused by their use. Although the Act did not introduce the principle of liability without proof of negligence this was mentioned during the debate upon the Bill. During the debate Mr Sullivan, the Member for Avon, urged that there should be cover against risk, no matter how the accident happened,[59] and in reply to the suggestion the Attorney-General (the Hon. F. J. Rolleston) who had introduced the Bill remarked, "That is a goal to which I should very much like to attain, and I hope it will eventually be possible to extend this scheme to that extent".[60]

144. Ten years later Mr Rolleston was present at the Fifth Dominion Legal Conference when a remit was considered, "That this Conference approves of the principle of absolute liability in motor collision cases . . ." He supported the remit, and in doing so he made the interesting disclosure to the Conference that "it was just a toss-up whether the Bill . . . would contain the principle of absolute liability or not, and the only reason that it did not was that the whole subject was new and that we felt that we must proceed on safe lines . . . and not introduce the principle . . . until we had a little experience of the working of the system".[61]

145. We have referred in paragraph 104 to the views of the Hon. H. G. R. Mason, who as Attorney-General, stated in the course of the debate on the Judicature Amendment Bill 1936 that the only logical solution to the compensation of victims of road accidents was to exclude liability for fault in favour of a comprehensive scheme of insurance which would provide suitable payments for all accidents. In the following year he gave instructions for the drafting of a Bill which would exclude the fault principle, but the measure was not introduced owing, it seems, to considerable opposition which developed immediately from the motor unions.

146. Further criticism of the fault principle came from both sides of the House when the Contributory Negligence Bill was introduced in 1947 for the purpose of removing contributory negligence as an absolute defence to an action at common law. Dr A. M. Finlay, the Member for North Shore, stated that in his opinion liability based on wrongful conduct involved a concept that was out of place in a modern form of society, and he went on to say—[62]

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[59] 219 N.Z. Parl. Debates, p. 604.
[60] Ibid. p. 617.
[61] 14 N.Z. Law Jo., p. 124.
[62] 276, N.Z. Parl. Debates, p. 787.

"We should recognise that an accident is an accident and its results economically, socially, and in every other way, are the same wherever and however that accident may have happened. Whether it happened at home, at work, or on the road, or whether a person was on holiday, whether it happened because somebody was at fault, or because no one was at fault, it is still an accident, and it still has very grave economic consequences . . . In a word I believe we should adopt a system of real compensation for injury however received or however caused, and that whenever an injury is suffered by a person we should in the fullest sense of the word 'compensate' him for his loss."

147. In the same debate Mr Hanan, the Member for Invercargill, and the present Minister of Justice, expressed the view that the ordinary man is not interested in fine legal distinctions related to the law of negligence, but would wish to know how the new proposal would affect him if he was hit by a motor-car in the street. After considering the effect of the legislation he went on to suggest that some consideration should be given to the protection of persons being injured on the highway by introducing the doctrine of absolute liability, at least to the extent that the driver concerned should have an onus cast upon him of proving that he had not been negligent.[63]

148. In a recent debate in Parliament upon proposed amendments to the Workers' Compensation Act there was criticism of the striking differences in treatment afforded people affected by similar problems. The Hon. W. A. Fox (Member for Miramar) said—[64]

"It is manifestly wrong that under a common law claim a widow can receive as much as £20,000 whereas another widow with the same commitments can receive, under the Act as it is at present, a maximum of a little over £2,800. Then, too, both accidents causing death could have been identical except that in the one case there were no witnesses. It has never seemed right to me that we should have this great disparity between the amounts payable to dependants."

149. The problem of proving negligence was also referred to by Mr Riddiford (Member for Wellington Central), and he described the unreality of the present situation in the following way—[65]

"It would seem to many people unjust that, where a worker suffers an injury in the course of his employment and no negligence can be proved, he can claim only the limited amounts under

[63] Ibid. p. 796.
[64] 340 (1964) N.Z. Parl. Debates, p. 2293.
[65] Ibid. p. 2299.

the Workers' Compensation Act, whereas if negligence can be proved against the employer a common law claim can be brought and a substantially greater sum of money can in many cases be obtained."

150. The same point had been mentioned by the Hon. T. P. Shand, Minister of Labour. He said[66] some countries have decided that—

> "The difference between accidents giving rise to common law claims and accidents which do not provide grounds for common law claims, and can therefore be dealt with only under the workers' compensation legislation, is very often a matter of chance."

And in winding up the debate he referred to the need to ensure that techniques of litigation would not divert attention from the need to guard against the occurrence of accidents and rehabilitation of injured workmen if they happen. He said—

> "It is so easy in the pursuit of what is called absolute justice to slide into the error of making the procedure of justice itself so expensive and so drawn out that the objective of the rehabilitation of the worker might be lost . . . I would stress that the most important thing is to avoid accidents. The avoidance of accidents is more important than any compensation can ever be."[67]

[66] Ibid. p. 2292.
[67] Ibid. p. 2303.

XI—VIEWS OF ORGANISATIONS AND PERSONS MAKING SUBMISSIONS

151. The Federation of Labour and numbers of the Industrial Unions support the retention of the right of injured workers to claim damages against their employers, and addressed to us many of the arguments considered in the foregoing paragraphs. Similar submissions were made on behalf of Federated Farmers of New Zealand (Inc.), Sawmillers' Mutual Accident Insurance Company and by three persons who made submissions independently. These arguments claimed, for example, that damages would cover a man's full losses; that he would be assisted by a capital sum in hand; that both these facts were important to seriously injured workers in particular; that there were advantages in achieving absolute finality; and that the fault principle promoted industrial safety. This last consideration was the major reason advanced by the Sawmillers' Mutual Accident Insurance Company for its support of the common law process. In addition we were invited to consider whether there was any public demand for change.

152. Probably this last matter is regarded as no more than a talking point by those who put it forward. But there are three answers to it. First, there is the fact that the subject is not one to stir the imagination; and few people anyway are stimulated by potential trouble. Second, the capricious achievements of the common law remedy have never been the subject of surveys in New Zealand which would give a broad picture of what has been happening, nor has an attempt been made to record the reactions of a suitable sample of those who have actually journeyed through the system. As a result, on any statistical basis, its performance is enshrouded in comfortable obscurity.

153. However, in Ontario in 1965 a study was made of some of these matters by the Law Faculty of Osgoode Hall University at Toronto. It suggests that the claims of plaintiffs are satisfied by the common law process in inverse proportion to the severity of their injuries. A sample group of 590 victims of road accidents was taken. Of these, 226 who suffered minor injuries received 71.8 percent of what could fairly be assessed as their losses; but 307 who suffered serious injuries received only 32.7 percent of their losses; and the dependants of 57 persons who died received as little as 2.1 percent.[68]

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[68] Report of the Osgoode Hall Study on Compensation For Victims of Automobile Accidents, 1965, Chap. I, p. 10, and Chap. II, p. 3.

154. Too much cannot be taken from a single study of this sort, but pieces and fragments of information are beginning to accumulate both here and overseas which confirm this general picture. Accordingly we do not think it at all surprising, that when the members of the Ontario group were asked to answer other questions directed to obtaining their opinion of the whole system they provided a series of markedly adverse replies. Of those with minor injuries 46.9 percent were against the present fault system, 53.8 percent of the seriously injured opposed it, and 61.5 percent of those concerned with the fatal injury cases were also opposed to it. As the Report suggests,[69] "if you want to know what war is like it may help to ask someone who has lived through one".

155. The third answer to the complaint that the whole topic has not been a burning public issue in New Zealand was provided by the New Zealand Law Society. In its submissions (referred to in the following paragraph) the Society remarked that the introduction of a new system should be approached with suitable caution, but stated—

> "We agree that where society demands a change in the law because of a need socially in a particular sphere, then the law should be amended to meet that need; likewise we do not agree that change must necessarily await a public demand for it, if obvious improvements to existing law can be made to avoid hardship or injustice."

156. The submission of the New Zealand Law Society was presented on the basis that among its 2,500 members a wide divergence of opinion existed. The Society felt, nevertheless, that some general views could be expressed on the matters in issue.

157. It considered, as we do, that the whole field of inquiry opened up before this Commission is a social rather than a legal question, and that nobody would deny that an injured person is entitled to at least economic support from the community through one channel or another. However, in examining the question as to whether the fault system should remain, it made the following comment—

> "There seems to be little justification for dealing with one class of injury cases without others. Although it might be urged that the industrial injury field is one in which the first step could be taken for removing fault as a consideration this view is not necessarily valid having regard to the availability of worker's compensation

[69] Chap. VIII, p. 2.

payments (payable without fault) and, in the isolated cases where workmen's compensation is not available, of social security benefits. Equally so, the apparent illogicality of providing a degree of benefits at the expense of the employer without the necessity of establishing fault on his part whilst affording full recompense by way of damages at common law if fault is established cannot be overlooked. It would however we think be more illogical to introduce a system whereby a person of a particular category (e.g., the employee) was not required to prove fault to receive full recompense whilst all other categories of claimants were so required."

158. The Society stated that "there may be a case for the ultimate removal of fault as envisaged from all cases of personal injury claims", but was of the opinion that there must be consistency in relation to all personal injury claims. It was then said that the Society had no knowledge of the cost of such a comprehensive scheme and questioned whether the country would be able to afford it. The conclusion reached in this part of the Society's submissions is as follows—

> "The end result of these comments on 'fault' then is that it is our view that the present system of damages awards be retained with fault as a necessary matter of proof before entitlement, subject to the reservation that if and when fault is removed as an ingredient in all cases where it now is relevant (or at least in all personal injury cases) then, and not before, should specific attention be directed towards the treatment of employee injury cases upon the same basis and in all respects as other injury cases. We are not seeking to preserve a form of remedy simply because of opposition to change; rather do we say that *if the change is warranted it should be universal in application.*" [The italics are ours.]

159. It should not be forgotten that these submissions do not represent the unaminous opinion of the large number of members of the New Zealand Law Society. It seems clear enough, nevertheless, that the Society as a whole was disinclined to search for positive arguments in support of the common law process. It has preferred to express its conclusion upon the negative basis that change might be more than the country could afford, and that it would be unjust to find something better for only one class of injured persons.

160. The submission presented on behalf of the various Railway unions took a different view. The unions were critical of the fault principle and described it as an "outmoded concept", and as a principle which did not provide a sound foundation for dealing either with road accidents or with the problem of industrial injuries. It was argued that "there can be only one true barrier to the immediate

institution of absolute liability in industrial accidents, and that is the barrier of cost". However, having criticised the concept the unions then went on to qualify their position by explaining that they would not be prepared to surrender the common law right to bring an action for damages if workers under some alternative system would receive less than they would receive under the present system.

161. The Public Service Association stated that while it did not favour the abolition of the right of action under the common law, it considered that the contrast between statutory compensation and damages in the event of a successful common law claim was anomalous. The Association stated that it agreed "that the future welfare of an incapacitated worker should not depend upon whether the employer or some fellow employee was negligent, but we see the solution in making the compensation available under the workers' compensation scheme realistic". The Association made the comment that if this solution were followed there would be fewer common law claims, and in due course the present anomalous situation would disappear entirely. Whatever the solution, this cannot be regarded as an enthusiastic endorsement of the damages action.

162. In addition to these arguments a numerically similar number of submissions was made which advocated the outright rejection of the fault principle. It is sufficient to mention three of these submissions.

163. The Safety Engineering Society of Australasia (New Zealand Branch) described the common law system as having a serious effect upon the important problem of accident prevention. The Society said—

> "The fact that common law claims are made in only 0.9 percent of the total reported injuries, and yet adversely influence the investigations of the majority of the remaining 99.1 percent, is a serious indictment of the present system. The system promotes an air of controversy which also influences participation in accident prevention measures. As far as accident prevention in industry is concerned it should be a non-controversial matter thereby enabling all who are involved to work harmoniously towards this common goal."

164. The Health Department considered that the abolition of litigation would result in a dramatic reduction in the incidence of accident neuroses and would be of corresponding assistance in pushing forward the physical rehabilitation of those who were injured.

165. The same two arguments were advanced by the Social Security Commission which also was critical of the anomalous situations which arise as a result of past failures to integrate the various remedies available to injured workmen.

SHOULD WORK-CONNECTED CLAIMS BE DEALT WITH SEPARATELY?

166. It will be remembered that the Committee on Absolute Liability heard and accepted arguments that "it would not be logical or acceptable to introduce a system which would mean that persons injured in industrial accidents would be in a much worse position than those injured on the road".[70] This argument in reverse is the reason now given by the New Zealand Law Society for its conclusion that no isolated action should be taken in respect of industrial accidents. Unless road accidents and domestic accidents of all kinds are embraced in any new scheme the victims of industrial accidents could be placed at an advantage, so it is suggested.

167. In the event we believe that it is possible and desirable to abolish the fault principle in respect of all personal injury claims; but it needs to be emphasised that this certainly does not follow from arguments that it is wrong to remedy a large problem in stages. In his dissenting opinion annexed to the Report of the Committee on Absolute Liability, the present Chief Justice said that—

> "If the basic aim is sound then the fact that all categories of misadventure cannot be provided for at once is not a ground for doing nothing."[71]

We agree. If it had seemed impractical to recommend the comprehensive scheme outlined in this Report we would have had no hesitation in acting upon this sensible principle.

168. A start must be made at some point and it seems clear enough that if that start were made in the field of work-connected injuries, then there could be no further objection (as foreseen by the Committee on Absolute Liability) to taking similar action at once for the victims of road accidents and others as well. Fortunately, however, the cost factor does not preclude the wider approach in dealing with the question, and accordingly it is the basis of our general recommendations.

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[70] Op. cit. para. 47.
[71] Op. cit. p. 52, para. 31.

169. In carefully documented submissions this wider approach accompanied by abolition of the common law remedy was strongly urged upon us by the Social Security Department at the outset of our public hearings and at a later stage by a group of four members of the Law Faculty of the Victoria University of Wellington led by the Dean of the Faculty, Professor C. C. Aikman. Similar arguments were addressed to us by other citizens who presented submissions on their own account.

XII–CONCLUSIONS CONCERNING THE DAMAGES ACTION

170. The preceding analysis of the common law process demonstrates, we believe, that few of the many persons who are injured are ever able to obtain assistance from it: and only a tiny proportion of those who are assisted receive a complete indemnity. The built-in barriers against relief make this inevitable. All unexplained or "accidental" occurrences are excluded at once. So are those where proof is lacking or the arbitrary assumptions of the rules of evidence fail to operate for the plaintiff. Moreover, if damages should be awarded they are assessed by speculative processes which receive judicial approbation only because the system must be made to work; they will be reduced if the plaintiff himself has failed at the one critical moment to exercise that uniform prudence which distinguishes the "reasonable man" throughout every moment of a long and prescient life; and then, when the damages are finally settled, they will be paid over in a lump sum (always assuming that the defendant is insured or has means) and so become subject immediately to the routine and temporary financial pressures of present living. In the meantime the mounting pressure of suspense and financial strain upon the plaintiff has been matched by the plodding course of his claim from accident to final disposition. All this is ill-suited to the reasonable expectations of men and women who become the fortuitous victims of accident in a complex and fast-moving society. The process hardly begins to meet the problem.

171. In summary our conclusions upon the topic are—

(1) The adversary system hinders the rehabilitation of injured persons after accidents and can play no effective part beforehand in preventing them.

(2) The fault principle cannot logically be used to justify the common law remedy and is erratic and capricious in operation.

(3) The remedy itself produces a complete indemnity for a relatively tiny group of injured persons; something less (often greatly less) for a small group of injured persons; for all the rest it can do nothing.

(4) As a system it is cumbersome and inefficient; and it is extravagant in operation to the point of absorbing for administration and other charges as much as $40 for every $60 paid over to successful claimants.

(5) The common law remedy falls far short of the five requirements outlined in paragraph 55 of this Report.

PART 4 – STATUTORY COMPENSATION FOR INDUSTRIAL INJURY

172. The system of compensation for workmen was first introduced into New Zealand in 1900, and the Act of that year was modelled upon legislation introduced in the United Kingdom three years earlier. In direct contrast to the principles of the common law action for damages, this is a system which provides compensation irrespective of fault. It was developed as a reaction against the disadvantages of the common law which 80 years ago was hedged about by a number of technical defences, and accordingly worked even less favourably for injured plaintiffs than it does today.

173. The purpose which lay behind the legislation was to provide for misfortune, not by examining the random quality of the causes which might have occasioned it, but by attention to the condition itself. It is true that in one sense causation has relevance—the incapacity must be shown to have developed from a work-connected injury. But this test of entitlement is not designed for the negative purpose of saddling some suitable scapegoat with liability; its sole object is to ensure that those who suffer industrial injuries will qualify as of right for the remedy. In this way the Act has provided that entitlement should depend not upon the kind of act or omission which caused the injury but rather upon responsibility.

174. At the time it was considered that this responsibility should be accepted by industry and the compensation provided for injured workmen made to form one of the normal incidents of the costs of industry. In fact this was merely a practical means of solving what has always been a social problem, and the legislation itself is generally described here and elsewhere as the earliest example of statutory social insurance. Beveridge remarked in 1942 when referring to the position in the United Kingdom that the system had conferred great benefits in the past.[72] Undoubtedly this has been true in New Zealand also. Nevertheless, as the law stands today the compensation process carries with it a number of serious disadvantages.

175. The most obvious of the disadvantages we have mentioned in paragraph 39 of this Report. Its benefits have been spread widely and uniformly, and this is its great justification; but for reasons of economy they have been spread so thinly on the ground that this form of compensation at least in any case of serious injury in no way can be regarded as recompense for a man's real losses. There are other problems. It is convenient, however, to provide a brief account of the scope of the Act before we consider these various matters.

[72] Cmd. 6404, para. 78.

XIII—THE WORKERS' COMPENSATION ACT 1956

176. The Workers' Compensation Act 1956 is a consolidation of much previous legislation. It provides for payment of compensation for all persons (defined as workers) who are employed under a contract of service or apprenticeship, and for certain designated groups such as share farmers. In addition certain persons who come within the definition provided by section 98 of the Act may be covered on a voluntary basis.

177. Entitlement to compensation arises when a worker suffers personal injury by accident arising out of and in the course of his employment or is incapacitated by reason of certain industrial diseases; and the compensation is payable during periods of total or partial incapacity for work, and (in the case of death) to dependants. As is mentioned in paragraph 174, responsibility for payment of compensation is upon the employer who since 1943 has been obliged to insure in respect of his liability unless exempted on grounds of demonstrable ability to pay the compensation independently of insurance.

178. The level of compensation is related to the injured worker's earnings and is assessed for periods of temporary or permanent incapacity for work at 80 percent of his weekly earnings. There are, however, two important statutory limitations upon the amounts of compensation which can be paid in respect of any one accident. There is a maximum weekly payment of $23.75 (it was raised from $21.75 as from 1 December 1966); and there is a maximum period of six years over which the payments may extend.

179. Permanent partial disability entitles a worker to a proportionate part of the weekly maximum compensation, and is assessed by reference to a schedule to the Act which puts arbitrary percentages upon certain specified disabilities. Other disabilities which are not listed can be related to this schedule on the basis of an acceptable medical report. It is usual for permanent total or permanent partial incapacity payments to be capitalised and paid in a lump sum. Taking into account the limitation of six years, the maximum capitalised payment at the present time is $7,434.

180. The ceiling put upon the weekly rate of compensation has tended to bring payments to many injured workers well below the level of 80 percent of their normal weekly earnings, particularly during the last decade or so. This fact prompted a departure in 1956 from the normal principle of compensation based upon earnings. In

that year there was introduced into the Act a provision for supplementary payments in respect of a dependent wife or child during periods of temporary incapacity for work. The supplementary weekly payments were increased on 1 December 1966 from $2 to $3 for a wife, and from $1 to $1.50 for each dependent child.

181. Claims for compensation are not disposed of in the ordinary Courts, but in a Court specially set up for the purpose. However, the Act does not deprive a worker (or his dependants in the case of his death) of the right to claim damages where it is considered that the injury or death was caused by the direct or vicarious negligence of his employer or by breach of some statutory duty. The employer is never liable to pay both damages and compensation. If the worker fails in a damages action he may apply to the Court to assess compensation. Conversely, if he succeeds in such an action he may not subsequently claim compensation under the Act.

THE INSURANCE QUESTION

182. During the years, both in New Zealand and overseas, questions had been raised concerning the propriety of permitting such a system of social insurance to be handled by private enterprise. There had been much comment also to the effect that too great a proportion of the amounts being paid into the system were retained by the insurance companies for administrative expenses and profit. Following the amendment to the Act in 1943 which required that every employer should insure against this risk, the criticisms were renewed, and led in 1947 to a further amendment which gave a monopoly of all this business to the State owned insurer. Thereafter for a period of two years from 1949 to 1951 the State Insurance Office handled the whole of the workers' compensation insurance in New Zealand.

183. There was, however, a change of Government during this period, and the new Government had committed itself to repeal the monopoly provisions in the Act. The outstanding reason for this probably lay in the fact that the State Insurance Office was a competitor of the other companies in all the remaining areas of insurance business, and by many it was considered unfair that it should be put in the position of being able to attract these other types of insurance business away from the private insurers by reason of the fact that every employer in the country had willy nilly become its customer. Accordingly the monopoly ceased on 31 March 1951, and at the present time workers' compensation insurance is spread among some 61 private insurers or mutuals in addition to the State owned concern and 48 self-insurers.[73]

[73] As at 8 September 1967.

XIV–DISADVANTAGES OF THE WORKERS' COMPENSATION ACT

184. The workers' compensation system has provided a more consistent remedy than the common law, and because smaller amounts of money are involved in compensation cases, there has been less contention associated with them. Nevertheless, nobody would claim that the system has proved equal to the hopes of those who first put it forward. The 41 amendments to the Statute since it was first enacted reflect the criticisms and difficulties which have surrounded it, and so do the many volumes of reported decisions upon the meaning of the classical expression "injury by accident arising out of and in the course of the employment."

DEMARCATION PROBLEMS

185. To take only the first portion of the qualification, (that is, accident "arising out of the employment"), an injured workman must show that the accident arose because he was doing something which he was employed to do, or because the nature of the employment exposed him to some particular risk. The anomalous situation which can develop from applications of this provision are well illustrated by two cases mentioned in the report dated 1 February 1962 of the Irish Commission set up in 1955 to consider the Workmen's Compensation Act in that country.[74] In the first case a bricklayer who was working in an exposed position on a scaffold 23 ft above ground level was killed by lightning and was treated as covered by the Act;[75] but in the second a workman engaged on road work whose duties included cleaning out gullies to prevent flooding and who was killed by lightning, was not covered on the ground that there was no greater exposure to lightning to a man engaged on this work than to the general public.[76]

186. But the accident must also be shown to have arisen "in the course of the employment". Accordingly, accidents which might occur to a man travelling to or from his work will leave him unprotected unless he is within the particular circumstances defined by section 5 of the Act. There is some force, in our view, in the submission that this section confers advantages upon those workers who are included within it, which probably should not be denied to others. But whether or not the scope of the provision is extended, there must necessarily be some point at which the line is to be drawn, and the fact must always cause difficulty to the Court, and no doubt hardship

[74] Para. 139 of that report.
[75] Andrew *v.* Failsworth Industrial Society (1904) 2 K.B., p. 32.
[76] Kelly *v.* Kerry County Council (1908) 42 Ir. L. T., p. 23; 194 C.A. (Ir.).

to certain claimants. It has been said that "the dividing line between the man hurt on his way to work, and the one injured within the factory gates has, at times, been so thin as to be almost imperceptible."[77]

187. Anomalous cases can arise, too, of employees who could not be regarded as working at the time of an accident, but where the circumstances are clearly related closely to the employment.

188. The Inter-departmental Committee of Government Departments provided an example of employees of the Forest Service who take part in organised recreation in off-duty hours but who are on stand-by duty in order to guard against the risk of forest fires. There are employees, too, engaged in prison and mental hospital work who are encouraged to participate in sporting activities during off-duty hours to assist the rehabilitation of the inmates. It may be doubted whether they would be covered by the Act.

189. Other difficulties arise out of the definition of the word "worker" and the exclusions which have been made from it. For most purposes the line of demarcation in these various respects is now sufficiently settled to enable litigation to be avoided. But there certainly remain borderline cases which can give rise to much heart-burning.

190. Even among the most recent decisions of the Compensation Court there are examples of the fine distinctions which the Court is obliged to draw between cases which might seem to deserve equal treatment. The first two of these are indicative of the difficulties associated with attempts to link some degenerative physical condition with employment. They are two heart cases heard by the Court in March and July 1967. In each an action was brought by the widow of a worker who had collapsed and died after engaging in strenuous activity during the course of employment. In each there was medical evidence to support and to rebut the claim that there was a causal connection between the work done by the deceased prior to his death and his subsequent collapse. One widow succeeded in recovering compensation,[78] but the other failed in her claim and received nothing.[79]

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[77] A. F. Young, Industrial Injuries Insurance, 1964, p. 91.
[78] Kean *v.* A. B. Wright and Sons Ltd., unreported, Auckland, July 1967.
[79] Powell *v.* Christchurch Fire Board, unreported, Christchurch, March 1967.

191. There are two other cases of a different type which were heard in March and April 1967. Each was concerned with the status of a man who had been engaged in erecting a fence for an employer. The simple issue was whether the fencer concerned had the status of a worker or that of an independent contractor at the time of the accident. Although the nature of the work was substantially the same the Court felt bound to hold on the basis of earlier decisions that in the one case the widow of the man concerned (who unfortunately had been killed) could not recover,[80] but in the other that the claim should succeed.[81]

192. These cases turn, of course, on their own particular facts and the law applicable to them in terms of the body of precedent which has grown up over the years. We think, however, that those affected by the various decisions can be forgiven if they fail to share the lawyers' satisfaction that four more cases have been neatly labelled and sent on their way despite the intellectual complexities which might seem to have surrounded them in advance of the hearing. It is our opinion that difficulties like this are bound to remain for so long as it is thought appropriate to deal differently with injured workmen depending upon the cause rather than the extent of their injuries.

SCHEDULE DISABILITIES

193. Other difficulties and anomalies arise from the First Schedule to the Act (mentioned in para. 179) which on an arbitrary basis attempts to proportion certain specified disabilities to total incapacity. By reason of section 17 of the Act compensation for one of these schedule injuries is provided by taking an appropriate percentage of the aggregate of weekly payments for total disability over the full permissible period of six years less any period in respect of which amounts of compensation might have been paid for periods of temporary total incapacity resulting from the same injury.

194. A similar process of assessment is used for permanent injuries which are not specified in the schedule and which are frequently referred to as "quasi-schedule" cases. A discretion is given to the Compensation Court which enables variations to be made from this arbitrary process of assessment when it is shown that in the circumstances of the case the compensation would be inadequate and also would be substantially less than the amount of compensation that would become payable if the section did not apply.

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[80] Perry *v.* Satterthwaite (1967) N.Z.L.R. 718.
[81] Scott *v.* Trustees Executors Co. Ltd. (1967) N.Z.L.R. 725.

195. General methods of this sort are used in various forms by many countries in the assessment of permanent partial disabilities. The underlying purpose is to provide a guide which will produce broad uniformity and avoid the disparities which are inseparable from independent evaluations made by different tribunals at different times and places. However the schedule which is applied in New Zealand appears to have antecedents which go back to the statistical experience of German or Swiss insurance companies of nearly a century ago.

196. The schedule first appeared in the New Zealand legislation in the Act of 1908. The Minister of Labour at the time hoped that it would provide a speedy, and above all an accurate guide for the assessment of compensation without recourse to litigation. But even then one member of the House had forebodings, as the following extract from the debate upon the Bill discloses—

> "The Hon. Mr Millar (Minister of Labour) : With the evidence before us the loss of earning power has been calculated by experience so that we can compute exactly the loss of earning power caused to any man by the loss of any specific limb or limbs mentioned in the schedule. These computations have been worked out scientifically with wonderful exactness by actuaries, medical men, and others.
>
> Mr Wilford: Trouble would arise in different forms of employment.
>
> The Hon. Mr Millar: That makes no difference . . ."[82]

197. Unhappily the doubts expressed by Mr Wilford have been realised. Not only is the stated severity of certain injuries disproportionate to that of others in the schedule, but as a whole the schedule is a far less reliable guide than the Minister had hoped. The New Zealand Law Society in its submissions to this Commission regards the schedule as involving a fundamental flaw in the Act. The Society considers that this is the case because an attempt has been made by means of the schedule to lay down a scheme for payment of lump sum compensation "depending upon the severity of various injuries" without any reference to the fact as to whether or not there is associated with any such injury any loss in earning capacity.

198. This is a forceful argument, particularly as the Act stands at present. We think that the loss of physical capacity by itself, and regardless of its effect upon future earnings, is a factor which

[82] 145 N.Z. Parl. Debates, pp. 940, 941.

deserves to be compensated, and compensated by methods which will avoid extravagance and contention. But in New Zealand at present the difficulty referred to by the New Zealand Law Society is exaggerated, because the percentages in the schedule are necessarily related to restricted amounts of compensation.

199. The maximum weekly compensation that can be paid and in particular the six-year restriction during which the payments may continue combine to produce an artificially low figure for total disability. Because of this it was thought necessary to give a high severity rating to relatively minor disabilities in order that the sum paid out in respect of them might not become so small as to be quite unacceptable. In the result these payments are disproportionate when put beside the relatively modest amounts due in respect of much more serious injuries. All this has the effect of magnifying the disparities which are criticised by the New Zealand Law Society.

200. There are great advantages in using some broad schedule method of assessing these cases in order to achieve a fair and reasonably predetermined level of compensation. It should be accepted that while the method will not enable absolute justice to be achieved, nevertheless the speed and certainty of assessment must far outweigh the expense and effort which would be associated with attempting to make the most meticulous adjustments in every case. In any event we think it unlikely that assessments of such delicacy are possible if broad uniformity is to be realised up and down the country. Indeed, if each case had to be separately evaluated without the advantage of clear and general guide lines then many of the advantages of a scheme of comprehensive insurance would disappear.

201. The problem of assessing permanent partial disabilities and the provision of an appropriate schedule is difficult. We regard it as one of the more perplexing issues in the whole field of compensation, but we are equally satisfied that the approach must be retained in any general scheme. Having said this it must be added that there is much room for improvement in both the pattern and the detail of the schedule at present in force in New Zealand, and without doubt it should be radically amended in both respects.

ADVERSARY PROCEDURES

202. In 1942 Beveridge was critical of the fact that in the last resort the compensation scheme then in force in the United Kingdom rested on the threat or practice of litigation.[83] Today nobody would argue

[83] Op. cit. Cmd. 6404, para. 79 (i).

that the regular administrative decisions required in any new social programme should be resolved by the techniques of private litigation. But the compensation scheme in New Zealand still has to accommodate itself to adversary procedures and attitudes. It retains the employer as a notional defendant, and refers to claims and to plaintiffs, and still clings to common law ideas of establishing liability when it would be more accurate and less contentious to talk of the statutory rights of injured workers and the acceptance of statutory responsibilities in respect of them.

203. All this is due to the origins of the Act and the need at that time to find somebody who could be made responsible for the social costs of industrial accident. It has continued until now because each employer is permitted to find an insurer of his own choice to stand behind him, and who then has a direct interest in the outcome —this despite the fact that the insurance scheme is now compulsory and that the overall costs are finally borne by the whole community.

204. It is true that long experience has enabled those who handle the claims to arrange settlements out of Court in the great majority of cases. However compromises cannot always be in the best interests of the injured workman, nor can they always avoid contention or friction with the employer. For both reasons the system cannot be desirable. If a sick employee is assisted by the general health scheme, employers have no feeling that their interests are directly affected, although all contribute to the scheme by means of direct taxation. The costs of injury are equally spread today, and we think that employers should not be implicated in the decisions required to distribute amounts which might become due to their injured employees.

205. But even if employers are excluded from compensation proceedings the adversary atmosphere will remain for so long as private enterprise has a stake in the outcome of each of the claims. Private organisations cannot reasonably be expected to disburse their stock-in-trade (in this case their funds) on the basis that the injured man should be treated generously or given the benefit of most reasonable doubts. For the reasons shortly contained in the following paragraphs we are firmly of the opinion that the time has arrived to make a clean break.

206. The logical, and we think the inevitable conclusion, is that an independent agency of the central Government should handle the whole comprehensive scheme of loss sharing. Independence would be necessary to enable this body to work with detachment in the new field; and given a constitution wide enough to ensure that its

decisions would never become illiberal and would always be made upon the real merits and justice of the case, we do not doubt that it would receive the same measure of public confidence which has supported similar boards in Canada for the past 50 years. All this, together with our recommendation that there should be a right of appeal to the Supreme Court upon a point of law, is given some further attention in Part 6 of the Report.

THE INSURERS

207. In paragraphs 182 and 183 there is brief reference to the insurance question which in 1949 led to a monopoly of this business in the hands of the State owned insurer. But there had been similar discussions in other countries for many years prior to this, and 50 years ago in Canada monopolies were set up in the provinces although in a different way. It was felt strongly that there was a need "to get rid of the nuisance of litigation" as Sir William Meredith described it.[84] For this reason, and also because it was considered that the social costs of industrial injury should be met by the cheapest form of comprehensive insurance which could be provided, decisions were taken to set up *ad hoc* bodies, the sole responsibility of which would be to give attention to the prevention of accidents, the rehabilitation of injured work people, and the collection of appropriate levies from employers, and disbursement of the fund so set up by non-contentious administrative procedures to those entitled.

208. Since 1914 this form of monopoly has operated to the general satisfaction of all concerned in Ontario, and since 1916 in British Columbia following upon the presentation of the Report of the Commission of Investigation on Workmen's Compensation Laws appointed on 27 September 1915 under the chairmanship of Avard B. Pineo. All the other Canadian provinces have adopted the same system. A similar step was taken between 1913 and 1915 by a number of the United States, and at the present time seven jurisdictions have exclusive funds and require that all workmen's compensation insurance be sold through them, although two of these, Ohio and West Virginia, permit self-insurance.[85] We make some further reference to this matter in Part 6 of the Report, but it needs to be said at this point that during our inquiries in North America we were left in no doubt that the admirable precedent recommended by Sir William Meredith in 1913 and which has been operating in much the same form ever since is widely regarded as a model system.

[84] See para. 131 *supra*.
[85] Somers and Somers, Workmen's Compensation, 1954, p. 96.

209. It is said that the State should hesitate before interfering with private enterprise in what is claimed to be a legitimate field of operation. However, we think there is much confusion of thought about this matter. It is our opinion that private enterprise can have no claim to handle a fund such as the compulsory fund in New Zealand which has arisen not because employers have been persuaded to provide the business, but because Parliament has ordained that employers must do so.

210. Exactly similar considerations apply, of course, to the compulsory insurance scheme in respect of road accidents. In other areas of insurance the private insurers compete among themselves for the available business, but in addition they are properly able to remark that it is their enterprise which has made the business available at all. In each of the fields of workers' compensation and motor vehicle third-party insurance, however, the only competition can be for shares in a fund already required by the Act. This is the answer to those who might wish to argue that for an agency of the central Government to take over the administration of the scheme would amount to a form of socialisation of business which legitimately should be left to others. It is, we think, an important distinction which needs to be kept in mind when decisions are taken as to whether or not the North American example should be followed in New Zealand.

211. A further matter deserves emphasis. In any real sense this is not an insurance scheme at all. It has always been treated as such in New Zealand, but in truth it is a compulsory and universal method of sharing one of the costs of social activity. The interpolation of private enterprise between the group of beneficiaries and the ordained fund has arisen simply because the contributions to the fund have been required and collected, not in the form of tax from employers as a general class, but as individuals and in terms of individual risks.

212. This conception is not in accord with other schemes of social insurance such as the health service and universal superannuation, and provision for the interruption of work by reason of sickness or unemployment.[86] People in New Zealand would be astonished if the administration of the funds required for these purposes was to be handed to business organisations. In respect of general industrial injury there can be no difference in principle, as Beveridge recognised in 1942—a view which thereupon was accepted and acted upon by the British Government. It is not always remembered that for 20

[86]See, for example, Beveridge Report, para. 25; Abel-Smith, *The Reform of Social Security*, p. 15.

years in Great Britain industrial injury insurance has been handled not by the private companies but as a branch of a unified social service.

213. But these arguments do not stand alone. Other considerations relate to the cost of handling workers' compensation by present methods. In Canada *ad hoc* bodies have been set up by the provincial Governments as we have mentioned, and the evidence is conclusive that they need no more than approximately 10 percent of levies made upon employers to cover all the costs of administration; and this includes a significant annual amount for education in the prevention of accidents. During the six-year period 1960 to 1965 inclusive the experience of the Ontario Board, for example, given in terms of percentages of administration costs to total costs was as follows:[87]

	1960	*1961*	*1962*	*1963*	*1964*	*1965*
Injured workmen	89.3	89.7	89.4	89.5	89.6	89.9
Accident prevention	2.9	2.9	3.1	3.3	3.5	3.6
Administration	7.8	7.4	7.5	7.2	6.9	6.5

We understand that the figures in respect of the 1966 year (which were awaiting audit when we inquired about them) are comparable with the 1963 results. It will be observed that administrative expenses during the period range from 6.5 percent of total levies to 7.8 percent, and that it has been possible for the Board to make contributions for accident prevention which in some cases are more than half the item for administration.

214. The cost of maintaining the present system in New Zealand should be compared with these figures. The premiums which may be charged here by private insurers and the mutuals are controlled by the Workers' Compensation Board on a ratio intended to permit the insurers to retain 30 percent of the total amount collected for administration and profit. This 30:70 ratio results in the retention by the insurers of an amount equal to approximately 40 percent of the aggregate sum needed for compensation; and it is unnecessary to dissect or find reasons for the retained amount in order to appreciate that it is four times as much as is required by the Workmen's Compensation Board in Ontario for administration and accident prevention combined. The New Zealand method of handling the whole problem by 62 individual insurance companies results in much inevitable duplication of organisation up and down the country. This diversion of energy, time, and money together with the normal processes of competition makes it inevitable that the ratio of expenses to compensation must be high. Although, it is necessary to add that,

[87] 1966 Royal Commission on the Workmen's Compensation Act. Brief of the Ontario Board, October, 1966, p. 15.

neither in the United Kingdom (where in 1923 the 30:70 ratio was proposed to the Government there by the insurers) nor in New South Wales (where it was later adopted) nor in this country (which in turn adopted it from New South Wales in 1950), has there ever been an independent examination of the costs of the insurance industry which might demonstrate that the costs-claims ratio of 30:70 is in fact justified. And we have not undertaken this task ourselves because in our view the overriding need to supplant the adversary system and provide a universal and compulsory system of compensation makes it inevitable that private enterprise should be replaced by a detached (and independent) agency of the State.

215. However, whether the method justifies the full amount of the retentions is not the issue in this context. Whatever may be the answer, the process as it stands must be regarded as extremely expensive. For example, almost $15 million was collected in premiums in the year ended 31 March 1967, of which $10.25 million was required to meet claims or provide for claims outstanding. If the administration of such a fund could be handled within the expense ratio regarded as sufficient by the Ontario Board, the total of claims plus the necessary 10 percent for administration and safety education would have been a little more than $11.25 million, and the overall saving something in the vicinity of $3.75 million. The disbursement of additional amounts of this magnitude could be justified only if the advantages which followed from it were great. In fact the balance of advantage falls heavily in the other direction.

216. Private enterprise plays no part in obtaining the business. The system itself can offer no central impetus in the important areas of accident prevention and rehabilitation. It is operating in an area which ordinarily would be handled by the central Government as a social service. It is involved with all the adversary problems to which we have referred. And it is very expensive—not because the system is mismanaged, but because the system makes this inevitable.

217. For too long the more serious cases have been neglected in New Zealand for apparent lack of funds, and this we believe must be changed at once, as we mention in the following paragraphs. The cost of badly needed and belated increases in compensation must come from somewhere, and savings which can be achieved by a co-ordinated type of administration are able to meet the added cost which otherwise would become a further charge against employers. If a co-ordinated system is adopted employers would not be asked to provide any further amounts at all. Taking all this into account and the present financial restraints the conclusion is inevitable that

the economic waste associated with the present method of handling these matters can no longer be accepted. For this reason, as well as for the others mentioned, it should be discontinued.

BENEFITS UNDER THE ACT

218. The Workers' Compensation Act has never attempted to replace all the losses of injured workers for three valid reasons. First, once a work-connected injury can be demonstrated then there is certainty of compensation to follow. Second, if the compensation is provided on a suitably generous basis it seems fair to leave part of the loss with the man himself. Third, it is in accord with public opinion that some margin of effort should be left to injured workers as an incentive to get well and back to productive work.

219. Reasonable men may differ about the proportion of loss which should be left with the injured workman, but few would argue with the general principle, and for the most part this was the trend of the submissions put to us. Most fair-minded people who qualify under a scheme of this sort are perfectly prepared to meet part of their own losses. Nonetheless, the validity of the principle and its acceptance by the individual concerned depends upon its practical application. If society should not be asked to bear the whole of a man's loss, neither should the man himself be expected to bear an undue proportion of it, and the graver and more prolonged his incapacity, so much more is this argument reinforced.

220. However, one of the most striking aspects of the compensation process is the way in which the value of benefits has gradually been eroded (particularly over the last 20 years), and the accompanying tendency to move away from the strict compensation principle towards payments which have been levelled out in a fashion akin to the social security system. Such a tendency certainly must be reversed if real recompense for individual losses is to be offered to injured workmen.

221. This leads to the arbitrary restrictions which have been put upon the compensation process. On the face of it compensation assessed at four-fifths of earnings for periods of total incapacity seems attractive. It is, however, an extremely superficial attraction whenever the incapacity lasts for any length of time or is accompanied by some form of permanent physical disability. The reasons have been mentioned. They are the artificial limit of six years during which the benefit may be paid, and the low maximum weekly payments which are permitted. In the case of short-term incapacities or minor physical handicaps (even when the latter are permanent), these

qualifications do not present problems which cannot be overcome by individual initiative. In cases of more serious injury, and particularly in cases where a man is put out of action perhaps for years, the effect can be drastic.

222. Limitations of time during which compensation payments may continue have been applied in compensation schemes by numbers of countries overseas. But it is a practice which has never been generally accepted, and it ignores the International Labour Office Convention 121 adopted on 8 July 1964,[88] which stipulates that benefits shall be granted throughout the whole period of the contingency, subject only to some short waiting period.

223. In the course of submissions put before us Mr I. B. Campbell, Secretary of the Workers' Compensation Board, remarked in connection with the six-year limitation that in his view it was "incredible how long this severe limitation on compensation for the relatively few seriously injured has gone virtually unchallenged by the trade union movement". This may have been the position in the past, but there were strong submissions to us that the time had come to remove the limitation on grounds that it is quite out of line with international trends (leaving New Zealand as one of the few countries in the world with such a restriction), and also because it is unfair and indefensible.

224. There can be no doubt that these submissions should be accepted. In our view the practice of putting arbitrary limits upon the time during which payments of compensation may continue must be regarded as unjustified in principle and quite illogical in practice. It is wrong in principle, first because it affects only those whose needs and whose claims are greatest; and second, because it is a rejection of the theory that compensation should provide some adjustment for the whole of a man's losses. If at the end of six years a gravely incapacitated workman is suddenly left to carry his burden without assistance, it can hardly be said to do this. Then, it is demonstrably wrong in practice because the saving it achieves is derisory when compared with the total amounts of compensation expended annually over the whole work force.

225. The second of the restrictions which is open to criticism is the low maximum weekly payment which can be paid and which has the effect of bringing compensation much below four-fifths of normal earnings in all but a few cases. This fact led to the provision in 1956 of the supplementary allowances in cases where there are

[88] See Article 9.

dependent wives or children. This in itself is a serious reflection on the value of the benefit, and in our view it is an unwelcome departure from the whole principle that compensation should be related to actual losses.

226. In the final analysis matters of this sort will be decided upon a financial argument. It becomes necessary to measure the extent of the resources that can be made available. At present, however, we think the priorities have not been recognised. Clearly the need for meaningful compensation increases to the extent that incapacity is severe or is protracted. By levelling out the compensation over the whole field of injury the available resources have been spread so thinly that whenever a man's capacity to work is interrupted for any length of time he is put under increasingly pressing financial strain. If there must be priorities in the compensation field as distinct from priorities between various social services, then they should go in favour of providing for the larger losses, and we believe that no slightly injured New Zealander would begrudge his seriously crippled fellow worker some preference.

227. The low maximum level of the benefit and its restricted duration have had the effect of pushing the compensation process in the direction of a system of flat rate payments. Together with the provision of flat rate supplements for dependants the trend is in accord with the social assistance principle that need should be the test for assistance rather than loss the measure of recompense.

228. All widows of deceased workers receive the same lump sum payment from the scheme regardless of their husband's past earning history. The same flat rate payment is made to all workers suffering a similar permanent disability, regardless of likely loss of income, occupation, or age. Dependants' allowances are paid, but subject to this the maximum weekly payment tends to be a minimum as well. And the anomaly arises that it is possible for some men who are entitled to the dependants' allowances to receive by way of compensation as much as 97 percent of the net income they had been earning at work.

229. All this needs to be changed. It has arisen from pressures designed to control the aggregate amount of compensation which must be found each year, and from well-intentioned attempts to divide the fund fairly among as many injured workers as possible. Nevertheless there has been a failure to appreciate that a process of averaging has been followed and that this has distorted the whole system in favour of minimal and at the expense of major problems.

The strain has had to be taken by those suffering long-term incapacities and by those whose wage losses have been most grievous. It is clear from the calculations in Appendix 7 that on the basis of the recommendations contained in this Report this emphasis can be reversed (as clearly it should be) while still leaving ample for the minor cases and without involving significant increases in the total costs involved.

230. It is wrong that the short-term or minor incapacities should be preferred to protracted or serious ones. It is indefensible to provide a man with 97 percent of his wages during a fortnight's absence from work while leaving the long-term victim of a crippling accident without assistance after six years. It is disheartening for an energetic and skilled tradesman to find that the compensation he must accept in respect of his lost wages is the same as that provided for the most recent recruit to the industry earning half his income and facing half his losses. There are not many real passengers in the work force but those who exist will not be discouraged by a system which gives them the bulk of their wages during some short-term incapacity. Instead there should be a system of wage-related payments kept to a fair but sensible level for the minor case and greatly increased for all others.

DOUBLE COMPENSATION

231. Most compensation cases and all common law claims are settled by lump-sum payments which involve the personal disadvantages mentioned in paragraph 116. However, the public interest is adversely affected as well, for they permit a situation where the social security fund will give additional assistance in respect of the same injury. As an instance, a widow with three children is entitled at present to receive from the fund weekly payments totalling $22, and (if her husband was killed in an industrial accident) a further capital sum of $6,807 under the provisions of the Workers' Compensation Act. Each of these systems ignores the other, as Sir Richard Wild has pointed out in an address on the subject entitled "Social Progress and the Legal Process", delivered while he was Solicitor-General.[89]

232. He illustrates this form of double compensation by the further example of a recent case heard by the Court of Appeal:[90]

> "A lady aged 40 was left widowed with four children. Her husband's wages and pension, with the family benefit, had brought

[89] K. J. Scott Memorial Lecture 1964, 27 *N.Z. Journal of Public Administration*, March 1965, p. 9.
[90] Wood *v.* Attorney-General (1963), N.Z.L.R., p. 39.

the family an income of £21 9s. per week. On her common law claim she received £9,250 in general damages, an amount which the Court of Appeal had no difficulty in judging to be quite sufficient in itself, despite an allowance of 20 percent for contributory negligence, to make good the financial loss the family had sustained. But in addition, from superannuation and State benefits including a war widow's pension . . . she received £18 12s. 6d. per week, so that there was only £2 16s. 6d. less coming into the home with one mouth less to feed. But the £9,250 award ignored all this. In the existing state of the law the Court of Appeal could only say that it was not its function so to apportion the damages between the widow and children as to promote a review of the State benefits".

233. This part of the address concludes with a reference to the Beveridge Report to the effect that a person should not have the same need met twice over.[91] The remarks which then follow, in our opinion, sum up the whole situation:

". . . It may be that our community approves it. But I doubt whether the community is aware of the fact. I do not think it is realised that, in such cases, the community is now to a large extent meeting the same need twice over, paying once through taxes and once through insurance premiums added to its purchases. I doubt whether Parliament, in its regular concentration on the amounts rather than on the equity of distribution of State benefits, has ever faced this problem . . . Its existence provides another weighty reason for discarding lump sums in favour of periodic payments."[92]

234. Some faint suggestion was made during the course of our inquiry that such double payments gave injured workers no more than the amounts to which they were entitled. The argument is that contributions are made on their behalf by employers to the Workers' Compensation fund and by themselves in the form of direct taxation to the Social Security fund. It is a fallacious form of reasoning. The whole community provides the Workers' Compensation fund in the final analysis; while the taxes which support all the various social security benefits are not provided as a form of personal investment which can be redeemed by individuals regardless of other claims. Clearly enough general taxes collected for the benefit of all cannot be equated with contributions to an insurance fund intended as a form of personal insurance.[93]

[91] See also para. 41 *supra*.
[92] Loc. cit. p. 9, cf. Report of Mr Justice McGillivray, Workmen's Compensation Act, Ontario, September 1967, pp. 23-30.
[93] See also the Beveridge Report (Op. cit. para. 272).

235. In the preceding paragraphs we have discussed some of the disadvantages and difficulties associated with the Act in its present form. A large number of other problems have been referred to us in submissions during the course of the inquiry.

236. They include, for example, the difficult position of volunteers who assist in rescue operations. A Cabinet Minute[94] enables those of them who suffer injury while taking part in organised search and rescue work to be given grants equivalent to payments under the Workers' Compensation Act for similar incapacities. But there is a need to consider the position of those who act independently.

237. Then the method of assessing payments which might become due in respect of apprentices is a matter in issue; and there is the more general problem of students under training. Anomalies exist in regard to independent contractors and some special groups such as jockeys. There are difficulties in defining certain industrial diseases and the evidence which should be accepted in respect of them. Questions arise as to whether risks in individual industries should continue to be measured in order that differing levies or premiums should be assessed in respect of them. There are claims by chiropractors that they should be recognised beside the medical profession. There is the basic problem of the way in which benefits in general should be defined.

238. All these and other important matters are more conveniently dealt with in parts 6 and 7 of this Report which outline the scope and form of the comprehensive scheme which is recommended.

[94] CM (58) 55.

XV–CONCLUSIONS CONCERNING THE WORKERS' COMPENSATION ACT

239. It will be recalled that 25 years ago Lord Beveridge offered the downright criticism that the workers' compensation legislation had been put forward on a wrong principle and had since been dominated by a wrong outlook.[95] The criticism is justified and it is equally applicable in New Zealand.

240. The position is due to the unfortunate compromises which mark the legislation. It had been hoped that it would overcome the procedural problems of the common law, and yet it has adopted all the forms of litigation. It was designed to provide a consistent and certain remedy, but offers no more than partial compensation. It was put forward principally because of the difficulties which accompany serious injury, and yet its emphasis goes in favour of short-term or minor problems. It is handled by private enterprise but it affects a social responsibilty. It is a costly process, and yet the system can do nothing effective in the field of prevention of accidents or the physical and vocational restoration of the injured. In short, in its present form the Act works upon a limited principle, it is formal in procedure, it is meagre in its awards, and it is ineffective in two of the important areas which should be at the forefront of any general scheme of compensation.

[95] Op. cit., para. 80; see also para. 48 *supra*.

PART 5 – THE SOCIAL SECURITY LEGISLATION

241. When the Workers' Compensation Act was introduced into New Zealand in 1900 there was no system of social security. Old age pensions which had just been introduced were the only pensions available from general taxation, and there was no medical care. Gradually the pensions scheme was enlarged, and then in 1938 the Social Security Act introduced what has been described as a new concept.[96] The principle was accepted—

> "that every citizen had a right to a reasonable standard of living and that it was a community responsibility to ensure that its members were safeguarded against the economic ills from which they could not protect themselves. The inspiration of the Social Security Act was the determination to end poverty in New Zealand. A comprehensive system of benefits was thus established covering all the main economic hazards which in the past had been the cause of poverty."[97]

242. The preamble to the Social Security Act 1938 indicates the wide purpose of the legislation. It declares that this is—

> "An Act to provide for the Payment of Superannuation Benefits and of other Benefits designed to safeguard the People of New Zealand from Disabilities arising from Age, Sickness, Widowhood, Orphanhood, Unemployment, or other Exceptional Conditions; . . . and, further to provide such other Benefits as may be necessary to maintain and promote the Health and General Welfare of the Community."

The principle upon which the Act has operated has been universal coverage for all who might need or deserve assistance from the State.

243. The social security system is not a scheme of social insurance in the sense that benefits should be balanced against contributions or that the benefits should be related to the varied income losses of individual beneficiaries. Instead, its first purpose has always been to provide basic assistance at a level which would enable every person to maintain himself against need without undue strain.

[96] *An Encyclopaedia of New Zealand*, 1966, Vol. III, p. 270.
[97] Ibid.

244. The social security scheme and the health service are financed by grants from general taxation. There is a direct tax amounting to $7\frac{1}{2}$ percent on wages, salaries, and other income which forms part of income tax. This is paid into the Consolidated Revenue Account which provides for all the charges upon the health and social security services. There is therefore no separate fund for these purposes.

245. Benefits are not related to past earnings but are provided on a uniform flat rate basis. There are supplementary allowances for dependants, and supplementary allowances where economic circumstances justify the exercise of a discretion in this respect. There is, however, a means test. These methods of assessing benefits are administrative devices applied to diminish the size of the aggregate amount to be expended.

246. Until 1960 the means test took into account capital assets, as well as income. Since that year it has been related to income alone. However, there is no means test in the case of the benefits payable under the scheme of universal superannuation or the general family benefit payable in respect of all dependent children. Examples of various benefits and allowances at current rates are contained in Appendix 8.

DOUBLE COMPENSATION

247. As the preamble to the Act suggests, it is not merely consistent with its philosophy that protection should be afforded to those who might suffer personal injury; this is one of its objectives. Many injured persons, or the dependants of those who have been killed, have been aided by the social security scheme when they have failed to obtain assistance elsewhere. In numerous other cases it has taken over where the Workers' Compensation Act has left off: or where a lump sum has been provided either under that Act or in the form of damages at common law. Thus (in respect of the same accident) it has supplemented the amounts received through the one process or the other.

248. In the circumstances it may seem surprising that the other systems have not been merged with it. That efforts have not been made to achieve this in the past cannot be ascribed merely to loyalty to the other systems or the tug of tradition. It is due also to the fact that a system of flat rate payments, whether increased by special allowances or not, is regarded as an unacceptable substitute for processes which attempt (even if in stumbling fashion) to match lost income and make some provision for damaged or lost limbs.

CONDITIONS FOR MERGER

249. There would be great advantage in the integration of a comprehensive scheme of accident compensation into the present social security framework. An organic structure and unity would be given to the whole process. It would be possible to exclude entirely the whole out-moded conception of personal liability which has left with the Courts and the law what is no more than an "administrative system with a social purpose". There would be a great saving in expense and effort. Compensation could be provided speedily and in terms of consistent principle. There would be no double payment for the same injury. Instead there is discordant treatment of people with equal losses; there is an absence of central direction in the two vital areas of accident prevention and of rehabilitation; and there is a serious diversion of effort from productive work caused by a costly and duplicated series of administrative arrangements.

250. Nevertheless, integration is not feasible if compensation for injury would then have to take the form of the same flat rate payments for all. Few would accept such a scheme. Nor would it be just. And special provision for economic hardship or allowances for dependants would neither avoid the injustice nor gain general acceptance. The losses of individuals vary greatly and so do their continuing commitments. A fair part of their different losses and a fair part of their sudden problems will not be relieved by a system which ignores lost earnings in favour of a general average of assistance. The only way in which a comprehensive system of compensation could operate equitably is by linking benefits to earning capacity and by taking into account permanent physical disability.

THE DEPARTMENT'S PROPOSAL

251. Discovery of the ideal measure of compensation is central to our inquiry and the choice, in our view, is governed by the fourth principle outlined in paragraph 55 of this Report and discussed in paragraphs 59 to 61. It must be mentioned again at this point, however, because the Social Security Commission put forward two important submissions upon the whole subject. First, it was urged that we should recommend a unified system of compensation in place of the present processes. Second, concrete and specific proposals were advanced for a new scheme founded upon the principle of a basic and uniform level of compensation for all, supplemented by means-tested economic and dependants' allowances.

252. A unified system is essential, in our opinion, and because we are satisfied that a suitably generous scheme of compensation can

be devised, we have no hesitation in accepting the first of the two submissions. The second submission, however, we feel bound to reject for the reasons we have mentioned in paragraph 250, and more specifically in the paragraphs which follow.

253. Before we examine the proposal for a new scheme it is right to express our appreciation of the thought and industry which mark the extensive submissions presented to us by the Social Security Commission.

254. In essence the proposal is that a weekly basic flat rate payment of $11.80 should be paid for total incapacity regardless of financial circumstances, and that there should be supplements in the form of economic and dependants' allowances paid at the rate and generally subject to the same conditions applicable to present social security benefits. The income-related means test in regard to these supplements would permit an exemption of income amounting to $8 per week. For a single man the maximum economic supplement would be $11.75, and for a married man $10.75 together with an allowance for a wife dependent upon him, amounting to a further $10.75. Certain cases of severe or multiple disablement would become entitled to an additional benefit amounting to $7.

255. This proposal has the virtue that it is uncomplicated, it could be merged easily with the general social security system, and it would create no difficult administrative problems. It is, nevertheless, open to a number of criticisms which we regard as insuperable.

256. The first criticism to be made of the proposal is that it equates unequal losses and does this at an unacceptably low level. We have described the present weekly rate of compensation under the Workers' Compensation Act as a meagre form of recompense for a man who is incapacitated for any period beyond three or four weeks.[98] The proposed basic benefit in the Department's scheme would cut that present low maximum rate in half for men without dependent wives, and would fail to match that rate in other cases in the absence of the special economic supplement or the allowance for grave disability.

257. The second criticism is that the effect of the scheme is to give preference to all with lesser losses at the expense of those whose losses are great. The effect arises in two ways. First, a man with

[98] See para. 175.

an income loss lasting two or three days would receive the same daily proportion of lost income as his neighbour on the same wage who is left to bear the difference for a year. Second, the payment would replace all the lost earnings of some, while others would receive but a small fraction of their normal income. And the two effects would be cumulative upon one another. The greatest happiness of the greatest number is not, in our view, a suitable foundation for a just system of injury compensation. The real purpose of such a scheme is "not to smooth out the routine ups and downs"[99] but to provide for the material strains and needs of incapacity. We firmly believe that if preference should be needed in the distribution of the available funds, then it should go in favour of the longer term incapacities and the more severe cases of permanent partial disability.

258. The third criticism is that although there is an allowance in respect of wives where the family income does not rise above the stated level the proposal ignores the other and often substantial commitments of large numbers of people whose standard of living has quite reasonably been geared to rising levels of income. The economic supplement could not take care of these commitments, nor would it be automatically available.

259. The fourth criticism concerns the awards which would be made in respect of permanent partial disabilities. Assessments would be related to the basic injury benefit of $11.75 only. Accordingly, all with similar disabilities would receive the same amount regardless of age and effect upon earning capacity; and the amount would be a proportion of this small weekly sum. It is an approach to the problem which involves an abandonment of the compensation principle.

THE MEANS TEST

260. The final criticism relates to the means test which has been proposed. Our comment falls under five heads. First, this is a device usually applied to promote economy in the distribution of limited funds at a level of basic subsistence. It could not properly be operated in the assessment of compensation merely to give subsidies, from adequate funds, to a segment of injured persons whose qualification for the subsidy bore no relation to the level of their losses. Second, fair recompense should not be denied to one man because he has been provident; nor over-compensation provided for another with minor injuries but massive debts. Third, income from savings

[99] Ison, op. cit., p. 60.

would be taken into account, and we think that a system "which penalises savings is not only inequitable but against [the country's] economic interests".[100] Fourth, the inquiry into means which would become necessary to establish entitlement seems to us an unnecessary intervention and quite irrelevant to any attempt to compensate a man for injury. Fifth, an income-related means test would be a serious disincentive to rehabilitation and a return to work. In the present context the principle must be compensation for losses, not assistance for need which already is the subject of generous attention in New Zealand.

INCOME-RELATED BENEFITS

261. In propounding the scheme of flat rate benefits the Social Security Commission invited us to consider features of income-related schemes which the Commission considered involved difficulties or anomalies. These matters should be mentioned briefly.

262. It was suggested that the need to apply maximum and minimum levels of compensation in wage-related schemes tended to provide the same uniform benefit for many people, and thus the advantages of such a system were more apparent than real. The force of the argument depends entirely upon the upper and lower limits of compensation. Under present conditions in New Zealand the margin can and should be a wide one, and we have made recommendations accordingly.

263. Then it was said that the value of wage-related benefits would gradually be exhausted by the effluxion of time: compensation which might seem attractive at the time of injury would be left behind by changes in the value of money. This is a difficulty which affects pension schemes of all types. It is not confined to those which are linked to past earnings. In many countries the difficulty is overcome by regular and automatic review designed to keep benefits in touch with current standards of living. In our judgment this sensible process should be adopted for the new scheme (as we recommend) and if it is, then the objection mentioned by the Social Security Commission disappears.

264. The next consideration put before us is the case of the young man with prospects whose career has barely commenced at the time of injury. The point was made that people in this situation would be left with inadequate compensation because there would be no account taken of potential earning capacity. This is a practical problem and it can be overcome by a provision that

[100] Brian Abel-Smith, *The Reform of Social Security*, p. 13.

such cases should be reassessed after some suitable interval of time or by the exercise of discretion in favour of the applicant at the time of assessment.

265. It was suggested, too, that there would be difficulty in assessing on any equitable basis the real earning capacity of injured claimants in order to assess fair compensation on the wage-related basis. The example was given of seasonal workers whose wages might fluctuate considerably over a period of time. This is an administrative question which certainly is not incapable of solution. We consider that it can be handled by providing weekly compensation for short-term periods in relation to current levels of income: and calculated for long-term incapacity against average earnings over a suitable period of time.

266. Other questions were raised concerning the difficulty of making assessments of compensation for permanent partial disabilities as a percentage of past earnings. In our view only by those means can substantial justice be achieved generally and for particular cases. A flat rate level of compensation would produce an unreal answer in every case, and in addition would present most of the same difficulties in assessment. In any event administrative difficulties of this sort should never be used as a reason for departing from principle.

267. A final issue was put on the basis of equity. We were asked to consider whether the community should "maintain a person at his pre-accident income if the income was well above what an average person would receive in full-time employment". Our answer is that if such a person should become the chance victim of socially acceptable activitiy it would be wrong to leave him to make drastic adjustments in his standard of living merely to pay lip service to egalitarian doctrines unneeded by any economic consideration. The community should accept responsibility for all victims of accident: and if that responsibility is to be fairly discharged every man should be provided with a fair measure of his actual losses. The calculations as to cost contained in the appendices to this Report make it clear that this can be done for all citizens without affecting the claims of any. Real compensation is the aim, and in our view injustice by discrimination must be avoided.

A UNIFIED SCHEME

268. Integration of any comprehensive scheme of compensation within the social security structure is an important objective for reasons which have been mentioned. Accordingly the Social Security

Commission asked that we should not overlook the present organisation of benefits provided by the social security system and the basis upon which they are assessed.

269. We recognise that, in the interest of unification, it would be undesirable for a new scheme to conflict with any fundamental principle which governed the general social security system. Nevertheless, for the reasons we have given, we are completely satisfied that if the common law process and the Workers' Compensation Act are to be replaced the substitution certainly cannot be achieved on a basis of flat rate payments.

270. Moreover we doubt whether a concept for social assistance which was developed in the 1930s should be applied to the compensation needs of the 1970s. That the social security experiment in New Zealand was founded upon a bold and imaginative concept has been proved by the intervening years, but there have been great economic and social changes since 1938. It would be a serious mistake to lose the advantage of achieving a comprehensive scheme of compensation now by trying to adapt it to a flat rate system of benefits which itself might be modified in the period ahead.

271. In most modern schemes of social insurance, "benefits vary among beneficiaries *in accordance with their prior earnings*".[101] [Our italics.] The trend today seems to be clearly in the direction of such income-related benefits (sometimes provided as a supplement to a basic pension), and many important countries have been moving towards or enlarging pensions schemes in this way. Examples on the continent of Europe alone are to be found in the social insurance schemes of Austria, France, Germany (Federal Republic), Netherlands, Norway, and Sweden.

272. The United Kingdom also has undertaken a re-examination of the principle of universal flat rate pensions. Within 16 years of the Beveridge Report and only 12 years after legislative effect was given to it, the Conservative Government in the United Kingdom presented a White Paper concerned with the future development of the National Insurance scheme in which it was said:

> ". . . Social and financial considerations alike point to the need for a new and bold step away from the universal flat-rate system. It is evident that a sound system which takes account of varying standards and capacity to pay requires that contributions and pensions should vary according to earnings."[102]

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[101] *Social Security Programs Throughout the World*, 1967 (U.S. Department of Health, Education and Welfare), p. ix. See also Appendix 10.

[102] Cmd. 538 (October 1958), para. 27.

273. Then in 1964 the view of the new Labour Government was expressed by the Chancellor of the Duchy of Lancaster (the Right Hon. Douglas Houghton). He remarked that "the modern concept of social security goes far beyond the sort of national minimum which the Webbs and Beveridge thought about".[103] Then he commented upon uniform flat rate pensions in the following way:

> "In these days no scheme of social security can be satisfactory which fails, first, to provide benefits bearing some reasonable relationship to the actual amount of income lost by sickness, unemployment, and on retirement, and so on, and, secondly, which fails to keep those benefits abreast of changing values or standards. . . . Our concept for the 1970s is that all should pay according to their means and should receive in return an assurance of income-related social security."[104]

CONCLUSION

274. It may happen that the next move in New Zealand would be an acceptance of the trend which we have outlined and that some form of income-related benefits will be introduced as a modification or supplement to the present social security system. This is something which we are unable to judge or anticipate. However, the possibility is there, and for this reason as well as for the compelling practical reasons which have been mentioned in preceding paragraphs, we believe that an income-related system of compensation for personal injury must be recognised as an essential part of our general proposals.

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[103] 701 U.K. Parl. Deb. (Commons), p. 870: 10 November, 1964.
[104] Loc. cit., p. 872.

PART 6 – PROPOSALS FOR A COMPREHENSIVE SCHEME

275. It is now necessary to set down our proposals for the future. The scheme which will be outlined involves several far reaching changes. Some of them have been indicated in earlier parts of the Report. Others need more specific attention.

276. We make no attempt to answer in advance every query which might be raised concerning the proposals. Nor is it possible to define every aspect of the administrative arrangements which might be required. But certainly the scheme must be described in sufficient detail to enable decisions to be taken that theory can, in fact, be translated into practice.

277. However, the detail ought not to be allowed to submerge the structure. The proposals should be examined within the framework of a discernible and coherent system. Accordingly in this part of the Report we provide an outline of the whole scheme in the form of a running summary. Where it can be done conveniently explanations and reasons are provided for the suggestions made: otherwise they will be found associated with earlier parts of the Report, or in Parts 7 and 8 which follow.

XVI – GENERAL

278. OBJECTIVE

(a) The overall purpose is to provide a unified and comprehensive scheme of accident prevention, rehabilitation, and compensation which will avoid the disadvantages of the present processes and will itself operate on a basis of consistent principle.

(b) The scheme must meet the requirements of the five principles outlined in paragraph 55: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency.

(c) It must meet the requirement of cost.

279. APPROACH

(a) The compensation purpose of the scheme is not to provide merely for need but to shift a fair share of the burden suddenly falling upon individuals as a result of personal injury.

(b) This is a form of social insurance—not a form of social assistance. Once this general target is recognised and kept in mind apparent difficulties in subsidiary areas will tend to disappear.

(c) Since the object is compensation for all injuries, irrespective of fault and regardless of cause, the level of compensation must be entirely adequate and it must be assessed fairly as between groups and as between individuals within those groups.

(d) If economic reasons require preference to be given then the more serious incapacities must always have priority over short-term or minor cases.

(e) The compensation process must not be allowed to impede rehabilitation: on the contrary it should be developed in ways which will support the important objectives of rehabilitation.

280. METHOD

(a) Given a suitably generous scheme on the foregoing basis it follows automatically that previous ways of seeking to achieve the same or a similar purpose become irrelevant.

(b) Thus the common law rights in respect of personal injuries should be abolished and the Workers' Compensation Act repealed.

(c) Wherever relevant, existing benefits under the Social Security Act would be merged with the compensation payable under the new scheme.

(d) In the absence of personal liability and with the disappearance of any element of voluntary contribution there will be no place for the 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.[105]

(e) The scheme involves the acceptance of community-wide responsibility in respect of every injured citizen, and as such it clearly must be handled as a social service by an agency of the Government.[106]

(f) The procedures and techniques of private litigation should be replaced by non-contentious processes of assessment and review with recourse to the Courts only upon a point of law.[107]

281. SCOPE

This involves defining—

(a) The classes of people to be protected; and

(b) The contingencies to be covered; and

(c) The compensation to be paid.

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[105] See paras. 209 to 216 *supra*.
[106] See paras. 306 and 307 *infra*.
[107] See paras. 308 and 309 *infra*.

282. COMPREHENSIVE ENTITLEMENT

(a) There must be comprehensive entitlement and an acceptance of the second principle outlined in paragraphs 55 and 57. The reasons are repeated briefly in the following subparagraph.

(b) There could not be unequal community treatment of identical losses simply because one man was injured at work and a second on the road. Nor could the system provide for the second man and ignore his injured wife or child. What is more each one of these persons is the chance victim of a necessary or an acceptable social activity. Nor could a fund maintained by the whole community provide for the road injury victims and fail other groups in the community so helping to maintain that fund such as the housewife, or her husband injured in some domestic accident. And clearly the self-employed must be included. Once the essential principle of community responsibility is recognised in respect of any one of these groups it must be accepted for all.

(c) The elderly and the young must be included on a basis which recognises their past or potential contribution to the productive effort of the nation: and the housewife because of her direct and continuing contribution to that effort.

283. AGE LIMITS

(a) All this gives rise to the question as to whether compensation should be restricted to those within defined age limits. There is a case for age limits at each end of the working population, and differing opinions may be held upon it.

(b) However, an upper age limit would disregard the element of lost physical capacity in the case of periodical payments of compensation; it would be difficult to provide adequately for those injured outside the age limit; and it would cost relatively little to go beyond the normal span of working life in favour of lifetime payment. Accordingly no upper age limit is recommended.

(c) There should be a lower age limit entitling those who reach it to commence receiving compensation for past injuries and to qualify them for compensation in the ordinary way in respect of any future injury.

(d) The lower age limit should be defined to include all those regularly engaged in full-time employment or whose injury occurred at a time when they were parties to a contract of employment at a wage of $15 or more per week, or who have attained the age of 18 years.

(e) Some discretion should be given to enable exceptional cases to be given special treatment, but monetary compensation during periods of temporary total incapacity would not be justified for most young people. And any permanent incapacity normally could be properly attended to at the time the qualifying age was reached.

(f) However, all these cases should receive the same medical and hospital benefits available to other injured persons.

284. DEPENDANTS OF LIVING BENEFICIARIES

(a) As the scheme is designed to shift losses and is not limited merely to deal with need, the level of compensation must be brought appropriately close to the level of income lost by the individual concerned.

(b) If this is done there can be no case for supplementing compensation to take notice of dependants. The question would not arise if the compensation were fixed at 100 percent of tax-paid income, and once compensation is brought to the correct point in relation to this level the same argument applies.

(c) Upon this principle no supplementary allowance can reasonably be required for dependants of living beneficiaries, and we recommend accordingly.

285. DEPENDANTS OF DECEASED PERSONS

(a) On the other hand provision should be made for the dependants of a deceased person whose death resulted from injury by accident or from one of the industrial diseases.

(b) Dependants should be defined to include such of the members of the family of the deceased or such of his relatives as were wholly or partly dependent upon him at the time of his death or who but for the incapacity due to the accident would have been so dependent.

(c) The relatives of the deceased should be defined to include all the persons referred to under that definition in section 2 of the Workers' Compensation Act 1956.

(d) In addition there should be provision during continuing dependency for a wholly or partially dependent—

(i) Invalid widower;

(ii) Separated or divorced wife;

(iii) Common law wife who had occupied that *de facto* position for the entire period of two years preceding the death of the deceased.

(e) There should be an irrebuttable presumption of total dependency in favour of the wife of the deceased during her widowhood and in favour of each child of the deceased (including step-children and illegitimate children) until 18 years of age, or until 21 years of age if engaged upon a full-time course of education or training without regular salary or wages, and regardless of age if an invalid.

286. NEW ZEALAND RESIDENTS INJURED OVERSEAS

(a) New Zealand residents temporarily abroad for periods not exceeding 12 months should continue to enjoy the protection of the scheme.

(b) In the case of New Zealand residents absent from the country for periods longer than 12 months, protection should be continued upon application to and at the discretion of the controlling authority.

(c) The level of compensation for hospital and medical attention should be limited to equivalent charges for those services in New Zealand.

(d) On the principle that a man should not be compensated twice for the same injury, compensation received by a New Zealand resident should be refunded out of any damages or compensation obtained abroad by him in respect of the same accident.

(e) On the other hand we do not think it necessary that such New Zealand resident should be required to take action abroad for recovery of these amounts. The return to the fund would rarely justify the administrative problems or the cost.

(f) In certain cases, at least, the assessment of permanent partial disability and payment of compensation in respect of such a disability would have to await return to the country.

287. VISITORS TO NEW ZEALAND

(a) In general a visitor to a country always takes it as he finds it, and the absence of common law rights in respect of personal injury claims would not justify, in our opinion, an extension of the comprehensive insurance scheme to include visitors. New Zealanders abroad are obliged to accept risks of this sort and usually insure in respect of the contingency.

(b) On the other hand persons employed by a New Zealand employer should be protected if injured at any time or place within New Zealand while the contract of service remains current. In such cases the employer concerned would qualify the employee by reason of the contribution to the fund based upon payments of wages.

(c) Persons employed by employers domiciled outside New Zealand should be protected in terms of regulations designed to meet circumstances of this sort.

(d) Visitors in general should be permitted and perhaps encouraged to obtain the protection of the scheme on a voluntary basis on terms approved by the controlling authority.

288. SPECIAL GROUPS

On the basis of the preceding paragraphs victims of criminal violence would automatically be included. In the same way those engaged on rescue work on a voluntary basis would be protected. The scheme is all-embracing and particular groups in the community need not be specially mentioned.

XVIII–CONTINGENCIES TO BE COVERED

289. GENERAL PRINCIPLE

(a) The general basis for protection should be bodily injury by accident which is undesigned and unexpected so far as the person injured is concerned, but to the exclusion of incapacities arising from sickness or disease.

(b) No system of compensation or damages is able to avoid all the "hard" cases. In defining the area of protection the aim should be clarity and certainty and the avoidance of future dispute or disappointment.

(c) We recommend that, in general, protection should be afforded in respect of injury conditions which fall within the categories of external cause of injury classified as Numbers E800 to E999 in the International Classification of Diseases[108] with the exception of categories E970 to E979 (suicide) and E985 (judicial execution) and perhaps some categories of therapeutic misadventure or late complications of therapeutic procedures (E950–E959).

(d) Incapacity arising from such injuries should be protected when the injury resulted from an unexpected or undesigned external cause, including exposure to the elements; or unusual and material physical strain or poisoning; or following upon some voluntary act in an emergency.

(e) On the other hand incapacities should be excluded which resulted from a condition of disease or sickness; or a sudden physiological change in the course of disease or sickness; or a physiological event occurring during activity which itself was normal and uneventful.[109]

(f) Injury which has been deliberately self-inflicted should not be the subject of compensation.

(g) The issue of drawing a line between injury by accident and sickness or disease is a mixed question of law and medicine. The recommended approach to the matter by means of the International Classification of Diseases is a new one which may enable both professions to work more certainly at the boundary. We make the further recommendation, therefore, that a small group of medical and legal experts be appointed to study the question.

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[108] "Manual of the International Statistical Classification of Diseases, Injuries and Causes of Death", World Health Organisation, Geneva, (1957), p. 243.

[109] Cf., Articles by H. Luntz, 1966, 40 Aust.L.Jo., p. 179; and K. J. Jenkinson, 1967, 41 Aust.L.Jo., p. 112.

(a) It is possible to argue that if incapacity arising from accidental injury is to be the subject of comprehensive community insurance then interruption of work for reasons of sickness or unemployment, or other causes which cannot be guarded against should equally be included.

(b) We are able to understand the logic of the argument, but the proposal we now put forward is far-reaching and is designed to remedy a situation which at present is the subject of attention by unrelated processes which produce inconsistent and inadequate results. Moreover, there is a need for more statistical information in the area of sickness and disease before firm decisions could be taken as to the cost of a scheme which would embrace incapacities arising from these causes.

(c) Nevertheless certain industrial diseases are included within the scope of the present Workers' Compensation Act. For this practical reason we think they should remain within the protection to be afforded under the new scheme, but for work-connected injuries only, and upon the conditions at present laid down by the Workers' Compensation Act.

(d) In the past difficulties have arisen concerning damage to hearing as the result of repetitious noise.[110] There is a good case for the inclusion of deafness within the scheme where the condition has resulted from noise. We recommend that deaf persons should have the advantage of a rebuttable presumption to the effect that the condition resulted from that cause. In the absence of evidence to the contrary the condition should then be regarded as an injury arising by accident.

[110] See, for example, Beasley *v* Attorney-General (1966), N.Z.L.R., p. 1089. Cf., Report of Commission of Inquiry, Workmen's Compensation Act, British Columbia, 1966, pp. 233–240; see also Mr. Justice McGillivray, op. cit., pp. 128–130.

XIX—SCOPE OF COMPENSATION

291. BASIS OF BENEFITS

(a) The incapacity of a productive worker usually results in a loss of income. Thus compensation in a real sense must be assessed on an income-related rather than a flat-rate basis. Reference to the matter generally is contained in paragraphs 248, 250, and 253 *et seq.*

(b) Moreover, there are incapacities which involve permanent physical disability. We use the expression in the sense that there is "a fixed persistent pathological change resulting in a loss of effectiveness of one or more parts or systems of the body".[111]

(c) Whether or not such a loss of physical faculty has economic consequences, it is nonetheless a loss to the individual concerned, and in a greater or a lesser degree may adversely affect him thereafter. If this element is significant it should accordingly be included.

(d) It can be included by accepting the principle that loss of bodily function should be the test rather than actual loss of earnings. This test will indirectly reflect the general effect of the faculty loss on all normal activities.

292. PROPORTION OF LOSS COVERED

(a) Opinions may differ about the proportion of loss which should be left with an injured person, but certainty of compensation and the need to leave some margin of effort to personal initiative are just and practical reasons why such a scheme as this should not attempt to provide complete indemnities. The matter is mentioned briefly in paragraphs 218 and 219.

(b) It is our opinion that automatic compensation equivalent to 80 percent of lost income for periods of total incapacity would adequately take account of the matters to which we have referred.

(c) It should be laid down, however, that assessments must give all reasonable doubts in favour of the applicant; that they must be based on the real merits and justice of the case; and that suitable discretion should be available to deal with unusual circumstances. On such a basis the proposed level of compensation should be accepted by all.[112]

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[111] See *Occupational Disability and Public Policy* (1963) (Ed. E. F. Cheit and M. S. Gordon); Earl C. Steele, p. 273.

[112] See paras. 206 and 309.

(d) Compensation should be paid as from the day following incapacity on the principle that there is rarely a wage loss for the day of the injury. Otherwise it should be paid in respect of the whole period of incapacity.

(e) Compensation for housewives and others without direct earning losses should be paid in respect of periods of temporary total incapacity as from the fifteenth day after the day of injury, but compensation in such cases should be paid as from the day after incapacity commences whenever it lasts for eight weeks or longer.

293. PERIODIC PAYMENTS

(a) Compensation should be paid on a periodic basis subject to the provision for commuting to lump sums in certain cases, as mentioned in paragraph 305 which follows. There is reference to the question generally in paragraphs 115 to 122 and *126* and *127*.

(b) International Labour Office Recommendation No. 121 provides that rates of permanent benefits "should be periodically adjusted, taking account of changes in the general level of earnings or the cost of living".[113] The Convention itself provides that rates of these benefits "shall be reviewed following substantial changes in the general level of earnings where these result from substantial changes in the cost of living".[114] Already in New Zealand war pensions are reviewed every two years in relation to movements in the consumers' price index. Social security benefits are adjusted from time to time upon the same general basis. The principle is now accepted in many countries overseas.

(c) We recommend that there should be automatic adjustment of periodic payments at two-yearly intervals in order to keep pace with changes in the cost of living. The adjustments should be made up or down on the basis of the consumers' price index for movements of 3 percent or more.[115] The maximum and minimum rates of weekly compensation should be adjusted at the same time.

(d) An advantage of periodic payments of compensation lies in the fact that they can be assessed and paid promptly and later adjusted following assessment if changed circumstances should indicate this to be necessary. Accordingly we recom-

[113] Article 15.
[114] Article 21.
[115] Cf., Report of Mr Justice Tysoe, Commission of Inquiry into Workmen's Compensation Act, British Columbia (1966) at p. 51.

mend that a beneficiary should be entitled to have his case reviewed for the purpose of obtaining an increase in benefit should his condition deteriorate.

(e) But the converse should not apply. A man should not be left with the thought that energetic attempts to overcome physical handicap might result in a reduced pension, and we think it in the national interest that there should be no uncertainty in this respect. The matter is mentioned in paragraphs 127, 305 (d), and 404.

294. HOSPITAL AND OTHER ALLOWANCES

(a) We recommend that all hospital care should be provided by the national health service, together with medical fees within the limits at present prescribed. However, as part of compensation and for the promotion of rehabilitation all medical and specialist services should be provided free of charge.[116]

(b) The compensation fund should therefore assume responsibility for the full amount of all these fees and obtain suitable refunds from the health service. These general questions are considered in more detail in Part 7 of the Report.

(c) Provision should be made for reasonable travelling expenses to and from hospital or for the purpose of obtaining medical attention and for such related treatment as physiotherapy.

(d) There should be provision for payment of a full-time attendant for totally and permanently incapacitated persons where such assistance is shown to be necessary.

(e) Appropriate provision should be made to meet the reasonable expenses associated with the rehabilitation of injured persons, and for the supply and repair of prosthetic appliances.

295. AMOUNT OF COMPENSATION

This will involve defining—

(a) The income to be used as the basis for assessment of compensation; and

(b) The upper and lower limits which should be placed upon periodic payments; and

(c) The benefits to be paid to dependent survivors; and

(d) The method of assessing compensation for permanent disabilities.

These various matters are considered in the following paragraphs.

[116] See para. 310.

XX—LEVEL OF BENEFITS

296. EFFECT OF TAXATION

(a) Compensation should be assessed as a fraction of the tax-paid earned income of the individual concerned.

(b) It may have been satisfactory in the past to take income before tax as the basis. The upper limit of compensation has been kept low and until recent years many incomes have not been greatly affected by the incidence of income tax.

(c) The position today is different. Average incomes are subject to substantial taxation. Moreover, the scheme requires an upper limit of compensation at a level which will have meaning over a wide range of incomes; and certainly at the higher levels compensation taken as a proportion of a man's gross income could exceed the whole of his take-home pay. Such a situation would be wrong unless the compensation were to be taxed.

(d) To provide a percentage of gross earnings as compensation and then tax the result would be administratively cumbersome; it would not provide the correct share of the actual loss of the individual concerned; it would provide persons on higher incomes with a greater percentage of their real loss than persons on lower incomes owing to the increasing rate at which income tax is calculated; and it would be wrong to tax the part of compensation which represented lost physical capacity.

(e) It might be said that a portion of gross earnings should be taken as the basis and compensation so assessed left tax-free in the hands of the individual concerned.

(f) This alternative we reject. Such a system would prefer people on higher incomes for the reason mentioned in the preceding subparagraph (d): and it would provide for actual losses on a variable basis.

297. CALCULATION OF TAX

(a) An administratively simple method should be adopted for the assessment of tax-paid incomes.

(b) Accordingly we recommend that once the earned income has been ascertained the amount to be deducted for tax should be determined on the basis of the PAYE tables.

(c) The personal exemption and the exemptions for wife and children only should be taken into account: family income and any other particular circumstances should be disregarded.

298. ASSESSMENT OF EARNINGS

(a) Differing considerations affect those whose earnings fluctuate on a seasonal basis or from year to year; or those whose income is likely to be increased following a period of training; or those who are unemployed or incapacitated at the time of injury.

(b) In our view short-term incapacities should be compensated on the basis of current personal earnings; and long-term incapacities on the basis of income averaged out over a period of 12 months, or by some other method in the discretion of the controlling authority. In neither case should amounts earned at overtime rates be excluded.

(c) Apprentices, trainees, students, and others whose earnings but for the accident would probably increase should be entitled to a review of compensation on one or more occasions following the original assessment.

(d) The controlling authority should be given some margin of discretion to deal equitably with all cases at the time of assessment. And the applicable regulations should be used "as a guide, not as a strait jacket".[117]

299. EARNINGS OF SELF EMPLOYED

(a) The assessment of earnings of the self-employed presents administrative and practical difficulties. For this reason we recommend that every self-employed person should be obliged to declare an income for premium purposes which would become the basis for the assessment of benefit.

(b) The income so declared should be earned income for the previous financial year, subject to a minimum of $500.

(c) Subject to this minimum there should, however, be a provision enabling the average of earned income taken over several years to be declared in suitable cases, or alternatively the income expected to be earned in the current year.

300. LIMITS OF COMPENSATION

(a) There should be a lower limit of compensation fixed to accord with the existing sickness benefit for a single person provided under the social security system (at present $11.75 per week).

(b) This would be the rate of compensation during periods of temporary total incapacity for persons without incomes or whose earnings were low.

[117] Ison, op. cit., 60.

(c) For the purpose of assessing permanent partial disabilities the minimum rate for total incapacity should be fixed at a notional level of $20 which also should be the actual rate of minimum compensation paid to injured persons left totally and permanently incapacitated.

(d) In no case should the payment for compensation fall below the amount currently available in the circumstances as a benefit under the social security system.

(e) The upper limit of compensation must be defined at a point at which nearly every injured person could feel that his real losses were being fairly met on the proportionate basis outlined. The overall cost to the fund of taking this ceiling from $80 per week (which we consider to be the lowest acceptable limit) to $120 per week (which would include practically the whole working population) is statistically so insignificant that the higher figure clearly should be accepted.

301. MINOR INCAPACITIES

(a) The real drain upon any compensation fund results from the very many payments for short-term and quite minor injuries. Accordingly it is extremely important that the level of compensation for these injuries should not be allowed to rise to a point where the majority with lesser troubles are satisfied at the expense of those whose problems are great.[118]

(b) In the past the total amount absorbed for short-term cases has kept the level of compensation payable under the Workers' Compensation Act for all injured workers down to virtually the same level; and the duration of payments to only six years. This distribution of funds is inequitable.

(c) No man facing some short-term incapacity would wish such a situation to continue: moreover for short periods he is able to carry some strain himself. Nor would it be possible to deal adequately with more serious cases of incapacity if the same approach were to be followed under the new scheme.

(d) Real compensation must be available wherever it is needed, and in order that funds can be distributed upon this principle we recommend that compensation for the first four weeks should not exceed $25 per week.

(e) At the expiration of four weeks the limit should be removed for those still incapacitated. In the case of persons incapacitated for periods of eight weeks or longer compensation should be reassessed at the full rate for the whole period of incapacity.

[118] Cf., E. C. Steele, op. cit., p. 276.

302. DEPENDENT SURVIVORS

(a) Compensation for a widow should be assessed at one-half of the amount which would have been received by her deceased husband if totally incapacitated; together with a lump sum of $300.

(b) The periodic payments of compensation should cease on remarriage; but in lieu of these payments we recommend that a lump sum equal to the payments for two years should be paid to the widow concerned within one month after the day of her marriage.[119]

(c) An amount not exceeding $200 should be payable to the widow or the personal representative of the deceased in respect of funeral expenses.

(d) Compensation should be assessed for each dependent child of the deceased at one-sixth of the compensation which would have been paid to the deceased had he survived and been totally incapacitated.

(e) Common law wives qualifying for compensation, and separated and divorced wives of deceased persons should receive amounts related to and during dependency and within the limits specified for a legal wife.

(f) Other dependent relatives of the deceased should be compensated within the limits specified for a widow, subject to the extent of dependency in each case.

(g) The compensation payable to a child who is a full orphan should be double the rate which would be payable for a dependent child with a living parent.

(h) Clearly the legal wife or the children of a deceased person should take priority over any other dependants.

(i) Invalid widowers should be compensated on the same basis as a widow.

(j) In no case should the total amounts of compensation payable in respect of a deceased person exceed the amount which would be payable in respect of total incapacity had he survived.

303. PERMANENT DISABILITIES

(a) There are great advantages in using a broad schedule method of assessment for these cases. They are mentioned briefly in paragraph 200.

[119] Cf., Sec. 38 (1) Workmen's Compensation Act 1960 (Ontario).

(b) The schedule at present contained in the Workers' Compensation Act is distorted in favour of minor incapacities for the reasons outlined in paragraph 193 and following paragraphs. Moreover it is based on medical opinion and statistical experience now more than 70 years old. In the circumstances an entirely new scale is required.

(c) In designing the new schedule the emphasis should go in favour of the more serious cases.

(d) We have provided examples in Appendix 11 of severity ratings which we think should be given to certain classes of injury. But we have not designed a new scale. The matter is complex and after there has been opportunity for consideration of our general proposals the assistance of the medical and legal professions should be obtained in order to ensure that the principles we have outlined are fairly applied in a detached way to many specific and varied disabilities. We recommend that a committee be set up at some suitable time to deal with this matter.

(e) It is necessary to provide assessments that are consistent and reasonably meet the need for uniformity. Nevertheless the schedule should be used as a general guide as in Ontario rather than an inflexible measure.[120] In addition there must be some area for discretion to deal with the unusual case.

(f) Past attempts to define percentage disabilities almost to decimal places should be abandoned in favour of gradations on the scale separated by 5 percent for each step. Such an approach will leave a somewhat wider discretion to the medical profession, particularly in the case of non-schedule injuries, and this we think is desirable.

(g) There will always be anomalies associated with guide lines such as this. The anomalies should be accepted for the great advantage provided by the system as a whole and on the basis that the system will always be operated to avoid undercompensation or the ungenerous treatment of any individual claimant.

304. SEVERITY RATINGS

(a) Some relatively minor injuries have no significant effect upon a man's future life or upon his earning capacity.

[120] *Workmen's Compensation in Ontario, A Study in Medical Administration* (1965), p. 85.

(b) Subject to the discretion needed to deal with special cases this type of injury should be removed from the schedule. Instead such injuries should be listed for lump sum payments of compensation ranging from $100 to $1,200 according to injury. Examples are set out in Appendix 11.

(c) Non-schedule injuries of comparable significance should be compensated upon the same basis.

(d) Apart altogether from cases of this type all the less serious injuries should be brought much lower on the scale than the level outlined in the present schedule to the Workers' Compensation Act. This can be done with justice to those concerned because under the proposed scheme payments of compensation will not terminate at the expiration of six years as under the Workers' Compensation Act at present.

(e) For the purpose of assessment the minimum weekly payment to be taken as a base for permanent total disability should be $20.

(f) Some persons entitled to compensation for temporary total incapacity at rates higher than $80 weekly would be adequately compensated for permanent partial disabilities if the appropriate percentage were applied against that amount as a notional maximum. We recommend accordingly. However, the notional limit of $80 should be removed whenever in the particular circumstances of the case this should seem necessary and fair.

305. LUMP SUM PAYMENTS

(a) The disadvantages of lump-sum awards of compensation are discussed in paragraph 115 and following paragraphs.[121] Generally payments should be provided on a periodic basis.

(b) This principle is accepted by the International Labour Office Convention (No. 121) concerning benefits in the case of employment injury.[122]

(c) It is a principle which in 1962 was endorsed at the annual conference of the New Zealand Federation of Labour in respect of totally incapacitated workers and in respect of the survivors of deceased workers: and at the conference in 1964 in respect of workers generally.[123]

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[121] See also A. F. Young, op. cit., p. 76; and Somers and Somers, op. cit., p. 160.
[122] Article 14.
[123] Remit 112, 1962; Remit 70, 1964.

(d) Periodic payments can maintain their real value if kept in line with the consumers' price index, as we recommend in paragraph 293 (c). And if it is laid down that they should never be reduced because of a man's successful efforts on his own behalf (as we recommend in paragraph 293 (e)) then the periodic method of compensation would stimulate rather than retard the rehabilitation of those concerned.[124]

(e) However, the minor permanent partial disabilities referred to in paragraph 304 (b) should be compensated in the form of a lump sum.

(f) There should be a discretion in other cases to commute all or part of the periodic payments to a present capital sum where the interests or pressing need of the person concerned clearly would warrant this.[125] Such a discretion would, in our opinion, be sufficient to provide for the commutation of periodic payments in all suitable cases.

[124] See Earl C. Steele, op. cit., p. 277. See also paras. 127, 293 (d), and 404.
[125] Cf., Workmen's Compensation Act 1960 (Ontario), sec. 27 (4).

XXI–ADMINISTRATION

306. GENERAL

(a) Decisions as to the scope and nature of the scheme will determine the type of organisation which should handle it and the processes which should be used for the assessment of compensation.

(b) The proposal is for a comprehensive, universal, and compulsory system of social insurance. It involves extinguishing present common law rights in respect of personal injuries and a departure from the principle of employer liability under the Workers' Compensation Act. For the reasons which have been mentioned private enterprise could have no part in such a scheme.

(c) Against this general background there could be no point in retaining any form of adversary system in regard to the assessment of compensation.

307. AN INDEPENDENT AUTHORITY

(a) The scheme outlined involves a partial merger with some aspects of the present social security system. There are important differences in principle, however, and the general philosophy of the scheme has no exact parallel elsewhere.

(b) We think, therefore, it should be brought to life and set upon its course by an independent authority whose whole responsibility it would be to ensure the successful application in every respect of that general philosophy.

(c) It must be provided with all necessary administrative arrangements, nonetheless. With all these considerations in mind we recommend that an independent authority be set up by the Government which should operate within the general responsibility of the Minister of Social Security and be attached to his Department for administrative purposes.

(d) We recommend that the authority should be under the control of a Board of three Commissioners to be appointed by the Governor-General in Council, for specified terms of at least six years and secure in office except for disability, bankruptcy, neglect of duty, or misconduct proved to the satisfaction of the Governor-General. The appointments should alternate in a manner which will ensure continuity of experience on the Board.

(e) The Chairman should be a barrister of at least seven years practical experience.

(f) It is important that no member of the Board should be appointed as representative of any particular group in the community:[125a] and we think that "upon the good judgment and ability of the men who have charge of the organisation and conduct of this system of compensation . . . will depend very largely its ultimate success".[126]

(g) In regard to these matters generally we were impressed by the admirable arrangements made in Ontario for the organisation of the Workmen's Compensation Board there.[127]

(h) In the important areas of accident prevention and rehabilitation there would be much advantage in the stimulus which could be provided by central direction. In Ontario these matters, and indeed all aspects of administration, are tightly controlled from Toronto by the three members of the Board there. The benefits can be seen at a glance by any interested observer, and we recommend that this type of administration be used as a general model.

308. ASSESSMENT OF COMPENSATION AND REVIEW

(a) The structure for assessment, review, and appeal has been developed in Canada on lines which, broadly speaking, would work well in New Zealand. The public confidence which supports this general process in Canada depends upon a liberal and enlightened attitude on the part of all concerned with the decisions and upon centralised control by the members of the various boards concerned.[128]

(b) In Ontario the pattern is application, inquiry, investigation, and decision at the first level; review by a review committee at the request of the claimant; an appeal to an appeal tribunal which may hold *viva voce* hearings at which the claimant may be represented if he so desires; and a final appeal to the members of the Board itself. There is no hearing at the first two levels, and nearly all cases are dealt with in this way.

(c) We recommend that a somewhat similar approach be adopted in New Zealand except that on a point of law there should be an appeal to the Supreme Court.

309. PROCEDURE

(a) The appeal tribunal should comprise three persons including a doctor and a lawyer. The members of the Board themselves should deal with final appeals.

[125a] See Report of the Royal Commission, Ontario (1967), op. cit., p. 77.
[126] Report of British Columbia Committee of Investigation (1916), p. 16.
[127] See paras 206–208 *supra*.
[128] See para. 206.

(b) 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.[129]

(c) On such a basis the whole process of assessment will become one of inquiry and investigation. There should be discretion to deal with any unusual circumstances and every decision should be based on the real merits and justice of the case.[130]

(d) Under such a scheme as this there should be no reason for strictly limited periods of time within which claims could be made. We recommend that for all cases the limitation period should be six years, with a wide discretion to the Board to extend the time for any reasonable cause.

310. REHABILITATION AND SAFETY

(a) These matters are dealt with in Part 7 of the Report.

(b) Success in both fields will be achieved by central control, direction, and drive, supported by funds provided by the scheme itself. This approach would best supplement, in our view, the existing efforts being made in these fields.

(c) The object of rehabilitation demands efficient medical attention at all levels. To attempt economies in this area would be to fail the man himself and would, we think, be an extravagance in itself.

(d) Accordingly, we recommend that all medical fees should be paid in full by the fund on the basis of a scale prepared by the Medical Association of New Zealand and agreed to with the Board. There should be provision for automatic review of this scale at regular intervals.

(e) The Board should set up a medical branch under the leadership of an experienced doctor of high quality to act as Director of Rehabilitation and principal Medical Assessor. Under him it should engage the services of an appropriate number of experienced doctors whose function would include the active promotion of rehabilitation.

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[129] See Report of Mr Justice Tysoe, British Columbia Commission of Inquiry (1966), pp. 353–355; Briefs of the Workmen's Compensation Board, Ontario, before the Royal Commission (October 1966), pp. 1–8; Report of the Royal Commission, Ontario (1967), op. cit., p. 63; Earl C. Steele, op. cit., 260.

[130] See paras. 206 and 292 (c).

(f) For the general reasons mentioned in subparagraph (c) above the use of private hospitals should be encouraged if this would avoid delays in treatment and promote the general purpose of rehabilitation.

(g) The head of the medical branch should be given authority to exercise control of the use to be made of private hospitals, but subject to this we think, where used, the cost should be met in full by the Health Department. It is clear from submissions made to us that most private hospital beds involve no greater outlay per day than the beds in many of the public hospitals.

(h) Steps should be taken to encourage the vocational rehabilitation and retraining of all those likely to be assisted.

(i) We recommend that initially an annual sum of approximately 600,000 dollars should be set aside out of the compensation funds for the promotion of rehabilitation and safety.

XXII – FUNDS REQUIRED

311. COST OF SCHEME

(a) The present cost of such a comprehensive scheme would be approximately $38 million.

(b) An amount equal to 11 percent of estimated costs has been allocated for administration and for safety education and rehabilitation. On the Ontario experience this is more than sufficient. The matter is discussed in paragraphs 448 to 457.

(c) The overall figure mentioned includes a contingent sum of $6 million which should amply provide for any error in the detailed estimates. The calculations have been made difficult by the need to use broad categories of statistical information, particularly in the area of home accidents.

(d) All this can be compared with the present costs of maintaining the compulsory motor vehicle injury scheme and the workers' compensation scheme. Including amounts met by the Government through the social security and health services the overall charges at present total approximately $36.6 million.

312. SOURCE OF FUNDS

(a) Industry at present provides amounts totalling $15 million in the form of premiums under the compulsory scheme of workers' compensation.

(b) The estimated cost to self-insurers, and the Government (in respect of the State Services) amounts to a further $4.1 million.

(c) Owners of motor vehicles provide $9 million for the compulsory third-party insurance scheme. A similar amount should, in future, be paid by way of levy to the Post Office at the time of relicensing the vehicle concerned.

(d) Additional costs to the Government which are borne by the Social Security Fund and the Health Department total $8.5 million.

(e) It is proposed that $36.3 million of these total amounts (as shown in Appendix 9) should be supplemented by contributions from the self-employed (who at present are not included in any scheme) and by the drivers rather than the owners of motor vehicles. These additional amounts will bring the total estimated income to $41.8 million.

(f) The Inland Revenue Department should be used for the purpose of collecting the levies from both employers and self-employed persons. A separate section of the income return could be used for the purpose of the comprehensive insurance fund levy. The proposal has the advantage of avoiding the need for assessments, and it will enable the appropriate levy to be calculated and checked by processes already being used.

(g) The proposed income is in excess of estimated costs by $3.8 million. This arises from our belief that at the initial stage of this comprehensive proposal which affects many different groups in the community it is more important to balance the equities than to achieve an exact and final balance of accounts; and the margin is on the side of income as it should be.

313. DRIVERS OF VEHICLES

(a) In the past drivers have not been obliged to insure against the results of their own negligence on the highway. Probably it was thought that it would be difficult to identify the driver and easier to identify the vehicle.

(b) The problem disappears, however, with a comprehensive scheme which embraces all accidents. And we think that rather than impose a further levy upon the owners of motor vehicles the time has arrived to require individual drivers to make some direct contribution to a fund which will provide them with considerable personal advantage.

(c) We recommend that a small annual levy of $1.50 be charged in respect of all driving licences, and that this sum should be collected by local authorities on behalf of the compensation fund.

314. CLASSIFICATION OF RISKS

(a) In the past premiums paid by employers in respect of their employees have been classified in terms of the degree of risk supposed to be inherent in the industry concerned.

(b) It is a complicated process. At present it involves as many as 137 separate classifications. Yet it is a system which fails to recognise that all industrial activity is interdependent.

(c) Twenty years ago classifications were discarded for these reasons in the United Kingdom, and clearly there is even more reason for abandoning the system in New Zealand under a scheme which will ignore individual liability in favour of community responsibility.

(d) We recommend therefore that the method of classification should now give way to a uniform levy based upon salaries and wages paid.

(e) At present the aggregate amount collected in the form of insurance premiums is a little more than 1 percent of all wages. We recommend that in future an amount equal to 1 percent on wages should be paid by way of levy to the fund by all employers.

(f) The effect of a graduated income tax is to alter the ratio of levy (assessed upon gross earnings) to compensation (based on tax-paid earnings) as earnings increase. It works in favour of the fund as they so increase. For simplicity in administration we recommend a uniform rate on gross earnings despite the changing ratio: but as a matter of equity it should not be assessed against the portion of any single salary or wage which exceeds $8,000.

315. THE SELF EMPLOYED

(a) At present the self-employed are not protected by a compensation fund. On the principle outlined they should contribute an amount equal to 1 percent of net earned income, subject to an annual minimum levy of $5 and a maximum of $80.

(b) Unlike employees the self-employed must meet the levy themselves. Unlike employers they are unable to pass on the cost to the community. Moreover, employers are able to claim the item as a deductible charge in assessing income for tax purposes.

(c) In the circumstances a levy could not justly be made upon self-employed persons at all unless they could deduct the item from assessable income for tax purposes. We recommend accordingly, and add that clearly such a deduction should not be regarded as part of the exemption at present permitted for life insurance or superannuation contributions.

316. SCHEME TO BE COMPULSORY

The scheme which has been outlined involves comprehensive entitlement and obviously must be given comprehensive support. Protection is not to be restricted to work accidents or to road accidents, or to any period of the day, or to any group in the community. Individual liability, moreover, will disappear in favour of national responsibility. If the scheme is to be universal in scope it must be compulsory in application. Accordingly there will be no place for special arrangements or for "contracting out". And the enactment making provision for it should be made to bind the Crown.

PART 7 – SAFETY AND REHABILITATION

XXIII – THE PREVENTION OF ACCIDENTS

317. Every day 50 people are killed or injured on the roads. The number of deaths and drownings in domestic accidents of all kinds now approaches 700 each year. The annual total of casualties in industry is well over 100,000. Such figures speak graphically for themselves.

318. All this occupies the attention of many different groups in the community and considerable sums of money are allocated for the prevention of accidents. The goal, however, is as elusive and the problem as complex as the reasons which create accidents. Accordingly we regard it as a matter of prime importance that the proposed compensation system should be organised to take an active and co-ordinating part in the promotion of safety in all the different areas where accidents can occur.

319. The proposed system certainly would be in a unique position to assist the present efforts being made. It would have prompt access to the reports of every accident and it could ensure that these reports were detailed and accurate. It would have a direct interest in controlling the cost of accidents. It would be able to operate with detachment. Moreover, given trained personnel and imaginative direction it could build up a statistical picture unlikely to exist in the same detail in any other country. The information so obtained would be one of the important advantages of an integrated approach to the whole problem of personal injury and an invaluable aid to those attempting to cut down the endless lists of casualties.

THE STATISTICS

320. At present the statistical pattern is incomplete and even misleading. For example, little has been done to overcome the difficulties associated with collating and interpreting information relating to all the various domestic accidents. In the field of industrial accidents there is much more detail but their causes are often obscured by the sort of information which is currently supplied concerning them. In addition the information itself is frequently unreliable. The prospect of a court case does nothing to encourage admission of fault by the potential litigants.

321. Moreover, the recorded numbers of industrial accidents are inaccurate. The official statistics suggest that in 1965 there were 56,418 persons injured at work: and a further 35,111 who were injured but lost no more time off work than a day. But because of a consistent failure to report all accidents to the Government Statistician it is thought that the figures should be increased by about 25 percent. Effective safety programmes are not assisted by information which contains this degree of inaccuracy.

A SAFETY DEPARTMENT

322. We recommend, therefore, that the proposed authority should set up a department designed to promote all aspects of accident prevention. It should be placed under the immediate control of an experienced and energetic officer who should be left to devote his whole time to the work of the department. He should be directed to maintain an effective liaison with other organisations and the Government departments working to prevent accidents. And he should develop the statistical records in every useful direction.

323. We recommend that an annual sum of $400,000 should be set aside by the Board for the purposes of the safety department itself and more generally for the prevention of accidents of all types. The amount should be regarded as additional to and not in substitution for any present grants for similar purposes—whether provided by the Government or from other sources except the grant by the Workers' Compensation Board mentioned in the next paragraph.

THE NATIONAL SAFETY ASSOCIATION

324. At present the Workers' Compensation Board provides substantial annual grants to support the work of the National Safety Association of New Zealand Incorporated. This Association was set up in 1954 to promote industrial safety and has an active membership of more than 1,800 firms and individuals representing all sections of industry and the trade union movement. It has a trained staff of 26 officers and operates throughout New Zealand.

325. The valuable work the Association performs must not be allowed to wither and die. We recommend, therefore, that annual grants be made to the Association by the new Board to replace those at present being made by the Workers' Compensation Board. These grants probably should be continued indefinitely, but we think the matter should be arranged between the Association and the Board after the lapse of a period long enough to enable the correct decisions to be taken.

INSPECTION AND ENFORCEMENT

326. There is a great volume of legislation aimed at protecting the health and safety of industrial workers. It is largely within the responsibility of the Department of Labour which employs an efficient and active group of inspectors and safety officers for the purpose of safety education and enforcement. In the year ended March 1967 they visited over 12,000 factories, recorded 21,000 breaches, and issued more than 14,000 requisitions.

327. We note, however, that no more than 67 prosecutions affecting safety, were taken against employers. Without question the objective of safety should never be pursued by a stereotyped policy of enforcement through the courts. But the other extreme could be equally undesirable. There certainly should be no reluctance to use the penal sections of the various Acts and regulations when (in more serious cases at least) advice and persuasion has clearly failed.

MERIT RATING

328. In paragraphs 90 and 91 we have referred to arguments that the threat of damages provides a financial incentive to exercise care and so avoid accidents. For reasons there given we regard the point as one of negligible significance. However, similar theories are advanced concerning the insurance premiums which at present must be paid by employers and by motorists. It is said that the premiums should be made to fit the accident record and so act as a spur to safety.

329. The principle is not new. It has been applied in a variety of ways in different countries. For example, under section 95 of the Workers' Compensation Act it is possible for additional charges to be imposed where the accident experience of a given employer is greater than is usual in other businesses of the same class. In North America forms of merit rating have been tried from time to time: rebates are provided where the record is a good one.

330. However, we think the arguments are decisive against attempts of this sort to rate for risk. They are quite numerous and can be found in much of the literature and in many of the reports of committees set up to consider questions relating to compensation for work accidents. We summarise the more important issues in the following paragraphs.

331. First, the process of merit or experience rating assumes that employers are able to control the incidence of accidents. Unfortunately large numbers of accidents occur by chance or because of some lapse on the part of an employee or in circumstances over which the employer has no control. A man working alone on the side of a building might know he should wear a safety belt but fails to do so although the belt is with him and his instructions are clear. An employer cannot watch over each member of his staff all through the working day. And yet such a lapse by the man could become a mishap serious enough to ruin the accident record of the employer for a year.

332. This leads to the second point. Despite the complicated administrative arrangements which such a system of rating requires, the process largely ignores the important element of the degree of culpability involved in any given accident. For this reason the principle of merit rating does not operate with equity.

333. Third, the financial incentive is insignificant for any substantial organisation and relatively unimportant for small ones. It is the cost of lost production which really counts as we mention in paragraph 90.

334. Fourth, the incentive is lacking for all the organisations which employ labour but which do not operate for profit.

335. Fifth, the basis for experience rating cuts across the important principle that there should be a general pooling of all the risks of accidents to workers. Just as the steam power station relies upon the work of the coal miner so do all industries depend directly upon one another. In the United Kingdom this principle was accepted 20 years ago.[131]

336. Finally, there is the effectiveness of merit rating as a method of cutting down the numbers of industrial accidents. We have found no evidence here or overseas which shows that the process has any significant effect in the interests of safety. Indeed the experience in North America suggests that it can even have a contrary effect. There has been a tendency to withhold reports of accidents or to contest claims in order to produce a low accident ratio.[132]

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[131] See report of the Minister of Reconstruction, Cmd. 6551 (1944), para. 31 (ii).

[132] Somers and Somers, op. cit., pp.180 and 229; and Report on the Workmen's Compensation Act of Ontario (1950), pp. 97–100.

337. We believe that the objective of industrial safety really lies in active co-operation between management and employee and in a wider sense between the trade unions and the employers. In this regard we were much impressed by the effective measures which have been promoted in Sweden by the Joint Industrial Safety Council. This Council of six members (three representing employers and three the unions) was set up in 1942 by the Swedish Employers' Confederation and the Confederation of Swedish Trade Unions. Both organisations have worked upon the principle that—

> ". . . not even the most elaborate safety legislation can give the desired results unless it is supported by active collaboration between employers and employees. Organised, voluntary co-operation between the firm and its employees, supported and promoted by the central organisations, fosters a sense of responsibility and interest in safety. Undertakings freely given by employees and employers have much greater moral force than legal impositions."[133]

338. At present the investigation of industrial accidents in New Zealand involves questions concerning the so-called *liability* of the employer; or issues as to the neglect of the injured workman. Quite properly the trade unions interest themselves in these matters on behalf of their members. They make inquiries as to the circumstances of the accident, assist in finding relevant evidence and often take steps to obtain legal assistance for the man involved. Both the common law action and the compensation system are based upon the idea of private contest and because of it the process of inquiry and assistance for the trade union member "tends to confirm the trade union in the role of adversary of the employer".

339. We have no doubt that great advantages can flow from the sort of co-operation which has been developed in Sweden over the past 30 years between the trade unions and the employers. The two groups in Sweden have certainly promoted their mutual interests by their progressive methods as is widely known. Quite distinctly this area of accident prevention is one where the trade unions and employers in New Zealand have an important common interest. It is an area where any form of tension or dispute between them can and should be removed. The fact provides an additional and potent reason for doing away with the controversy which surrounds present methods of dealing with the losses which follow upon industrial

[133] SAF-LO, Promoting Mutual Interests on Sweden's Labour Market, Stockholm, 1961, p. 9.

injury: and the replacement of these out-moded methods by such a non-contentious system of compensation as that proposed in this Report.

SAFETY ON THE ROADS

340. The effort being made to promote safety on the highways is well known and need not be described here. It is the prime responsibility of the Transport Department and the local authorities. In all this they are actively supported by the valuable assistance of such organisations as the automobile associations and the New Zealand Road Safety Council.

341. The effort has been developed in two general directions. First, a constant campaign is waged to prevent traffic accidents happening at all—obviously this is the ideal to be pursued and the area which demands the major expenditure of time and money. Second, attempts are made to find ways of guarding those in vehicles which might become involved in accidents. This second approach to the whole problem has received increasing attention during recent years and it is one which seems likely to produce most valuable results. It is one which should be widely encouraged.

342. We are informed that there is a mounting volume of reliable evidence concerning the essential need for safety belts in motor vehicles. The concept itself is one which for many years has been accepted and enforced in industry. Regulations require safety belts to be worn by workers in quarries, for example, when working only 6 ft above the quarry floor. The reason for the precaution is so obvious that no worker demands explanations as to whether a fall from such a height could involve him in injury.

343. When attention is transferred to the need for safety belts in moving motor vehicles the example from the quarry gains emphasis from the fact that there the obligation to wear the belts begins at the relatively short distance of 6 ft above the ground. Yet a falling man does not attain a speed of even 30 miles an hour until he has fallen about 30 ft. Put in a different way, an adult passenger in a vehicle brought to an abrupt stop from 30 miles an hour must withstand the exertion of a force upon his body of about a ton. Despite all this it seems that only 34 percent of vehicles are fitted with safety belts and usually only one in every six of the belts so fitted is actually worn.[134]

[134] See results of Survey by Transport Department (Mar 1967), Appendix 12.

344. The evidence seems conclusive that the regular use of safety belts would reduce greatly the number of fatalities and serious injuries. The most recent estimate before us is that the number of deaths would be reduced by 60 percent and the number of injuries by 40 percent if all cars were fitted with belts and the belts were then worn.[135] If investigations of the Transport Department confirm the importance of safety belts then we think that the approach to the similar problem already applied and accepted in industry should be adopted for the road.

345. We do not doubt that questions would be raised as to whether such a requirement could be enforced. But most citizens require no more than a clear and unambiguous lead in most matters and given that clear lead they will then act upon it without the application of penal sanctions.

346. Nor need the cost of installing these belts be decisive against their general use. Already they must be fitted in new vehicles: other vehicles could and should be fitted with them over a period of perhaps three years. If our proposal is accepted that all victims of road accidents should be compensated for their injuries then there can be nothing unreasonable in requiring all road users to take sensible precautions for their own safety. Against the grim background of the accident statistics they could do no less.

OTHER ACCIDENTS

347. During 1966 34 persons died in tractor accidents on the farms of New Zealand and in the last eight years there have been 198 such fatalities. They are about half the total of all farm fatalities. Yet it is believed that—

> "Of 198 tractor deaths in the last eight years, 127 would most probably have been prevented if safety frames had been fitted. For another 53 cases there would have been a good chance of survival."[136]

348. In Sweden it has been shown that 42 overturning tractors without safety frames resulted in 33 deaths, whereas in 27 similar accidents where frames were fitted every driver survived. These are impressive figures and they are part of a pattern which resulted in a mandatory requirement that safety frames should be fitted to all tractors in that country. There is a similar requirement in Norway.

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[135] Dr Randal Elliott, 14 *New Zealand Road Safety* (1967), p. 27.
[136] Annual Report, National Safety Association of New Zealand (November 1967), p. 14.

349. Recently action of the same sort has been taken in the United Kingdom. Except in the case of some specialised industries all tractors purchased after 1 September 1970 must be fitted with safety frames and by 1977 all tractors (with a few limited exceptions) must be so fitted.

350. There is a very strong case for similar action in New Zealand where no more than 2 percent of tractors are fitted with safety frames.

351. In other areas no doubt there are neglected but important safety measures which have been recommended from time to time after careful investigation by the Government Departments concerned or by other organisations.

352. It is our view that as a corollary to the comprehensive scheme of compensation which we recommend, action should be taken to require the adoption of such precautions whenever it has been demonstrated that the need is great and the precaution itself is a valuable one. The introduction of a general scheme of compensation offers an unusual opportunity for a new approach to the whole problem of accident prevention and we recommend concurrent action accordingly.

CONCLUSION

353. In summary our recommendations are—

(1) There should be a department set up within the new authority charged with the promotion of safety wherever accidents are likely to occur.

(2) An annual sum of $400,000 should be set aside for the promotion of safety.

(3) The best statistical use should be made of the unique records which will become so readily available to the new compensation authority.

(4) Annual grants should at present continue to be made to the National Safety Association of New Zealand (Inc.) to replace those being made by the Workers' Compensation Board.

(5) There should be no reluctance to use penal sections of the various Acts and regulations affecting industrial safety when (in more serious cases at least) threats and persuasion have clearly failed.

(6) The system of merit rating or experience rating is ineffective as a means of promoting safety.

(7) The elimination of personal liability should be used to encourage increased co-operation between the trade unions and the employers in matters affecting safety in industry.

(8) The introduction of a comprehensive system of compensation should be regarded as an unusual opportunity for requiring the general use of safeguards likely to minimise injury or avoid death such as safety belts for motor vehicles and safety frames for tractors.

XXIV–THE PROCESS OF REHABILITATION

THE OBJECTIVE

354. A widely used definition of rehabilitation in the United States is "the restoration of the handicapped to the fullest physical, mental, social, vocational, and economic usefulness of which they are capable". It is a total process which begins with the earliest treatment of the injury or disease. It does not end until everything has been done to achieve maximum social and economic independence. The aim is that this should be achieved in a minimum of time.

355. As a concept it is comparatively new because it recognises that success will depend upon an overall assessment which often may not be possible by medical evaluation alone. Over the past 20 years it has made great advances. Men who once would have been regarded as totally incapacitated have been helped and encouraged towards some constructive activity and in the course of it provided with renewed self-respect and confidence.

356. In a recent report to the Minister of Health and Social Security the National Civilian Rehabilitation Committee has referred to three patients who attended the Pukeroa Home for the Physically Disabled.[137] On arrival they were considered to be virtually beyond assistance. Nevertheless, after a period in that institution it was possible for them to move on to outside employment. The Committee describes this as "a wonderful achievement". There can be no doubt of this.

357. There are many other dramatic examples of what can be done. It is worth mentioning one more. Dr H. H. Kessler has described a victim of the war in the Pacific who was—

> "so grossly wounded that he needed amputation of both arms, one leg, one testicle, and part of his jaw. He also had numerous shrapnel wounds to be repaired on various parts of his body. This man now gets about with a triple prosthesis; he is married and has a family, and is a successful business man and a Member of his State Legislature."[138]

358. Even the cases far removed in gravity from this can be handled in ways which are worth while to the man himself and

[137] Report (August 1962), para. 43.
[138] H. H. Kessler, *Principles and Practice of Rehabilitation*, 1952.

important for the community as a whole. During a period of five years the Penrose Industrial Health Centre near Auckland has dealt with an average of 3,552 new cases each year. About 400 cases in each year were referred to hospital, and there remained about 3,150. Of these only 75 had to be put off work on compensation. All the others were treated on the spot and encouraged to return to their place of work where co-operation on the part of employers enabled them to tackle some task within their immediate capacity. In its way this too is a wonderful achievement.

359. The rehabilitation process clearly is able to provide great benefits. Independence and self-respect, an alleviation of the strain of incapacity, and some mitigation of money losses are all offered to the man himself. And apart from humanitarian considerations there is for the community the advantage of increased production and the avoidance of some of the economic costs of incapacity. It is a process which should be supported widely and made available to all who might be assisted by it: and the test for assistance should never demand that the advantage to the patient must always balance the cost to the nation.

360. Upon this principle there could be no justification for providing rehabilitation services for the victims of work accidents, for example, to the neglect of other groups of incapacitated persons. Nor would the duplication of services achieve any useful purpose in a country the size of New Zealand. Accordingly this brief survey of the subject proceeds on the basis that there should be a co-ordinated approach designed to assist disabled and incapacitated persons generally.

THE NEED

361. For the purposes of rehabilitation incapacitated people can be considered in three main groups:

(a) There are those who will quickly recover and return to their old activities: fortunately this group constitutes by far the majority of incapacitated persons.

(b) There are others who eventually will be able to return to their normal work or activities, but only after a period of treatment and convalescence.

(c) There is a relatively small group who will require and deserve much assistance, and possibly retraining.

What is often described as medical rehabilitation can assist each one of these groups to achieve maximum physical condition in a minimum of time.

362. Most of those who come within the second and third groups will probably require a much longer period of rehabilitation including that form of it which can be described as vocational rehabilitation—a process aimed at conditioning a man or woman to the requirements of employment or normal social activity.

363. We have insufficient evidence to estimate the total number of persons who might come within the latter two groups. There is, however, a survey undertaken by the Social Security Department which shows that at any given time there are several thousand persons in New Zealand receiving long-term social security benefits in respect of physical disability.[139] Obviously these social security beneficiaries are only a fraction of similarly disabled persons in the whole population. All of these persons deserve some intensive form of rehabilitation.

364. Then there are the short-term cases. In the group of work-connected accidents alone the statistics show plainly that at least 95,000 short-term injuries occur each year apart altogether from several thousand others which are more serious. As the experience at Penrose has demonstrated, prompt and effective attention for these less serious cases often can reduce or even avoid wage losses and the interruption of productive work, and what is more important, provide a man with the resolve to get well quickly.

ASSESSMENT

365. The fact that rehabilitation can be of benefit to people with such a wide range of incapacities indicates the broad variety of professional skills needed to help with particular problems, and the diverse nature of the facilities which should be available. This in turn emphasises the further essential fact that as success will depend finally upon the man himself, there is a need for prompt assessment of his condition and his potential in the widest sense.

366. It has been said that "though specialists in rehabilitation, like other specialists, disagree about some things, they are unanimous about the need for early referral. A large percentage of the industrial accident cases referred to the Institute of Physical Medicine and Rehabilitation are said to require treatment *primarily because of the complications arising from injury,* such as deforming contractures, atrophy of disuse, general deconditioning, and psychological problems stemming from prolonged inactivity".[140] (Our emphasis.) We do not doubt that many similar cases could be found in

[139] See Report of the National Civilian Rehabilitation Committee, op. cit., paras. 11 to 13.
[140] Walter Gellhorn and Louis Lauer, *Administration of the New York Workmen's Compensation Law* (1962), Vol. 37, N.Y. Univ. Law Review.

New Zealand and if complications of this sort can be avoided by early assessment then every effort should be made to ensure that it takes place.

367. Such an assessment will involve not merely a patient's physical condition and the likely state he will reach after appropriate medical treatment: it must extend to an appreciation of his intelligence, educational standards, mental and emotional state, general aptitudes and adaptability, motivation, resilience, and social and economic background.

368. Most people will recover quickly and successfully in the absence of this sort of assessment. But the number of severely incapacitated persons and the extent of the individual problems which they have to face shows the clear need for teams of specialist assessors in all the more populous areas of the country.

369. As yet the need has not been satisfied. Indeed in its report to the Minister the National Civilian Rehabilitation Committee felt obliged to state:

> "The most striking deficiency is the need for accurate assessment of potential candidates for rehabilitation. The Committee believes that every handicapped person is entitled to a proper and accurate assessment of his potential capacity, periodic assessment according to his progress, and a final assesment which would be of value to him and to any employer with whom he might eventually be placed."[141]

We agree entirely with the opinion expressed by the Committee.

370. Although the assessment is largely medical in nature it has been increasingly recognised over recent years that the most accurate and useful answers are provided by the co-ordinated team work of a group of experts in the various fields. The more serious, and therefore the more important the case, the more likely this is to be needed. In such cases, if the man is to be provided with the best help and encouragement to overcome his problems, there must be a readiness by all concerned to work together. And this team should be wide enough to deal with all the features of many different cases: it should include surgeon, physician, psychologist, psychiatrist, social worker, placement officer, physiotherapist, and occupational therapist.

[141]Op. cit., para. 51.

371. In a paper prepared for the National Labour Market Board in Sweden the matter is mentioned in the following way:

> "The total results of a teamwork will rest on the strength of each individual link. A satisfactory total result presupposes the co-operation of all the components and this depends primarily on the team members' ability and desire to work together. No one can by himself master the medical, psychological, and social problems which may accompany the [patient's] difficulties. These difficulties cannot as a rule be rationally solved through one-sided efforts of a representative of one speciality."[142]

The paper goes on to stress the need for each member of the team to recognise his own limitations and be ready to pass the patient over to one of his colleagues whenever the occasion requires it.

372. Much the same point is raised in a recent paper by Dr J. G. Sommerville, Director of the Medical Rehabilitation Centre, Camden Road, London. He described the past emphasis upon "personal responsibility, with the resultant isolation of the individual doctor", and then said:

> "In a complex modern society the responsibilities are too great for an individual to carry. The team approach can be defined as the capacity to appreciate the personal contribution in relation to that of others—in short, to recognise when personal responsibility can be delegated to another."[143]

373. The need for delegation of the sort referred to by Dr Sommerville has created some difficulty from time to time because it tends to cut across the normal doctor-patient relationship. In New Zealand it may have been one reason in the past for a failure to make better use of the techniques of rehabilitation.

374. If this is the case it is not unique. In 1954 two American observers described the implications of the rehabilitation movement as wide ranging because they offered a challenge to settled principles and demanded "multi-disciplined analysis and action". They went on to say:

> "The goal is no longer confined to accurate diagnosis and expert treatment of trauma or some other acute condition. The goal of rehabilitation is no less than the restoration of the whole man to a useful function in society, involving manifold skills and techniques. This implies as great a revolution in medical care

[142] Seved Eriksson (Stockholm), Information Series V 1/1963 (Translation), p. 3.
[143] *Physiotherapy*, Vol. 53 (1967), p. 78 at p. 82.

and medical thinking and training as it is in social insurance legislation and techniques. The revolution has been under way for some time but at a slow and hesitant pace."[144]

375. The pace has been no less hesitant in New Zealand. Two years ago it was said of the Penrose Industrial Health Centre:

"The development of the Penrose Centre has not been simple and straightforward. There has been some controversy and inevitable delay before schemes which appeared so logical were put into practice."[145]

and the same point was referred to in submissions before us in the following way:

"With the passing of time there has been a reluctant acceptance of the fact that industrial medicine is a specialty and that these specialised clinics have a most important part to play not only in the implementation of the aim but also in the overall care of the patient in the broad medical sense."

THE DOCTOR-PATIENT RELATIONSHIP

376. It was said that this "reluctant acceptance" had developed from good liaison with the rest of the profession. And that earlier opposition to the clinic had arisen from a belief that the patient was being taken from his family doctor. It is an excellent thing that these fears have been largely overcome: they certainly should be avoided in the future. The objective of rehabilitation will not be achieved without the essential support and encouragement of the medical profession as a whole.

377. The aspects of this matter were touched on by the Medical Association of New Zealand. In submissions the Association emphasised the importance of the doctor-patient relationship. We well understand the need to preserve this relationship. It is part of a system which provides a high standard of medical care throughout the country. But we think that some doctors may have been inclined to elevate the principle to an inflexible rule of practice. Adherence to the principle cannot be allowed to have large numbers of injured workers travelling miles from their place of work to seek out a busy practitioner who then would often need to put the man on compensation where the clinic would have him back at work within the hour.

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[144]Somers & Somers, op. cit., p. 263.
[145]W. I. Glass, *The Penrose Industrial Health Centre* (1966), 65 N.Z.M.J. p. 87 at p. 92.

378. Similiar considerations should determine other questions which arise with regard to rehabilitation. There is the issue as to who is to assume general responsibility for some patients who need long-term or special attention. Care should always be taken to avoid usurping the function of a man's general doctor. But sometimes it is necessary in the patient's interests that this function should be delegated and when the occasion arises then without doubt the delegation should take place. It cannot be possible for every overworked doctor to maintain effective liaison with the specialised teams handling cases of this sort and yet there is often a need for overall supervision.

379. Then there is the question of co-ordination of effort in a wider sense. It is a matter which needs to be considered by the medical profession if a comprehensive system of rehabilitation and compensation is to work to the best effect.

THE ONTARIO EXPERIENCE

380. In Ontario the Workmen's Compensation Act provides that—

> "All questions as to the necessity, character, and sufficiency of any medical aid furnished or to be furnished and as to payment for medical aid shall be determined by the Board."[146]

In terms of this arrangement the Medical Director of the Board and his medical staff are constantly in touch with members of the profession throughout the whole of the province. They are able to do this because every medical report is filed promptly with the central office of the Board where it comes under the immediate attention of a skilled practising doctor and is then kept under frequent review. The impressive fact is that the profession generally gladly co-operates with the medical staff of the Board and welcomes and indeed usually requests the assistance or advice which the Board can offer.

381. This is a delicate issue in New Zealand as it is elsewhere. However there is great advantage in establishing some form of liaison between the Board we propose and the medical profession itself. There must be many general practitioners in particular who would accept with a sense of relief the opportunity of sharing their responsibility in some more complicated case. There is a need also for co-operation in regard to the matter of fees as we mention in paragraph 385. If these matters are tackled in an objective and detached fashion we believe that an acceptable formula could be devised.

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[146] Section 51 (6).

382. It is worth repeating a description of the position in Ontario given by Dr D. J. Galbraith, former Vice-Chairman of the Board there. He said:

> "Briefly, our plan is this: First and foremost the profession knows that we have at our office a staff headed by senior and recognised orthopedic surgeons who are trained to consult with and advise the profession regarding the approved treatment of traumatic injuries and occupational diseases. They know that it is our policy to have our patients treated by surgeons of their own choice, at their own hospital or as near thereto as adequate skilled care can be obtained. But they also know we will accept no substitute for efficiency, no excuse for neglect. The private physicians know that it is not only their privilege but their duty to call our staff and discuss with them all serious disabilities on reverse telephone charge. They are expected to call us as freely as they would their own friends in the profession, even if we are a thousand miles away; we do not complain of telephone bills. All X-rays, both pre- and post-reduction, are sent to us promptly and examined by our expert radiologists. In serious conditions or where diagnosis is requested or is incorrect, our orthopedic surgeons, after consultation with the radiologist, telephone the attending surgeon and discuss treatment. Most cases are then left to be treated by the attending surgeon if adequate hospital facilities are available and he advises constantly of progress. Some are advised to proceed with the assistance of the more qualified specialists in their neighbourhood and of their own choice. In some cases of more complicated injuries it is suggested that the patient be transferred to a large center having more adequate facilities. The very complicated cases may be transferred to Toronto for special treatment . . . the doctors are so co-operative and know the routine so well that they not infrequently charter planes or arrange other means of transport on their own initiative and merely call us to say that the patient is coming and describe the care required."[147]

383. The Ontario approach to these questions has received widespread attention in the United States. It was mentioned with approval in New York for example by the Callahan Commission, set up by the State Legislature in 1957.[148] And recently Dr Leon Lewis of Berkeley, California, discussed these aspects of medical administration as they are beginning to interest the insurance carriers. He wrote:

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[147] D. J. Galbraith, M.D., *Proceedings of the National Conference on Workmen's Compensation and Rehabilitation*, U.S. Department of Labor, Bureau of Labor Standards, Bulletin 122, 1950, pp. 45–46.

[148] The Callahan Commission, Second Report (December 1958), p. 18.

"The advantages of close supervision are being recognised south of the Canadian border by insurance carriers. They are beginning to employ part- or full-time medical staffs or consultants to establish liaison with treating physicians and to attempt to assure appropriate treatment. This is not easy in the United States. Traditionally the injured workman is looked upon by the doctor as 'my patient'. The intervention of an outside interest is not welcomed, and the threat of transfer of care is resisted as an attack on the prerogatives of the medical profession."[149]

384. The difficulties referred to have been overcome in Ontario by goodwill and co-operation on both sides. We believe the same thing can and should be done here.

MEDICAL FEES

385. At present medical fees incurred by injured workers are paid on their behalf in terms of regulations made under the Workers' Compensation Act. Some criticism has been made of the scale of fees which operates in this connection. We have been invited to examine the matter and upon the point of principle involved we have reached a clear conclusion.

386. The question is one which needs to be considered in three ways. First it is a matter of national importance that every injured person should be restored to health and useful activity as soon as possible. Often this will mean specialised and expensive medical care or the attention of a general practitioner over an extended period of time. Second there is the problem of persuading a man already facing some financial strain to seek specialised attention the reasonable cost of which might considerably exceed the assistance provided by the State or the Compensation Fund. Third it could not be reasonable to expect the medical profession to meet the difference between reasonable fees and some arbitrary scale kept down for reasons of economy. If the problem of injury is accepted as a community responsibility particular sections of the community should not have to subsidise the cost.

387. Accordingly we recommend that reasonable medical fees for persons entitled to compensation under the new fund should be paid in full by the fund.

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[149] Leon Lewis, M.D., F.A.C.P., *Medical Care Under Workmen's Compensation* (Occupational Disability and Public Policy, Ed. Cheit and Gordon) 1963, at p. 138.

388. But this leads to a mixed problem of administration and equity. If the recommendation is accepted then we consider that the medical profession should recognise for its part that individual doctors could not reasonably expect to have their fees met by the fund regardless of all supervision and in the absence of a general scale of fees. The independence of the profession should be maintained and, in general, we support the attitude of the profession to this matter. We are confident nonetheless that it can be no more difficult in practice for doctors than for lawyers to accept some reasonable control of their attendances and their fees and certainly there is no difference in principle. Accordingly we recommend that just as there is a scale of legal fees which is acceptable to that profession and a procedure for settling disputed fees so should there be a scale of medical fees for the purpose of compensation claims against the fund together with suitable procedure for administering that scale of fees.

389. We think the scale should be prepared by the medical profession itself and settled in agreement with the Board. It should contain a provision for suitable increases in the fees for special or unusual cases, and the scale should be subject to automatic review at regular intervals of approximately three years. We recommend that the Medical Practitioners Disciplinary Committee (the central committee in Wellington) of The Medical Association of New Zealand should be given authority to resolve any disputed question concerning fees which might arise between the Board and individual members of the profession.

THE CHIROPRACTORS

390. At this point it is convenient to refer to submissions made by the New Zealand Chiropractors' Association (Inc.). The Association asked that chiropractic be recognised as an appropriate treatment for some types of injury, that registered chiropractors be recognised as qualified to administer such treatment and that injured persons be given the right to choose to receive treatment of this sort rather than treatment from a medical practitioner. Support was given the Association by the Chiropractic Patients' Association (Auckland). But there was much opposition from the medical profession and the physiotherapists.

391. During the course of the public hearings we indicated that we were unlikely to express any opinion upon the validiy or otherwise of the treatment offered by members of the Chiropractors Association. No settled conclusion could be reached upon a technical issue of this sort without a prolonged examination of a great

deal of medical and other scientific evidence. The determination of such a technical issue is obviously irrelevant to the broad subject matter of this inquiry; and we have no doubt that if some sort of official blessing is sought in respect of the treatment as such then the matter is one for resolution by a tribunal appointed specifically for the purpose following upon a clear decision that the matter deserves or needs to be examined in this way.

392. In the circumstances it would be wrong for us to express an opinion one way or the other upon the submissions addressed to us by the Association. The basic question is the validity of the treatment and being unable to judge this issue we have no recommendation to make upon the submissions of the New Zealand Chiropractors' Association.

INCENTIVE

393. No rehabilitation programme will succeed without the interest and co-operation of those who can be assisted by it. In the past some incapacitated persons have been unaware of rehabilitation; others have refused to co-operate for economic or emotional reasons. And in general there has been a lack of central direction and co-ordination. Central to the problem is the matter of overall direction but at this point the attitude of the patient needs to be examined.

394. Those who have failed to understand or be made aware of rehabilitation have been caught up in a problem of communication. It is something which can be largely overcome by early assessment along the lines referred to in paragraph 365 and the associated steps which can then be taken. But there should be facilities for this sort of assessment at all main hospitals; and we think too that it is desirable that specialists in physical medicine should be easily available to most parts of the country.

395. Then there is the group of patients who have been reluctant to take advantage of or are disinterested in the process. Some of this group (often more serious cases) have been unwilling to face further disruption of home life when there has been the need to travel to another centre: or because of financial strain or other similar anxiety.

396. It will not be possible to provide facilities in every part of the country which might suit the needs of every type of patient although we recommend certain measures which should do much to overcome the problems which are related to the need to travel away from a home area. Accordingly we consider that in respect

of the compensation cases the Board should be authorised to make supplemental allowances to assist in special circumstances. The purpose of these allowances should be to enable a wife or husband to accompany a patient to another town where the necessary rehabilitation facilities are available. The arrangement should be for a limited or a more extended period dependent upon the circumstances. The discretion to make such allowances available should not become a matter of routine: the allowance should be made available when really needed.

397. But there will be others who are outside the support of the compensation fund. There is a clear need in our view for the provision of some type of rehabilitation benefit under the Social Security Act as suggested by the National Civilian Rehabilitation Committee.[150] The same proposal was made in submissions put before us by the Social Security Commission.[151] We recommend that such a benefit should be built into the social security scheme. It should provide the incentive necessary for the individual concerned to participate in any comprehensive programme which might be available. Obviously enough the converse is of great importance; there should be an absence of any financial disincentive which might arise for example from automatic application of a means test.

398. However we are not satisfied that it is desirable or wise to attempt to promote the rehabilitation objective by coercion. The aim should be to overcome a lack of motivation by education and encouragement and we think it unlikely that any useful purpose would be achieved by the application of some sort of sanction to those who are unable to be persuaded.

THE ADVERSARY SYSTEM

399. Other injured persons have failed to accept the assistance of rehabilitation because of pending claims for damages or compensation. They have preferred to await the outcome of contested proceedings lest the prospective capital award should be diminished by their own successful effort to overcome the disability.

400. The matter is mentioned in paragraphs 123 to 125 of this Report and represents in our opinion an important reason for abandoning the adversary method of handling all claims. If the system disappears, as we recommend, then the difficulty outlined in the preceding paragraph will disappear with it.

[150] Op. cit., paras. 74 and 87 (J).
[151] Submissions, Item 6, para. 22.

401. But it would be irrational to permit the new system to adopt principles or methods which would permit a recurrence of the old problems. For example there is a superficial attraction in arguments that compensation should be reduced once it were found that a man had managed to return to work with less than the expected income loss.

402. These are short-sighted arguments. If it was felt that energetic personal effort would result in a reduction in assessed compensation there would be a temptation to prolong the period off work or to work at less than maximum capacity. Such a situation would be bad for production, bad for the man and it would gain nothing for the compensation fund. The country cannot afford to throw away the benefits of personal initiative for the sake of delicate readjustments of compensation.

403. The matter was discussed by Somers and Somers in their work. They said—

> "If workmen's compensation is to exploit its opportunity to be something more than an income maintenance or indemnity program, however, and is to accept in practice rehabilitation as a primary objective, a strong case can be made for compensating anatomical loss as such. To stop payments to the amputee who succeeds in rehabilitating himself to his former, or even higher, earning capacity while continuing payments to one who fails to do so would increase the existing conflicts between rehabilitation and compensation. The results of rehabilitation are never entirely certain, and fear of loss of compensation rights, added to doubts about the probable success of the rehabilitation process, could prove a formidable deterrent to a worker's receptivity to rehabilitation treatment."[152]

404. It is for reasons of this sort that we recommend[153] that upon a review of permanent compensation there should be no downward reassessment. Adoption of this principle may enable a few injured persons to secure an over-generous level of compensation. But efficient medical administration can keep the number to a minimum and in any event it is something which is worth accepting in the general public interest and for the purpose of gaining in most cases complete co-operation for the purpose of rehabilitation.

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[152] Op. cit., p. 278.
[153] See also paras. 127, 293 (e), 305 (d).

405. We are aware that there are claims that fixed periodic compensation will encourage what is described as malingering. The word is intended to describe those who will put up a pretence that the injury is more serious than is really the case. Certainly there will be some who will attempt to take advantage of the system. But they are doing much the same in a different fashion at present. And we entirely reject the suggestion that there are substantial numbers of work-shy or dishonest people waiting for the moment of injury in order to batten on to a compensation fund for extended periods of time.

406. The matter needs to be mentioned because it troubles many reasonable people. For this reason we have examined some of the material which has been gathered together in regard to it.

407. In England the matter has been considered on several occasions over the last half century. In 1911 the report of the Departmental Committee on accidents in places under the Factory and Workshops Acts made it clear that in the opinion of the Committee injured workmen were not disposed to malingering.[154] Ten years later the well-known Holman Gregory Report[155] expressed similar conclusions having "made careful inquiries of employers and insurance companies' officials". Indeed the Committee had devoted a whole section of their questioning of witnesses to the matter. Their conclusion was that "we are satisfied that the average workman is anxious to return to his work as soon as possible".[156]

408. In 1961, Freda Young, a perceptive student of the British Social Services, considered the question in relation to the medical and other safeguards against abuse of welfare programmes. She considered on the experience of the Ministry of Pensions and National Insurance (of persons who persistently refused to maintain themselves) that "if malingering does exist it is of tiny proportions";[157] and that "the medical safeguards against malingering in the welfare state are fairly comprehensive".[158]

409. Then in 1965 the same matter was raised before Mr Justice Tysoe in British Columbia. In his report he has said—

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[154]Cmd. 5335, p. 17.
[155]Cmd. 816 (1920).
[156]See Wilson and Levy, *Workmen's Compensation*, Vol. 1 (1939), p. 186.
[157]A. F. Young, Social Security Quarterly (1961), Vol. 35, p. 69.
[158]Loc. cit., p. 68.

"As to malingering, I imagine there are cases of this. . . . but the number of these compensation cases must be very small indeed, and they are very hard to prove. The malingerer is a different person to the workman who honestly but wrongly believes he is not fit for work."[159]

410. Obviously enough any scheme of the sort proposed in this Report must be administered by methods which will keep abuse to the "tiny proportions" mentioned by Freda Young. But primarily the problem, to the extent that it exists, can be controlled by an experienced and efficient medical profession. We are in no doubt that the profession in this country is well able to discharge its responsibilities in regard to the matter. And in addition there will be the central oversight and control exercisable by the Medical Department of the authority itself.

411. The short survey we have been able to make has left us satisfied that the issue of malingering is one of minimal proportions when set against the vast number of reliable citizens who may have reason, from time to time, to seek the support which the scheme is designed to afford. It is a problem with a nuisance value but this is certainly so insignificant that it would be entirely wrong to allow it to bear down upon a scheme otherwise able to produce widespread and necessary benefit for the community as a whole.

412. A complicating factor has been the confusion between "the few individual cases of dishonesty that occur under any system";[160] and the man who "honestly but wrongly believes he is not fit for work" (as Mr Justice Tysoe has put it). The second condition is well known to the medical profession and accepted as a type of neurosis which can arise from anxiety. It is a condition which frequently is discussed in the Courts in relation to contested claims for damages. An experienced orthopaedic surgeon in the United States has referred to the matter in the following way:

"Most of the patients whom we used to call malingerers are not that at all. They are frightened individuals. They are afraid that they are never going to be able to hold down a good job again, and hence are worrying about how they are going to support their families. To overcome this is a challenge to every doctor who has to deal with compensation injuries. Even our private patients experience a good deal of that same worry."[161]

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[159] Op. cit., p. 144.

[160] Earl F. Cheit, *Injury and Recovery in the Course of Employment* (1961), p. 305.

[161] Edward L. Compere, 1A1ABC Proceedings, (1955) U.S. Dept of Labor, Bureau of Labor Standards, Bulletin 186, p. 38; and see Earl F. Cheit, loc. cit., pp. 304–305.

It is wrong to put the label of "malingerer" upon people in this condition. Instead every effort should be made to keep down the incidence of the condition by adequate rehabilitation and the removal of undue financial strain.

413. It is worth adding, before we leave the topic, that we have attempted to build some incentive into the proposals we have outlined. There is a margin left for individual effort which amounts to a manageable but nonetheless realistic proportion of a man's normal earnings. There is the emphasis upon longer term incapacities and a restriction upon levels of compensation for short periods which is hardly likely to lead to any great flabbiness. And we have attempted to resolve the administrative problem associated with minor mishaps to housewives by recommending that for 14 days their families might well take the strain themselves.

414. In the final analysis, however, we hold firmly to the view expressed by Dr E. C. Steele, one of the three experienced Commissioners of the Ontario Workmen's Compensation Board. He said—

> "Financial rehabilitation as provided by adequate compensation is a stimulus rather than a deterrent to speedy recovery. Prompt and regular payment of compensation during the period of incapacity is important in the rehabilitation process. Doubts and fears, unconsciously fostered by an adversary system, should be prevented if at all possible. The patient should not be allowed to be unduly disturbed about financial hardship during the course of his total disability or to have fears and forebodings for the future. Such fears accentuate the stress reaction, so ably described by Dr Selye, prolonging disability and driving reputable citizens to the only refuge they know—litigation.[162] Knowledgeable rehabilitation officers attached to the staff of the administrative authority can dispel the doubts and fears of the injured workman at an early stage of treatment. They can point out to him his rights and responsibilities under the Act and influence positive thinking about rehabilitation and employment possibilities."[163]

FACILITIES

415. If the prime objective of rehabilitation is to return the handicapped to useful employment or activity as soon as possible the process must be prompt, efficient, and continuous. And there will be a need for adequate facilities throughout the country.

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[162] Hans Selye, *Physiology and Pathology of Exposure to Stress* (Montreal: Acta Incorporated, 1950).
[163] Op. cit., pp. 270–271.

Already much has been done in this direction and comparatively simple but in our view imaginative measures have been taken in certain hospitals which are bound to produce good results if applied elsewhere.

416. For example a pilot scheme in operation at the Queen Elizabeth Hospital at Rotorua enables a number of patients to be taken on to the staff of the hospital in a supernumerary capacity. They are employed in such occupations as nursing, clerical work, engineering, painting, maintenance, and gardening. An attempt is made to provide these people with work most similar to their normal occupation or most suited to their capacity. Their effort is gradually enlarged to normal hours and normal production and when they have reached work readiness they return to their usual occupation or the Labour Department endeavours to find suitable work for them.

417. At the Palmerston North Hospital a special ward is to be prepared to which patients can be transferred when they become independent of nursing procedures. In this ward they will be able to look after themselves and their day will be occupied with vigorous rehabilitation activity. In this way an early effort can be made at the hospital itself to ensure that on discharge such patients will be fit to return to work.

418. At Otara on the outskirts of Auckland there is a civilian rehabilitation unit where facilities exist for full medical rehabilitation and for a measure of industrial or vocational rehabilitation as well. It is administered by the Auckland Hospital Board under the energetic direction of the Department of Physical Medicine. It is organised in such a way that it is able to push forward the rehabilitation of severely handicapped people and at the same time take some pressure from the ordinary hospitals in the city in regard to urgently needed and expensive hospital beds.

419. We think it probable that the Queen Elizabeth experiment could be widely used in hospitals throughout the country. And wherever possible rehabilitation wards should be made available on the lines being worked out in Palmerston North. Clearly in both hospitals practical and important steps are being taken to avoid any interruption in rehabilitation which should be continuous from the moment of injury until return to normal activity.

420. In a different way the Otara unit is an example of a facility which is achieving most important results. We think a similar unit should be established in Christchurch to cater for the South Island and it is likely that another unit should be located in the Wellington district.

421. Apart from units of this sort however we think there is a basic need in all the more populous centres for a specialist in physical medicine who could organise suitable rehabilitation programmes and make use of and extend existing hospital facilities. In addition there is a need for the establishment of assessment units of the sort discussed in paragraphs 365 to 375. We believe that the matter of prompt assessment and constant review to be of such importance that the establishment of these units should not be restricted to the four main centres. In our opinion there should be 10 of these units in the North Island and five in the South Island.

ROLE OF THE STATE

422. It is well known that a number of dedicated and efficient voluntary organisations have been working in this general field for many years. The New Zealand Crippled Children's Society and Disabled Servicemen's Re-establishment League, the New Zealand Intellectually Handicapped Children's Association, the Foundation for the Blind, and the sheltered workshops in various cities are only a few examples of the help that is given on a voluntary or semi-voluntary basis.

423. But basically the responsibility is one for the State and we think that through the Health Department the State should take a leading role in laying down a general and co-ordinated programme for the whole country. There is a need for acceptance of financial responsibility in the appropriate areas. Encouragement should be given to the voluntary organisations by means of direct grants and an energetic and widespread campaign developed to assist citizens with rehabilitation wherever the process might be needed.

424. In regard to all this we remark that rehabilitation is not an area where apparent or short-term economies are likely to work well in the interests of the country; nor could they be justified in a community which rightly prides itself on the quality of its general health and medical services.

425. Finally we refer briefly to the proposal made in paragraph 310 (f) that the use of private hospitals should be encouraged if this could avoid delays in treatment and promote the general purpose of rehabilitation. We are informed by the Health Department that, with increasing annual costs of public hospitals, there may be little difference between the cost of public and private hospitals today. Indeed there is evidence which shows that in some respects the public hospital bed can be more expensive. Be that as it may, we are left in no doubt that the importance of getting people well and back to productive work far outweighs (both financially and in human terms) the ostensible economic advantage of using the public hospital bed.

426. Accordingly we recommend the use of private hospital beds whenever the occasion seems to require their use. Control should be exercised by the medical director of the new authority as we have said in paragraph 310 (g); and subject to this the cost of the beds should be met in full by the Health Department.

THE REHABILITATION AND COMPENSATION AUTHORITY

427. The proposals made in this Report for a comprehensive scheme of injury compensation are designed to promote the physical and vocational rehabilitation of all injured persons. An important part of these proposals relates to the organisation of an efficient medical branch under the leadership of an experienced doctor of high quality.

428. The compensation process should always be secondary to the goal of rehabilitation but it is not enough to pay lip service to the principle. There must be imagination, drive, and leadership which will ensure that the best use is made of facilities; the best sort of co-operation is maintained with the medical profession; and efficient medical administration is achieved in the wide area of the authority itself.

429. All this will not be easy and it is a task which must be organised from the beginning. Accordingly it would be a mistake to underestimate its importance or undervalue the position of the medical director in terms of remuneration.

430. We have been much impressed by the medical administration of the Workers' Compensation Board in Ontario. It is a feature of the Board's activities which commands widespread respect. It has been developed over a period of years by central control, the maintenance of excellent relations with the medical profession,

insistence upon the best and earliest possible care for all injured workmen, and attention to detail. Central organisation of this description is unusual in New Zealand but we think it essential if the new authority is to function satisfactorily and provide the uniform and just results upon which complete public confidence will depend.

431. Although the responsibility for rehabilitation programmes is one for the State we recommend that an annual sum of $200,000 should be set aside by the new Board for the general purposes of rehabilitation. The amount should be used to support new programmes, encourage new ideas, provide specialised types of equipment, and ensure that at all times the country has available to it the most recent ideas and experience in this important field.

CONCLUSION

432. In summary our conclusions and recommendations are—

(1) The process of rehabilitation should be developed and encouraged by every means possible as it has very much to offer New Zealand both in human and in economic terms.

(2) There is a pressing need for a well co-ordinated and vigorous programme which will embrace all who might be assisted by rehabilitation and the responsibility for this financially and in all other ways should be accepted by the State through the Health Department.

(3) In order to provide adequate coverage throughout the country we recommend that a specialist in physical medicine should be appointed by the boards of all the more important hospital districts; that the scheme at present in operation at the Queen Elizabeth Hospital at Rotorua be duplicated wherever possible; and that the type of rehabilitation ward being established at Palmerston North should be extended.

(4) The proposed Rehabilitation and Compensation Board should set up a medical branch under the leadership of a doctor of high calibre and wide experience. The Board itself should be given sufficient authority to enable it to exercise some reasonable supervision within the field of medical administration. We recommend that the medical director should set up a small medical committee comprising a few senior members of the profession in active practice to act in a part-time capacity and provide him with assistance and advice concerning his general responsibilities.

(5) The new authority should undertake to pay the medical fees in full for all compensation cases subject to the provision of a suitable scale of medical fees to be prepared by the Medical Association of New Zealand and agreed with the Board. There should be discretion within the scale to provide adequate payment for unusual or special cases and the scale itself should be the subject of automatic review at intervals of approximately three years.

(6) Wherever the rehabilitation process might be speeded up by the use of private hospitals then we think these hospitals should be used and whenever such use has been authorised by the medical director of the Board then the cost of the beds should be met by the Health Department.

(7) For the general purposes of rehabilitation the Board could set aside an annual sum of $200,000. This amount should not be in substitution for any Health Department responsibility but should be used to urge forward the rehabilitation concept.

(8) The industrial clinics are performing an extremely valuable function and should be encouraged. We recommend that as an experiment the new authority should provide a mobile physiotherapy van at the Penrose clinic which would enable individual physiotherapists to offer treatment to their patients at the work site in this industrial area.

(9) A rehabilitation unit of the Otara type should be set up in the Christchurch district and consideration given to a similar establishment in the near future in the Wellington area.

(10) There is a pressing need for specialised teams of assessors able to make prompt and continuous assessments of patients requiring rehabilitation. We believe that 10 of these teams should be located in the North Island and five teams in the South Island.

(11) There should be much more direct and effective liaison between hospitals and other agencies concerned with rehabilitation and the employment of disabled persons and we believe the new board has much to offer in this connection. We recommend that the Director of Medical Services of the board should be invited to join the National Civilian Rehabilitation Committee.

(12) Being of the opinion that this Royal Commission should not attempt to resolve the basic question of the validity of chiropractic treatment we have no recommendation concerning the submissions made by the Chiropractors' Association.

(13) A special rehabilitation benefit should be defined and provided under the Social Security Act which would promote and provide incentives for rehabilitation.

PART 8 – FINANCIAL PROVISIONS

XXV–THE COST OF THE SCHEME

433. The feature of the proposed scheme is that it widely extends the range and level of compensation and yet avoids large new expenditures. Total estimated expenditure is $38 million[164] and this (including Health and Social Security contributions) is within $1.5 million of the amounts at present flowing directly into the compulsory work-connected and road injury schemes.[165] In addition there will be important indirect savings.[166]

434. The application of two basic decisions has made this result possible. First, available funds are to be used where really needed and not spread uniformly, and consequently thinly, over the whole range of injured persons. Second, collection and distribution of the funds is to be handled by existing facilities and on a co-ordinated basis which will avoid all duplication and administrative waste.

ALLOCATION OF FUNDS

435. The first point can be explained by example. In the group of work-connected accidents those who are absent from work for less than a fortnight are about 30 times as numerous as those absent for three months or longer. If there must be a careful allocation of funds as there certainly has been in the past, the emphasis, in equity, should go to this second group. After three months all sorts of problems could be accumulating for a family. And as a matter of arithmetic it is much easier to lift the level of compensation for this more serious but numerically much smaller group than to make uniform adjustments for those affected by short-term and longer term incapacities alike.

436. Moreover, insignificant additions to the general level of compensation will achieve little for anybody. In our view people would much prefer the assurance of completely adequate compensation in the event of serious injury and are prepared to accept some part of the manageable strain which might be associated with a short break from work.

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[164] See Appendix 9, table 11.
[165] See Appendix 9, table 12.
[166] See para. 466.

437. Accordingly a limit of $25 has been put upon the weekly rate of compensation for the first four weeks. Thereafter the limit is removed, and if the incapacity extends for eight weeks or longer the compensation would be reassessed from the outset at the full rate. On the other hand it is proposed that the duration of payments should now be extended to cover the whole period of incapacity (if necessary for life); and that artificially low limits for all these payments should be avoided.

438. Putting to one side allowances for dependants the limit of weekly compensation under the Workers' Compensation Act has recently been $23.75. A year ago it was only $21.75. This limit may be compared with the proposed limit of $25 weekly under the new scheme which would affect the first four weeks of incapacity; and the general limit of $120 which subsequently would apply.

439. The provision of compensation up to a weekly maximum level of $120 is necessary if a comprehensive scheme for all accidents is to have real meaning for citizens throughout the normal range of incomes. And it can be done without draining away any amounts which should be retained elsewhere. The explanation lies partly in the four-week limit; but principally in the fact that once the compensation level is lifted to a maximum figure of $40 the vast percentage of all cases has been satisfied.

440. Appendix 7, table 10 (which has been checked by the Government Statistician), discloses the position in respect of temporary incapacities for all work-connected accidents for employees and the self-employed alike. An amount of $5,621,000 is required to meet compensation payments if the maximum is fixed at $40, another $69,000 to take the maximum up to $60 and no more than a further $34,000 to go on to $120. In the circumstances financial reasons do not require a ceiling at all. We have thought, however, that at some point there should be a break in compensation supplied by a general fund and in our view this fair point is reached at $120 weekly.

441. There is an administrative problem associated with providing compensation for persons who have no earnings. It is necessary to ensure that all in this group are fairly compensated for any significant incapacity; but it would be extravagant to provide compensation for every minor bruise or laceration. For such reasons it is recommended that for this group of injured persons the compensation should commence on the fifteenth day after the day of

injury. The adoption of the principle carries with it the advantage of an associated and substantial saving to the fund since it will apply to those whose injuries are received in what can be described generically as domestic accidents, many of which are of a minor nature.

442. The final point which should be mentioned in considering the allocation of funds is the proposal that compensation should commence as from the day following the incapacity for cases other than those mentioned in the preceding paragraph. Few persons suffer an income loss for the day on which the injury occurred, and we think that the amount required to pay compensation for this initial day can profitably be used elsewhere.

EFFECT OF ADMINISTRATION EXPENSES

443. Economic methods of administration provide the second explanation given in paragraph 434 for the fact that a great deal can be done without large new expenditures.

444. In earlier parts of the Report we have referred to the cost of administering the compulsory work-connected injury scheme.[167] The cost-claims ratio is 30:70, and accordingly more than 42 percent of the amount paid out in claims is required for expenses. This is a considerable drain on any fund and it is worth examining the effect it can have.

445. The estimated cost of the proposed scheme is set out in Appendix 9, table 11, which discloses that administrative expenses have been allowed at 11 percent on compensation. It is a figure equal to 10 percent of the total amount needed for claims and expenses. A similar amount is incorporated within the item for contingencies. Accordingly the overall cost of about $38 million includes an item for administrative charges of approximately $3.8 million. The two figures should be compared with the cost of a scheme designed to provide the same benefits but which would require for administration an amount equal to the ratio of cost to claims mentioned in the preceding paragraph.

446. On such a basis the provision of the same net benefits totalling $34.2 million would demand an outlay for administration of $14.65 million. Thus the overall cost for benefits and their administration would rise to $48.85 million. The additional cost of such a scheme is $10.85 million, and represents a steep increase of 28.5 percent on the total estimated costs for the scheme propounded in this Report.

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[167] See paras. 182, 183, 213–217; and in general 207–212.

447. All this needs to be emphasised as it may be surprising to some people that so much can be offered by the proposed scheme for a superficially unlikely price. Comparisons cannot properly be made with the present achievements of the workers' compensation scheme, for example, unless the administrative charges under both schemes are allowed for on a similar basis. Accordingly if any realistic comparison is to be made with the present cost of the workers' compensation scheme then the proposed scheme should be thought of, not in terms of the actual estimated cost of $38 million, but the much higher figure of $48.85 million. As a corollary it may be said that by the adoption of streamlined methods of administration it is considered that the proposals avoid unnecessary extra charges of $10.85 million annually.

ESTIMATED COST RATIO

448. We are in no doubt that the figure provided in the estimates for administrative charges is not merely attainable but probably in excess of the necessary allowance. In summary the reasons for this conclusion follow.

449. First, it is possible to examine the actual achievement of organisations elsewhere. We take the three different systems to be found in Ontario, California, and New South Wales. The results attained by the Ontario Workmen's Compensation Board during a period of seven years are set out in paragraph 213. They show that the expenses have ranged between 6.5 percent and 7.8 percent of income. Then there is the California State Fund which operates in competition with private carriers. During the five years to 1961 it achieved a cumulative average expense ratio of 6.96 percent; and even if all dividends paid are deducted from premiums earned the ratio is still no more than 9.5 percent.[168] Finally there is the Government Insurance Office of New South Wales which also operates in competition with private insurance companies. The part of premiums absorbed by administration in the workers' compensation branch of the business for the three years to 1966 was 7 percent, 5.9 percent, and 5.6 percent.[169] We have had the advantage of direct assistance from that office in analysing the figures and they provide a fair basis for comparison.

450. Second, there is the experience of the State Insurance Office which had a monopoly of workers' compensation business in New Zealand during a period of two years.[170] The experiment was a

[168] Stefan A. Riesenfeld, *Efficacy and Costs of Workmen's Compensation* (Occupational Disability and Public Policy, Ed. Cheit and Gordon), p. 312.
[169] Annual Report, 1967.
[170] See paras. 182 and 183.

limited one, but not without significance. In the first year of operation (1950) the expense rate was 14.61 percent; and in the following year it came down to 9.5 percent. And this despite "considerable non-repetitive expenses in commencing the monopoly scheme which came to account and were written off during these years".[171] The State Insurance Office is of the opinion that because of this factor and also "because the Office would have become more efficient as its experience in handling the business as a monopoly increased, the expense rate for 1951 must be considered the maximum rate provided premiums had remained at the same level".[172]

451. Third, there is the opinion of three major New Zealand based insurance companies which consider that their costs (for workers' compensation business) "for pure administrative functions on the basis of current benefits, rates, and costs could be held in the vicinity of 8½ percent to 9 percent on gross premium". The companies emphasised that the ratio quoted excludes all ancillary out-go for agency commission and present levy to the Workers' Compensation Board; and also for catastrophe reinsurance protection, margin for extra benefits before premium adjustment, and for profit. But the first two and the last of these items would not affect the proposed scheme: and the two remaining items are usually recoverable if the charges actually arise. In any event the interest earned on provisions for claims outstanding and on the catastrophe reserve itself are not brought to account.

452. Fourth, there are the unusual administrative advantages which will work in favour of the new organisation. It will be able to operate in a clear field; there will be no need to set up offices throughout the country to handle merely routine aspects of administration; levies can be collected by the simple and extremely inexpensive processes mentioned in paragraph 478; it will be able to avoid the employment of a large staff; it will be equipped with an efficient medical section; and the compensation process itself will not be complicated by contention or the need for prolonged investigation. Provided with some of the foregoing advantages the direct costs of administration of the Social Security Department are 1.7 percent of benefits paid.

453. Finally it is necessary to mention the item of $6.95 million (set out in the estimated costs) for public hospital treatment. This would need to be included in calculating the overall cost of administering any scheme which had to collect and then disburse this

[171] Submission of State Insurance Office, p.11.
[172] Ibid, p.12.

amount. But the proposals put forward avoid all these problems, and the amount itself and all that it involves will be administered directly by the Health Department. Accordingly the item could properly be excluded when calculating the costs of administering the proposed scheme, and in effect a margin has been left in the item for administration amounting to as much as $0.76 million.

454. The Government Statistician was asked to accept our figure for administration when making the estimate of cost referred to in paragraph 460. In doing so he referred to the present expense ratio applicable to the workers' compensation scheme, and expressed the view that stream-lined methods of collecting premiums and administration generally would be needed to achieve the 11 percent ratio we had asked him to accept as the basis for calculation. He also referred to the problems which could arise from the administration of incapacity benefits for non-wage-earning groups. In making these comments he was unaware, of course, of our detailed proposals for administration.

455. The Government Statistician is in no way responsible for the estimate we provide of likely administrative expenses under the new scheme. The evaluation is our own and made as a result of analysis of all the evidence made available to us in New Zealand and overseas of schemes actually in operation. The conclusions we have reached are that entirely orthodox methods of administering a monopoly insurance fund of the sort operating in Ontario enable costs to be kept within the margin we have fixed. When the special advantages listed in paragraph 452 are superimposed we are left in no doubt that the estimate of 11 percent is generous.

THE RATIO FOR WORKERS' COMPENSATION INSURANCE

456. Although we have reached the firm conclusion that the comprehensive scheme can be operated with great economy in administration we prefer to express no opinion upon the cost ratio at present applicable to the workers' compensation scheme. The insurance companies were invited to assist us in this respect but finally advised that no accurate information could be given upon the point both because the business was intermingled with other branches of insurance, and because the external arrangement and organisation of the various companies differed the one from another. Subsequently the three New Zealand based companies provided the information mentioned in paragraph 451, but we have no other direct contemporary evidence.

457. The issue, in our view, is secondary to the central fact that private enterprise and a universal compulsory and non-litigious system of compensation are incompatible; and secondary also to the other matters outlined in paragraphs 209 to 212. Accordingly it has not been thought necessary to pursue the matter—a task which would involve much research, time, and expense. It is enough to draw attention to the fact that the ratio is by no means a modern one. It has its origins in an agreement[173] reached between the insurance companies and the Home Office in the United Kingdom as long ago as 1923.[174]

CALCULATION OF COSTS

458. The estimated cost of the scheme is summarised in Appendix 9, table 11. The summary is the result of calculations made at our direction by two mathematicians employed on our staff for the purpose. In order to make use of the available statistics a considerable number of assumptions have been made, and these were all settled by the members of the Commission after evaluating the evidence in regard to them.

459. Periodic payments have been commuted to present capital sums by the application of the conservative interest rate of 4 percent. Official statistics for industrial accidents have been increased by 24.6 percent because there is a discrepancy between the cost of these accidents as reported to the Government Statistician by the insurers and the actual cost of the accidents as reported by the insurers to the Workers' Compensation Board. It has been assumed for the purpose of the calculations that the difference represents numbers of accidents short-reported over the whole range of work-connected injuries, although it can be argued that such an approach unnecessarily inflates the overall cost. The road accident statistics have been applied on the basis that 4 percent of all injuries involve permanent disabilities. The Commissioner of Transport can give no accurate indication as to the number of persons so injured, but with this qualification he has advised that his department considers "that the number of persons permanently disabled would be something under 4 percent of the total reported as injured in motor accidents".

460. The calculations were forwarded to the Government Statistician to be checked together with all the assumptions upon which the calculations were based. He has commented that as well as assessing the likely errors in these assumptions directly, "I have

[173] Cmd. 1891.
[174] See Wilson and Levy, op. cit., 165; A. F. Young, op. cit., 70; and see para. 214.

made an entirely independent estimate of the cost of your proposed scheme. Starting with the recent claims experience under employers' liability insurance I have pro-rated up to allow for various extensions and modifications in your proposed scheme. The coverage of your scheme I have taken as set out in your paper entitled *Proposed Social Insurance Scheme.* You have assessed the cost at close to $38 million. On the information available I am unable to calculate the cost as closely as this, but, on the basis of 1967–68 populations, wage rates, and expenses, I believe the total annual cost including administration would be in the range of $35 million to $45 million". In making this estimate the Government Statistician has accepted our request that he should regard the cost of administration as requiring no more than 11 percent of other costs, as we mention in paragraphs 453 and 454.

XXVI–SOURCE OF FUNDS

461. A comprehensive system of social insurance involves community responsibilities which should be accepted by the State and supported by contributions from citizens generally. On this basis it can be argued that the State should finance the proposed scheme from taxation. Our recommendation is different, for two reasons.

462. First, the comprehensive scheme is intended to embrace two compulsory insurance schemes already operating. To the extent that the necessary insurance premiums can be built into the costs of industry or transport this has long since been done. If these premiums were wholly rebated in favour of a general system of taxation there would be a continuing advantage to industry at the expense of the general taxpayer. A logical argument is an insufficient reason for shifting these costs in such a fashion.

463. Second, to the extent that the amount of these premiums has been passed on by industry their cost is already being shared by the whole community, even though indirectly. Accordingly the broad principle of community responsibility is in this way being satisfied already.

464. Accordingly we recommend that subject to appropriate adjustments the amounts at present flowing into the compulsory workers' compensation and third-party insurance schemes should be made available for the purposes of the proposed comprehensive scheme. These amounts require to be supplemented to reach the figure of $38 million contained in the estimate of overall costs and provide some margin on the side of income. The details of all these proposals are contained in Appendix 9, tables 12 and 13. It is convenient to set them out in summarised form at this point.

465. The following table provides a comparison of present amounts expended in respect of the two compulsory insurance schemes and the contributions proposed for the new scheme:

	Present $(millions)	Proposed $(millions)
Insured employers	15.0	15.0
Self insurers—		
Government	3.1	3.5
Other	1.0	0.8
Self-employed	..	3.5
Owners of motor vehicles	9.0	9.0
Drivers of motor vehicles	..	2.0
Social Security Fund	2.0	..
Health Department	6.5	8.0
	36.6	41.8

466. Although the table provides a clear picture of present contributions to the two compulsory insurance schemes it fails to disclose the important indirect savings which the proposed scheme can effect. It is not possible to estimate these indirect savings. They include that part of the cost of servicing the adversary system which is not met by the insurance funds: the amount is not inconsiderable and includes unsuccessful litigation, costs of investigation, certain legal expenses, and the time occupied by medical and other specialists in providing reports or assisting in the preparation of a case. Then there is the present cost of public liability insurance in so far as it extends to the risk of personal injury. In 1965–66 total premiums paid in respect of "other forms of accident insurance" [175] (including public liability insurance) exceeded $8 million. A different type of saving will arise in respect of personal accident insurance. It may be expected that some part of the total amount expended for this cover will not be required. In the year 1965–66 the total premiums were in excess of $5 million. Next there is the sick pay which is provided by employers either by agreement or on a voluntary basis. The level of compensation proposed under the new scheme will provide a substantial saving in this connection. All these various items deserve to be considered when an assessment is made of the worth of the scheme propounded.

CONTRIBUTION FOR EMPLOYEES

467. The table discloses that at present insured employers provide sums totalling $15 million for compensation which might become payable in respect of their employees. As we explained in paragraph 314, the premiums are classified in terms of the degree of risk supposed to be inherent in the industry concerned. There are 137 separate classifications at the present time, but despite this fact it is considered that the system does not always work justly as between industries. There is the even more important point of principle outlined in paragraph 314. All industrial activity is interdependent and there should be a general pooling of all the risks of accidents to workers. The same point is mentioned in paragraph 335, and in paragraph 336 we have expressed our conclusion that merit rating or experience rating has no significant effect in the interests of safety.

468. Accordingly we have recommended that the method of classification should give way to a uniform levy based upon salary or wages paid. The aggregate amount collected in the form of

[175] New Zealand Insurance Statistics, 1965–66, table 17.

insurance premiums is a little more than 1 percent of wages and accordingly a levy at this rate should be made in respect of wages in future.

469. The proposal will involve a readjustment of contributions to the fund as between various employers. In our view the adjustment is equitable for the reasons given. And to the extent that some industries will gain and others lose in the process of readjustment the movement will go in favour of the group of industries most directly involved with production.

470. For the reason briefly given in paragraph 316 the scheme must be compulsory and it should include all employees of the Government. For self-insurers there may be some small saving, as indicated in the table. For the Government there is likely to be an increase of about $0.5 million. The fact is taken into account in the proposals outlined in the following paragraphs.

COST TO THE GOVERNMENT

471. It will be seen from the table that the apparent cost to the Government of the present system is $11.6 million when payments made from the Social Security and Health Departments are taken into account. In making the various estimates we have received the assistance of the two Departments concerned. A number of incidental savings will be made which are not taken into account in the table. They include, for example, the fund for victims of criminal injury and the compensation made available by the Government for those injured in certain types of rescue work.

472. On the other hand it is part of the general proposals that the Health Department should assume responsibility for the cost of all hospital treatment of all injured persons in future. There will be a consequential loss of the amounts paid by the Workers' Compensation fund and recoveries through negligence actions. There is administrative waste associated with these various recoveries, and in addition we are unable to accept the principle that a comprehensive scheme of insurance for injury should relieve the health service of costs which it undertakes as a matter of national policy for the rest of the population.

473. After balancing these various considerations we recommend that although the Social Security fund is likely to be relieved of outgoings of approximately $2 million, no direct grant to the new comprehensive fund should be made by that Department. In the result it is estimated that the proposed Government contribution

for employees together with the cost to be borne by the Health Department will total $11.5 million, or approximately the amount at present being expended, as explained in paragraph 471.

THE SELF-EMPLOYED

474. The contribution proposed in respect of self-employed persons is new. It can be argued that if the community is to accept a general responsibility for a comprehensive scheme then it is undesirable to invite special groups to make direct contributions unless similar contributions have been made in the past. If the community as a whole bears the real cost of employee-insurance then the community through taxation should bear the cost of employer-insurance. However, we think this argument is an oversimplification and that to adopt it would be to deprive employees of an advantage they have enjoyed in this respect insofar as work-connected accidents are concerned.

475. Accordingly we recommend that self-employed persons should contribute an amount equal to 1 percent of net income, subject to an annual minimum levy of $5 and the same maximum levy of $80 payable in respect of an employee. Obviously this rate could not be justified unless the self-employed were able to deduct the amount involved in assessing income for taxation purposes. If the Government will permit employers to deduct the similar contributions made on behalf of employees then similar treatment must in equity be given the group of self-employed persons. The matter is referred to in paragraph 315.

MOTOR DRIVERS

476. In the past motor *drivers* have not been given automatic insurance under the compulsory scheme in regard to their injuries which might arise from their own negligence or mere "accident". Moreover, the new scheme will widely extend the compensation available to all victims of road accidents.

477. It is equitable that those concerned should provide some additional contribution to the overall funds needed. In our opinion, however, the levy should not be made against the owners of vehicles. It should be provided by those who drive them. The matter is mentioned in paragraph 313. Accordingly we recommend that a small annual levy of $1.50 be charged in respect of all driving licences, and that this sum should be collected on behalf of the compensation fund by local authorities.

METHOD OF COLLECTING FUNDS

478. In a broad sense the amounts which will be subscribed to the comprehensive fund may be regarded as a form of taxation. Economical methods of assessment and collection of funds should be employed. We make the following recommendations in this regard—

(a) The Inland Revenue Department should be used for the purpose of collecting the levies from both employers and self-employed persons. A separate section of the income return could be used for the purpose of the comprehensive insurance fund levy. The proposal has the advantage of avoiding the need for assessments, and it will enable the appropriate levy to be calculated and checked by processes already being used.

(b) Owners of motor vehicles should provide as at present the appropriate levy to the Post Office at the time of re-licensing the vehicle concerned.

(c) The various local authorities can be used, as we have suggested, for the purpose of collecting the levy from drivers of motor vehicles.

(d) The Government contributions can, of course, be arranged by direct grant.

(e) The Health Department charges will be self-administered by that Department.

By these means we believe cost of collecting the various levies can be kept to a minimum.

INVESTMENT OF FUNDS

479. The estimate of costs includes calculations of periodic payments after capitalisation at 4 percent. Actual income will accordingly exceed actual payments until the fund has been in operation for a number of years. A decision must be made as to whether a system of funding should be operated or the unused income set aside and invested on the basis that the scheme should be self-supporting from year to year. We recommend that the second of these alternatives be investigated with a view to adoption. As part of the proposals put forward we recommend an automatic review of benefits to keep pace with the cost of living. Adjustments of this sort add to the complications of actuarial calculation. As the scheme will be a Government scheme of social insurance it must in the final resort receive the backing of the State. It is for this reason that a formal system of funding cannot be regarded as essential to the stability of the whole scheme. However, whichever method is adopted clearly surplus funds should be invested.

480. The investment of such surplus funds will achieve the double purpose of replacing the investment of funds at present surplus to immediate requirements of the insurance companies; and the interest so earned will justify the estimate of cost provided with this Report and the estimate made by the Government Statistician.

481. Finally we recommend that the levies proposed in respect of earnings and in respect of the owners and drivers of motor vehicles should be pegged. To the extent that additional funds might be needed in the future quite clearly these should be provided from general taxation.

PART 9 – CONCLUSIONS AND RECOMMENDATIONS

482. The following paragraphs repeat for ease of reference the more important conclusions and recommendations contained in the Report.

483. SCOPE OF INQUIRY

(1) It is not possible to resolve the problem of industrial injuries in isolation from the many other hazards which face the work force throughout the 24 hours of each day.

(2) This conclusion is reinforced by the findings and recommendations of the recent inquiry conducted by the Committee on Absolute Liability for road accidents. The inquiry supplements our own and the findings and recommendations are set out in paragraphs 137 to 141 of this Report.

(3) Accordingly, it has been essential to examine the implications of a unified and comprehensive system for meeting the losses which arise from personal injury no matter where or how the injury might occur.

484. REQUIREMENTS OF A COMPENSATION SCHEME

There are five essential principles which should be accepted by any modern system of compensation as follows—

(1) In the national interest, and as a matter of national obligation, the community must protect all citizens (including the self-employed) and the housewives who sustain them from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity.

(2) All injured persons should receive compensation from any community financed scheme on the same uniform method of assessment, regardless of the causes which gave rise to their injuries.

(3) The scheme should be deliberately organised to urge forward their physical and vocational recovery while at the same time providing a real measure of money compensation for their losses.

(4) Real compensation demands that income-related benefits should be paid for the whole period of incapacity and recognition of the plain fact that any permanent bodily impairment is a loss in itself regardless of its effect on earning capacity.

(5) The achievement of the system must not be eroded by delays in compensation, inconsistencies in assessments, or waste in administration.

485. THE ACTION FOR DAMAGES

(1) The adversary system hinders the rehabilitation of injured persons after accidents and can play no effective part beforehand in preventing them.

(2) The fault principle cannot logically be used to justify the common law remedy and is erratic and capricious in operation.

(3) The remedy itself produces a complete indemnity for a relatively tiny group of injured persons; something less (often greatly less) for a small group of injured persons; for all the rest it can do nothing.

(4) As a system it is cumbersome and inefficient; and it is extravagant in operation to the point of absorbing for administration and other charges as much as $40 for every $60 paid over to successful claimants.

(5) The common law remedy has performed a useful function in the past, but it has been increasingly unable to grapple with the present needs of society and something better should now be found.

486. THE WORKERS' COMPENSATION ACT

(1) The original legislation was put forward on a wrong principle and has since been dominated by a wrong outlook.

(2) The position is due to the unfortunate compromises which mark the legislation.

(3) It had been hoped that it would overcome the procedural problems of the common law, and yet it has adopted all the forms of litigation.

(4) It was designed to provide a consistent and certain remedy, but offers no more than partial compensation.

(5) It was put forward principally because of the difficulties which accompany serious injury, and yet its emphasis goes in favour of short-term or minor problems.

(6) It is handled by private enterprise but it affects a social responsibility.

(7) It is a costly process in administration and yet the system can do nothing effective in the field of prevention of accidents or the physical and vocational restoration of the injured.

(8) In short, in its present form the Act works upon a limited principle, it is formal in procedure, it is meagre in its awards, and it is ineffective in two of the important areas which should be at the forefront of any general scheme of compensation.

487. THE SOCIAL SECURITY SYSTEM

(1) The social security fund frequently has supplemented awards of damages or compensation and those concerned have thus been assisted twice in respect of the same injury. It is a situation which should not continue.

(2) The system itself provides uniform flat rate benefits and on this basis it cannot provide the framework for a comprehensive scheme of injury compensation. Flat rate benefits would be an unacceptable substitute for varied income losses or permanent physical impairment.

(3) Nor could an income-related means test be retained as a qualification for fair recompense. It would interfere inequitably with the principle of compensation for losses; it would be a serious disincentive to rehabilitation and a return to work; and it has the other disadvantages set out in paragraph 260.

488. A UNIFIED SCHEME

(1) There is a clear need for and we recommend a unified and comprehensive scheme of accident prevention, rehabilitation, and compensation. It must itself avoid the disadvantages of the present processes and operate on a basis of consistent principle.

(2) The scheme must meet the requirements of the five principles outlined in paragraph 484: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency.

(3) It must meet the requirement of cost.

(4) The object must be compensation for all injuries, irrespective of fault and regardless of cause. Accordingly the level of compensation must be entirely adequate and it must be assessed fairly as between groups and as between individuals within those groups.

489. CONSEQUENTIAL CHANGES

(1) Given a suitably generous scheme on the foregoing basis it follows automatically that previous ways of seeking to achieve the same or a similar purpose become irrelevant.

(2) Thus the common law rights in respect of personal injuries should be abolished and the Workers' Compensation Act repealed.

(3) Wherever relevant, existing benefits under the Social Security Act would be merged with the compensation payable under the new scheme.

(4) Such a scheme, involving the acceptance of community wide responsibility in respect of every injured citizen, must clearly be handled as a social service by an agency of the Government.

(5) And the procedures and techniques of private litigation should be replaced by non-contentious processes of assessment and review with recourse to the Courts only upon a point of law.

490. SCHEME TO BE COMPULSORY

(1) The scheme which has been outlined involves comprehensive entitlement. It must be given comprehensive support.

(2) Protection is not to be restricted to work accidents or to road accidents, or to any period of the day, or to any group in the community. Individual liability, moreover, will disappear in favour of national responsibility.

(3) If the scheme is to be universal in scope it must be compulsory in application. Accordingly there will be no place for special arrangements or for "contracting out". And the enactment making provision for it should be made to bind the Crown.

491. THE INSURANCE COMPANIES

(1) In the absence of personal liability and with the disappearance of any element of voluntary contribution there can be no place for the 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.

(2) It is said that the State should hesitate before interfering with private enterprise in what is claimed to be a legitimate field of operation. There is much confusion of thought about this matter. Private enterprise cannot claim as of right to handle a fund such as the compulsory road injury fund or

workers' compensation fund in New Zealand. Those funds have arisen not because owners of vehicles or employers have been persuaded to provide the business, but because Parliament has ordained that they must do so.

(3) Moreover, the insurance system itself can offer no central impetus in the important areas of accident prevention and rehabilitation. It is operating in an area which ordinarily would be handled by the central Government as a social service. It cannot avoid adversary problems. In terms of administration it is very expensive.

492. BASIS OF COMPENSATION

(1) Certainty of compensation and the need to leave some margin of effort to personal initiative are just and practical reasons why such a scheme as that proposed should not attempt to provide complete indemnities.

(2) Automatic compensation equivalent to 80 percent of lost (tax paid) income for periods of total incapacity and appropriate portions for partial disabilities would adequately take account of all relevant considerations.

(3) It should be laid down, however, that assessments must give all reasonable doubts in favour of the applicant; that they must be based on the real merits and justice of the case; and that suitable discretion should be available to deal with unusual circumstances. On such a basis the proposed level of compensation should be accepted by all.

493. LEVELS OF COMPENSATION

(1) Compensation should be paid as from the day following incapacity on the principle that there is rarely a wage loss for the day of the injury. Otherwise it should be paid in respect of the whole period of incapacity.

(2) The upper limit of compensation must be defined at a point at which nearly every injured person could feel that his real losses were being fairly met on the proportionate basis outlined. The overall cost to the fund of taking this ceiling from $80 per week (which we consider to be the lowest acceptable limit) to $120 per week (which would include practically the whole working population) is statistically so insignificant that the higher figure clearly should be accepted.

(3) Real compensation must be available wherever it is needed, and in order that funds can be distributed upon this principle we recommend that compensation for the first four weeks should not exceed $25 per week.

(4) At the expiration of four weeks the limit should be removed for those still incapacitated. In the case of persons incapacitated for periods of eight weeks or longer compensation should be reassessed at the full rate for the whole period of incapacity.

(5) In no case should the payment for compensation fall below the amount currently available in the circumstances as a benefit under the social security system.

(6) We have provided examples in Appendix 11 of severity ratings which we think should be given to certain classes of injury. But we have not designed a new scale. The matter is complex and we recommend that a small committee of medical and legal experts should be set up to prepare a new schedule having regard to the principles outlined in the Report.

(7) Compensation for housewives and others without direct earning losses should be paid in respect of periods of temporary total incapacity as from the fifteenth day after the day of injury, but compensation in such cases should be paid as from the day after incapacity commences whenever it lasts for eight weeks or longer.

494. PERIODIC PAYMENTS

(1) Compensation for permanent disabilities should be paid on a periodic basis for the life of the injured person, subject to the provision for commuting to lump sums in certain cases.

(2) There should be automatic adjustment of periodic payments and of the minimum and maximum rates of benefit at two-yearly intervals in order to keep pace with changes in the cost of living. The adjustments should be made on the basis of the consumers' price index for movements of 3 per cent or more.

(3) An advantage of periodic payments of compensation lies in the fact that they can be adjusted following assessment if changed circumstances should indicate this to be necessary. Accordingly we recommend that a beneficiary should be entitled to have his case reviewed for the purpose of obtaining an increase in benefit should his condition deteriorate.

(4) But the converse should not apply. A man should not be left with the thought that energetic attempts to overcome physical handicap might result in a reduced pension, and we think it in the national interest that there should be no uncertainty in this respect.

(5) Minor permanent partial disabilities should be compensated in the form of a lump sum. There should be a discretion in other cases to commute all or part of the periodic payments to a present capital sum where the interest or pressing need of the person concerned clearly would warrant this. Such a discretion would, in our opinion, be sufficient to provide for the commutation of periodic payments in all suitable cases.

495. AN INDEPENDENT AUTHORITY

(1) The scheme outlined involves a partial merger with some aspects of the present social security system.

(2) However, it should be brought to life and set upon its course by an independent authority whose whole responsibility it would be to ensure the successful application in every respect of the principles and philosophy upon which it is based.

(3) Nevertheless the scheme must be provided with all necessary administrative arrangements. Accordingly, we recommend that an independent authority be set up by the Government which should operate within the general responsibility of the Minister of Social Security and be attached to his Department for administrative purposes.

(4) The authority should be under the control of a Board of three Commissioners to be appointed by the Governor-General in Council, for specified terms of at least six years.

(5) The Chairman should be a barrister of at least seven years practical experience.

(6) It is important that no member of the Board should be appointed as representative of any particular group in the community.

496. PROCEDURE

(1) The pattern of assessment should be application, inquiry, investigation, and decision at the first level; review by a review committee at the request of the claimant; an appeal to an appeal tribunal (of three members including a doctor and a lawyer) which should hold *viva voce* hearings at which the claimant could be represented if he so desires; and a final appeal to the members of the Board itself.

(2) We recommend that on a point of law there should be an appeal to the Supreme Court.

(3) Informal and simple procedure should be the key to all proceedings within the jurisdiction of the Board.

(4) There should be a discretion to deal with any unusual circumstances and every decision should be based on the real merits and justice of the case.

(5) Under such a scheme as this there should be no reason for strictly limited periods of time within which claims could be made. We recommend that for all cases the limitation period should be six years, with a wide discretion to the Board to extend the time for any reasonable cause.

497. SAFETY

(1) There should be a department set up within the new authority charged with the promotion of safety wherever accidents are likely to occur.

(2) An annual sum of $400,000 should be set aside for the promotion of safety.

(3) The best statistical use should be made of the unique records which will become so readily available to the new compensation authority.

(4) Annual grants should at present continue to be made to the National Safety Association of New Zealand (Inc.) to replace those being made by the Workers' Compensation Board.

(5) There should be no reluctance to use penal sections of the various Acts and regulations affecting industrial safety when (in more serious cases at least) threats and persuasion have clearly failed.

(6) The system of merit rating or experience rating is ineffective as a means of promoting safety.

(7) The elimination of personal liability should be used to encourage increased co-operation between the trade unions and the employers in matters affecting safety in industry.

(8) The introduction and provision of a comprehensive system of compensation should be regarded as an unusual opportunity for making compulsory the general use of safeguards likely to minimise injury or avoid death such as safety belts for motor vehicles and safety frames for tractors.

498. REHABILITATION

(1) The process of rehabilitation should be developed and encouraged by every means possible as it has very much to offer New Zealand both in human and economic terms.

(2) There is a pressing need for a well co-ordinated and vigorous programme which will embrace all who might be assisted by rehabilitation and the responsibility for this financially and in all other ways should be accepted by the State through the Health Department.

(3) In order to provide adequate coverage throughout the country we recommend that a specialist in physical medicine should be appointed by the boards of all the more important hospital districts; that the scheme at present in operation at the Queen Elizabeth Hospital at Rotorua be duplicated wherever possible; and the type of rehabilitation ward being established at Palmerston North should be extended.

(4) The proposed Rehabilitation and Compensation Board should set up a medical branch under the leadership of a doctor of high calibre and wide experience. The Board itself should be given sufficient authority to enable it to exercise some reasonable supervision within the field of medical administration. We recommend that the medical director should set up a small medical committee comprising a few senior members of the profession in active practice to act in a part-time capacity and provide him with assistance and advice concerning his general responsibilities.

(5) The new authority should undertake to pay the medical fees in full for all compensation cases subject to the provision of a suitable scale of medical fees to be prepared by the Medical Association of New Zealand and agreed with the Board. There should be discretion within the scale to provide adequate payment for unusual or special cases and the scale itself should be the subject of automatic review at intervals of approximately three years.

(6) Wherever the rehabilitation process might be speeded up by the use of private hospitals then we think these hospitals should be used and whenever such use has been authorised by the medical director of the Board then the cost of the beds should be met by the Health Department.

(7) For the general purposes of rehabilitation the Board should set aside an annual sum of $200,000. This amount should not be in substitution for any Health Department responsibility but should be used to urge forward the rehabilitation concept.

(8) The industrial clinics are performing an extremely valuable function and should be encouraged. We recommend that as an experiment the new authority should provide a mobile

physiotherapy van at the Penrose clinic which would enable individual physiotherapists to offer treatment to their patients at the work site in this industrial area.

(9) A rehabilitation unit of the Otara type should be set up in the Christchurch district and consideration given to a similar establishment in the near future in the Wellington area.

(10) There is a pressing need for specialised teams of assessors able to make prompt and continuous assessments of patients requiring rehabilitation. We believe that ten of these teams should be located in the North Island and five in the South Island.

(11) There should be much more direct and effective liaison between hospitals and other agencies concerned with rehabilitation and the employment of disabled persons and we believe the new Board has much to offer in this connection. We recommend that the Director of Medical Services of the Board should be invited to join the National Civilian Rehabilitation Committee.

(12) Being of the opinion that this Royal Commission should not attempt to resolve the basic question of the validity of chiropractic treatment we have no recommendation concerning the submissions made by the Chiropractors Association.

(13) A special rehabilitation benefit should be defined and provided under the Social Security Act which would promote and provide incentives for rehabilitation.

499. INTERNATIONAL LABOUR CONVENTION

The International Labour Convention (No. 121) provides guidelines to Governments concerning benefits in the case of employment injury. The standards are desirable and should be accepted in New Zealand. The adoption of the standards for the various benefits outlined in this Report would meet and in many areas exceed the standards of the Convention.

500. SOURCE OF FUNDS

(1) The amounts at present contributed to the compulsory road accident and workers' compensation schemes should be applied to support the new comprehensive scheme.

(2) We recommend, however, that the classification of risks in industry should now give way to a uniform levy based upon salary or wages.

(3) At present the aggregate amount collected in the form of workers' compensation insurance premiums is a little more than 1 percent of all wages. We recommend that in future an amount equal to 1 percent on wages should be paid by way of levy to the fund by all employers, including Government.

(4) The effect of a graduated income tax is to alter the ratio of levy (assessed upon gross income) to compensation (based on tax-paid income) as incomes increase. It works in favour of the fund as they increase. For simplicity in administration we recommend a uniform rate despite the changing ratio: but as a matter of equity it should not be assessed against the portion of any single income which exceeds $8,000.

(5) It is recommended that Government, through the Health Department, should assume responsibility for all hospital treatment, both public and private, and in addition make contributions at existing levels to the compensation fund towards the cost of medical benefits.

(6) At present the self-employed are not protected by a compensation fund. On the principle outlined they should contribute an amount equal to 1 percent of net income, subject to an annual minimum levy of $5 and a maximum of $80.

(7) Unlike employees the self-employed must meet the levy themselves. Unlike employers they are unable to pass on the cost to the community. Moreover, employers are able to claim the item as a deductible charge in assessing income for tax purposes.

(8) In the circumstances this levy could not justly be made upon self-employed persons unless they could deduct the item from assessable income for tax purposes. We recommend accordingly, and add that clearly such a deduction must not be regarded as part of the exemption at present permitted for life insurance or superannuation contributions.

(9) In the past drivers have not been obliged to insure against the results of their own negligence on the highway.

(10) Owners of vehicles, who alone have provided funds for the compulsory insurance scheme, should not be required to make increased payments to the scheme proposed. The time has arrived to require individual drivers to make some direct contribution to a fund which will provide them with considerable personal advantage.

(11) We recommend that an annual levy of $1.50 be charged in respect of all driving licences, and that this sum should be collected by local authorities on behalf of the compensation fund.

(12) Finally we recommend that the levies proposed in respect of earnings and in respect of the owners and drivers of motor vehicles should be pegged. To the extent that additional funds might be needed in the future these in our view should be provided from general taxation.