PAPERS AND COMMENTARIES

15 May, 1974

CHAPMAN TRIPP

Auckland University

Legal Research Foundation Incorporated
CONTENTS

Foreword
C.R. Connard LLM, Convenor ................................................................. iii

First Session — Chairman: R.R. Ladd LLB (Hons)
The Scheme of the Act
K.L. Sandford LLB, Chairman of the Accident
Compensation Commission ................................................................. 5
Questions addressed to Mr Sandford .................................................. 12

Second Session — Chairman: D. Vaver BA, LLB(Hons), JD
The Meaning of "Accident"
P.G. Hillyer QC, LLB ........................................................................... 19
Margaret A. Vennell LLB, Lecturer in Law .......................................... 23
J.R. Kirker, FRCS, FRACS, Orthopaedic Surgeon .............................. 29
Questions addressed to the Panel ......................................................... 31

Third Session — Chairman: Margaret Wilson, LLB(Hons), M.Jur.
The Assessment of Compensation
L.M. Graham, Member of the Accident Compensation
Commission ........................................................................................... 35

Panel:
W.R. Caldwell, Director of Compensation of the Accident
Compensation Commission
M.D. Matich, MB, ChB, D.Obst., RCOG, MRCGP, Chairman
of the Medical Association of New Zealand
R.B. Guise, BDS, Treasurer of the New Zealand Dental Association
C.L. Purdue, Secretary, Auckland Carpenters and Joiners Union

Questions addressed to the Panel ......................................................... 43

Fourth Session — Chairman: D. Vaver BA, LLB(Hons), JD
The Effect of the Act on Insurances
R.V. Bell-Booth, Director, Stenhouse New Zealand Limited,
Registered Insurance Brokers ............................................................... 55
Industrial Safety — Economics an
Industrial Safety — Ergonomics and the Act
L. Ring, MSc, MCSP ............................................................................. 65
"Accident Compensation is the ‘new deal’ for people who suffer personal injury by accident on or after 1st April, 1974. It provides a range of benefits previously not available to New Zealanders and will apply to everyone — earners, non-earners, adults and children. It will also apply to visitors from overseas.

The accident compensation system will apply 24 hours a day to all accidents anywhere in New Zealand regardless of who was at fault. It replaces Workers’ Compensation for personal injury or death and Motor Vehicles (Third Party) Insurance; and Court actions to establish fault and to claim damages for personal injury are abolished.

The new system, while aimed at the prevention of accidents, also makes provision for the care of the injured person when an accident does occur. This care covers treatment, compensation, and rehabilitation.

How the accident happened is not relevant. It may occur at home, at work, or at play; in the factory, street or playing field; be caused by a motor vehicle or on a child’s bicycle. This is of no relevance to the claim. If you suffer personal injury by accident the benefits appropriate to your particular circumstances (whether earner or non-earner — adult or child) will be available."

With such words, the explanatory pamphlet issued by the Accident Compensation Commission introduced the new scheme. The principle is clear. But the practical operation of such a scheme is inevitably a major undertaking, by no means free from difficulties in interpretation and understanding.

For this reason, the Legal Research Foundation chose the Accident Compensation Act as the subject for its first Seminar of 1974. The Foundation was privileged to have so many distinguished speakers, each of whom is directly involved in varying aspects of the operation of the Act.

Following on from the Seminar, the Foundation was invited to make submissions to the Parliamentary Select Committee considering whether a statutory definition of “personal injury by accident” should be included in the Act, and these have been presented by Margaret Vennell on behalf of the Foundation.

Roger Connard
Seminar Convener.
FIRST SESSION
THE SCHEME OF THE ACT
by
K.L. Sandford, L.L.B.

New Zealand's Accident Compensation Scheme has been described by one overseas observer as "a unique experiment"; by another as "a milestone in social and legal history".

"A unique experiment?" "Unique" it certainly is, although some disparagers have been heard to say that is is no more than an improved Workers' Compensation system, a modified damages process to accommodate the no-fault principle, with platitudes concerning safety and rehabilitation added to make the whole package more palatable. Even if that were true which it is not, it would still be unique in the sense that no country has yet put together these elements in the one operating system. Certainly overseas countries are regarding it as unique — the Commission has received visits from Ministers of the Canadian Federal and Provincial Governments who have expressed more than mere curiosity; we are in communication with the Pearson Commission in England and the Woodhouse Committee in Australia; and many other overseas Governments and organisations have sought information.

It is only partly true to say that it is an experiment. Over the six years since the Woodhouse Report was presented, its proposals have been subjected to the most intense scrutiny by experts and interested parties in all fields. The Bill was drafted with meticulous care and attention to detail. After it became law on 20 October 1972, the Commission had the formidable task of constructing the systems to implement the legislation; and since 1 April the Schemes have been operating as a going concern. It now remains experimental only in the sense that time may demonstrate that systems should be altered, levels of benefits should be extended, and coverage widened. But the concept of no-faults compensation for accidents in New Zealand is no longer an experiment. It is an accomplished social and legal reality.

The other overseas comment that it represents "a milestone in social and legal history" must wait for history to confirm or deny. For while Parliament has decided that the advantages of the Schemes override the criticisms, only future history will tell whether the voices of the critics will be stilled, whether their criticisms will be confirmed, or whether in the end it will remain a question of balancing advantages against disadvantages.

These criticisms provide the theme for my remarks today. I hope to summarise the principal arguments that have been presented against the Schemes, and to offer such answers to them as have been revealed in the years of preparation and in the single month of practice.

I believe that there have been six main points of criticism. These are:

(1) Loss of rights
(2) Poorer benefits
I will deal with each of these in turn.

1. LOSS OF RIGHTS

The total abolition of the common law remedy for damages for personal injury as recommended in the Woodhouse Report, and finally brought about by the Accident Compensation Amendment (No. 2) Act 1973, predictably caused some people to believe that a centuries-old bastion of British justice was being demolished; that once more we were seeing the modern State removing justice from the open courts and placing it in the hands of a semi-secret bureaucracy. The academics amongst you will know that the negligence action has no lengthy tradition behind it and has been a comparatively modern legal development. Then what is it that is being lost? Opinions may well differ, particularly on the use of words such as “capricious” and “lottery” by the advocates of change when describing the common law process. But can one deny that in losing the negligence action, we have lost a remedy that existed for the benefit of only a chosen few? To those lucky ones it was splendid. It was an excellent and complete remedy. But to a man injured at work, without negligence, the remedy was unavailable, although he was entitled to a limited measure of financial protection. However, to the third man, injured identically with the other two, but without negligence and outside the work environment, the common law action was seen as an unnatural discrimination, looking to the causes, and not to his needs. It is fine to think of what a paraplegic might do with his $90,000 damages. But what, in comparison, can a paraplegic, who brought about his own injury, do with his social security benefit?

I therefore do not bemoan the loss of the damages system. In its limited area, it served a good purpose in its time. I nevertheless think it is proper for us to watch that benefits some people previously possessed should not drop too much, if at all, for the sake of accommodating a more comprehensive benefit system, Accident Compensation must therefore move with changing times, just as common law damages did.

Some people advocate that the damages action should still be available as an alternative to Accident Compensation, or be available for certain levels of injury. The whole idea of Accident Compensation is to do away with the anomalies and injustices of the damages process. Any suggestion of retaining it is, in my opinion, not only quite illogical, but totally impracticable from an administrative and economic point of view.

2. POORER BENEFITS

I have no doubt that cases can be presented where a person will appear to receive less immediate financial benefits under Accident Compensation than under the damages system. In such comparisons stress should be laid on the word “immediate”; and there will be a tendency to ignore the funds which the Commission can employ in professional or job retraining and other forms of
rehabilitation, quite apart from the Commission’s role in providing for a claimant’s earnings loss throughout the whole of working life. Now the concern will be, not on whether or not the plaintiff gets his verdict and if so for how much, but what are his real needs from the moment of the accident through to the end of his working life. Concern for the injured man will not end, as it so often does now, on the day of settlement or verdict. Whatever opinion is held concerning the comparison of benefits, surely the availability of compensation to all is an advance on a system whereby it was available to a limited number. 24-hour protection for everyone in New Zealand, covering accidents at work, on the roads, at home, or in sport, providing earnings-related benefits for widows and other dependants; providing long-term benefits for those who suffer injury while undertaking commendable voluntary social services, such as Search and Rescue, St. John Ambulance, or volunteer firemen — all these considerations bear on any comparison of benefits.

And in answer to every criticism put forward on the amount of benefits available, in some instances rigidly controlled by the Act, one can ultimately point to s.179A. This extraordinary and overlooked section enables the Commission to make *ex gratia* payments, without limit, to persons who may not even be covered by the Act, or to whom the Commission considers additional compensation should be awarded. This is a most valuable provision to enable the Commission to deal with what would otherwise be the hard and the hardship cases. Because any such *ex gratia* payments are to be met out of general taxation it is not unreasonable that the Minister of Finance is required to add his approval to a proposed award. In other words, quote me an example where a person stands to do worse under Accident Compensation than at common law. If considered appropriate, we can use the *ex gratia* section to do what is fair and right.

**3. EXTRA COSTS**

One of the earliest doubts concerning the Woodhouse Report related to its confidence that costs could be contained in reasonable comparison with existing insurance costs. Economic studies showed, however, that this confidence was justified — to the surprise of many.

So far as levies on employers are concerned, the former premiums under the Workers Compensation Act amounted to approximately 0.9 of 1% of the national salary and wage bill. Cover under the Accident Compensation Act is being achieved at only fractionally more, namely 1%. Many former premiums have been reduced; many have increased, but the greatest increase has not exceeded 30c per $100 of payroll. Admittedly on top of this 1% Cot, employers are undertaking to pay the first week of compensation, but a large, and increasing, number of employers are already obliged to do substantially the same thing by Awards prescribing sick leave payments.

The 1% levy on the self-employed is, of course, new. It is in effect a compulsory personal accident insurance policy.

Levies on motor vehicles will increase 25% this year. Compulsory Third Party insurance premium for a private car last year was $11.35. The vastly increased coverage provided by Accident Compensation will require this to be increased this year by $2.84. This is trifling and, considering the benefits
provided, represents an amazing bargain by world insurance standards.

Estimates for the first year of operations must be cautious. But using the best information and statistics that we have, the total costs for the first year are expected to approximate:

- The employees’ section of the Earners Scheme $46m.
- The self-employed section of the Earners Scheme $7m.
- The Motor Vehicle Accident Scheme $20m.
- The Supplementary Scheme for non-earners $1.6m.

Only a full year’s operational running will tell, but we estimate that the Schemes will be administered for as little as 7% or 8% in the first year. This is a considerable improvement on the 30%, more recently 20%, allowed to insurance companies for administration and profit in handling Workers Compensation business.

Any discussion concerning extra costs must not ignore the role cast upon the Commission in the fields of accident prevention and rehabilitation. If these roles can be properly implemented, long-term but intangible savings will result.

While the compensation aspects of the new Scheme are revolutionary, the Act places equal importance on the Commission’s role in accident prevention and rehabilitation. In both these areas there are well-known existing services and facilities. For many reasons the Commission therefore cannot enter these areas like a new broom. Its activities will take longer to plan, longer to integrate with the activities of those already operating, and longer for our influence to be felt.

In the field of safety, there are already a number of organisations actively engaged. Some have undisputed knowledge and expertise, for example, the Ministry of Transport, in connection with road accidents. The Labour Department, and the National Safety Association of New Zealand, are deeply involved in industrial safety. There are a number of others in their particular fields. But there is room, a vacancy, for a new body of sufficient authority to gather together much of the fragmented approach and overlapping that occurs now, and to offer a more cohesive and melding function in the whole area of accident prevention throughout all forms of activity of our citizens.

This new role is one designed for the Accident Compensation Commission. It will enter upon it in full appreciation of the good work already being done. In the short term it will offer assistance and co-ordination. In the longer term it will develop an innovative programme of its own.

Rehabilitation is a word that encompasses a variety of activities in relation to an injured person – medical rehabilitation, social, economic, and vocational. This work is now being done. But from the survey that the Commission has already conducted in New Zealand, it appears clear that a greater awareness, and a greater emphasis, must be directed towards rehabilitation, and this will be one of the Commission’s primary functions.

Once again, it will be a policy of appreciation of what is already being done; of assembling and co-ordinating what might now be fragmented; of assisting where we can without interference; and in time developing new programmes of our own. As in the area of safety, the Commission’s influence on rehabilitation may take some time to be manifest.

One of the first steps will be that, probably within a few months, the Commission will have stationed at Auckland, in the first instance, one or more
Rehabilitation Liaison Officers, whose main functions will be to ensure that the rehabilitation needs of our own clients — those injured by accident — are under constant review, and receive the attention of the persons and agencies engaged in the actual physical work of rehabilitation.

4. PROBLEMS IN IMPLEMENTATION

Critics have forseen a number of difficulties in applying the Schemes in practice. Let us not pretend that the Schemes are free of difficulties. But let us see how they are being coped with.

(a) Medical Profession.

Some doctors have predicted an intolerable increase in workload. It is pointless to be dogmatic about this. Only time will tell. The Commission believes that there may well be a very slight increase, but does not believe that there will be a wholesale descent on doctors’ surgeries from people with minor injuries who, in the past, have bandaged themselves at home and who might now decide to go to a doctor’s rooms in the belief that treatment will be free.

Some doctors also expressed concern that they will be required to face new responsibilities in deciding whether cases are accident or sickness. We have told them that we believe that, in the great majority of cases, they will face no difficulty in deciding. But, in the remainder, they should not attempt to grapple with any problem of definition but should simply report the condition and circumstances to the Commission. It is the Commission’s responsibility to decide.

Of course we would like to have a statutory definition if an appropriate one can be devised. But the Workers Compensation Act was administered for 73 years without one. I suppose we should not complain too much if we are asked to operate in the same fashion for a few months. We have sent to every doctor and legal firm a statement of some elementary principles which will be applied in making these decisions, but we are wary of saying in advance that some circumstances will qualify as personal injury by accident, and others not, to avoid pre-judgment of claims that are not yet presented. However, the Commission does intend publication of, not only formal law reports from our appellate structure, but of decisions at lower levels which may indicate policies and the pattern of decisions.

You are probably aware that Parliament has requested the Statutes Revision Committee to hear submissions on whether a definition should be incorporated in the legislation and, if so, what that definition should be. That Committee will be commencing its sittings soon.

Some doctors have also expressed the view that the charging of medical fees to the Commission may endanger the traditional doctor-patient relationship and be a step towards nationalisation of medicine. The Commission has failed to see the validity of that view. It will not interfere in the clinical management of a patient’s case by his doctor. Nor will it interfere with what a doctor chooses to charge for his services. The Commission’s only involvement is in paying to a doctor or dentist such an amount in respect of his fee as it considers it is reasonable for it to pay. For obvious reasons it is hoped that the views of the doctor on what he should charge, and the views of the Commission on what it should pay, should coincide. But in the course of a number of amicable and
constructive discussions with representatives of the medical profession, there has been worked out a satisfactory system for dealing with any disagreement in views. We do not now see this as presenting any substantial problem. There will be isolated occasions, as there have been already, when it seems to the Commission that a doctor or dentist is regarding the advent of Accident Compensation as a new opening to riches. This is no real difficulty.

(b) Levies

The construction of an equitable system of levies for the Earners Scheme has been a problem of some dimensions. As you know, levies are charged on employers according to the risk factors in their industrial activity. Levies on the self-employed are on a flat 1% rate. There were a number of good reasons why this differentiation was made which I will not go into now. But you may have recently observed that the Commission has already exercised a discretion it is given in the Act of amending the amount of levies payable by any person if, in the special circumstances of the case, a different levy would be fair and reasonable. This discretion has been exercised to meet cases of hardship. We are not yet prepared to use this discretion for immediately reducing levies on certain employers, solely on the ground of allegedly good safety records in the past, or on the commonly expressed ground that their insurance companies have previously given them discounts. Past statistics are either not sufficiently reliable, or are not available to the Commission, to enable it to consider at this stage any merit ratings for particular employers. A few years’ experience, with our own highly computerised statistical information, will be required.

Compensation

My fellow Commissioner, Mr Graham, will later be speaking on assessment of compensation. At this stage I will therefore mention only two topics which have been the subject of comment:

(1) When, and to what extent, should amounts prescribed in the Act be raised:
The commission is required to make periodical recommendations to Government on this subject. It can be expected that recommendations will be made during the present calendar year; and as soon as sufficient information is available. The Commission is fully conscious of past criticism often voiced at Workers Compensation and Social Security benefits — namely that they were always lagging behind up-to-date financial trends. We will try to avoid that criticism and will recommend changes to Government as soon as circumstances, and there are a variety of circumstances, appear to us to require a change. In turn, spokesmen for the Government have said that they likewise want a policy of Accident Compensation payments keeping abreast of the times.

(2) Calculation of compensation for the self-employed.
This has long been recognised as one of our real practical problems. An accountant running a one-man firm may suffer total cessation of income if he enters hospital. But if that accountant is in a firm of 8 partners he may suffer no loss whatever in the same circumstances. Between these two ex-
tremes lie an infinite variety of circumstances, which apply also with equal
difficulty to the farming community.
Mr Graham will no doubt remind you of s.113(4B) which, for the period
of short-term incapacity (from the 7th to the 35th day), gives the
Commission an arbitrary power to cut through the difficulties and award
what it considers fair and reasonable. Even with this provision, the
Commission acknowledges that this aspect of compensation is and will
probably always remain its most difficult problem.

5. BUREAUCRACY
Critics have said that it is a retrograde step to take people’s rights from the
courts and put them in the hands of a bureaucracy.
I wish to make three points in reply:
(1) From a primary decision made either by the Commission’s staff or by
its Agent, there is a right to apply for a Review. This Review may be conducted
either by the Commission itself, or by a Hearing Officer. It is intended that these
Hearing Officers will be suitably qualified persons in the area where the claimant
lives. Prominent lawyers will be asked to act, and probably members of other
callings also in particular cases. The effect of this is that the bureaucratic process
is immediately removed from the so-called bureaucrats themselves, and powers
given to selected independent members of the community. The Commission has
no power to override any decision given by a local Hearing Officer. The
Commission believes that his appointment represents an important community
involvement in its own community-financed Scheme.
(2) Apart from Reviews, the Act provides for additional appeal steps, to an
Appeal authority and, in certain cases, to the Supreme Court and the Court of
Appeal, which should effectively provide a check on any unwarranted
bureaucratic influence.
(3) The Commission is further required to report annually to Parliament,
where its policies can be debated, and it is subject to investigation by the
Ombudsman.

6. DECLINE IN NATIONAL CHARACTER
This is entirely a philosophical question. Some people say that the more a
State legislates for welfare, the weaker becomes the fibre of its citizens, their
self-reliance, and their incentive. It is of course a vital matter and must never be
ignored.
But can it ever be detected or ever measured? Who can prove it? All I can
say is that I know of no evidence that the fibre of our nation declined as a result
of the first introduction of pensions in the 1890s, or the first introduction of
Workers Compensation in 1900, or following the Social Security legislation of
1938.
I see in Accident Compensation, not so much a slackening of self-reliance
and calibre, but an increased confidence, an increased willingness to undertake
matters of initiative and spirit, because now one of the great fears of the past has
been removed – the fear that injury might bring calamitous financial
consequences.
In the three-pronged approach of the Schemes – prevention of accident,
rehabilitation of the injured, and fair compensation for all, the removal of fear and the consequent release of new confidence appears to me to represent a great advance in our social life, and not a retrogression.

CONCLUSION

I have used past and present criticisms of the Accident Compensation Scheme as the vehicle for not only reminding you of some of the answers, but of indicating some of the policies that the Commission is pursuing.

Whatever views are held about it now, for sure it will in future grow and change, expanding here, possibly retracting there. For all of us living in New Zealand at this time it must be regarded as an intensely interesting social and legal development. To those of us in the Commission, dealing with the problems of its creation and application, with the many difficulties but many satisfactions it has provided, we find our involvement affecting us in this way — that in no sense are we carrying out any utopian idealism, but rather that we are coming closer to the real and practical needs of injured people in a way that has never been possible before.

QUESTIONS ADDRESSED TO MR SANDFORD.

Question:
Dr Kahn:
We at the Accident Department, Auckland Hospital, are on the receiving end. We get approximately 80 accidents a day and it is most annoying to us to find the recurrent bad habit. We are paying the price that comes time and again of liquor. These people come to our hospitals. They constantly save money; they are rehabilitated. And yet the old lady of 87 with a broken hip cannot get into hospital. She has to wait. We are subsidising these baddies. Is there no way to fine them? Can the Commission do something?

Reply:
Mr Sandford:
I do not think we can stop a person being a bad hat. You know, of course, the Act is framed on the basis that the whole concept is that we do not look at the causes; we do not look at people's conduct that brought about their injury. We look at the fact that they are injured and we are debarred from enquiring that this person received his injury in a drunken brawl, or by someone's negligence. Whether this is quite good enough I do not know. Whether we should compensate out of the money you and I provide the drunken
brawler or the extreme case the newspapers picked up of the burglar who blew himself up when blowing a safe? I think this is a fair philosophical argument. Why should we use the money we all pay in to pay compensation. The Act says we do and the only case we do not pay is in the case of suicide or murder. I think that is a subject well worth looking at as to whether we should pay compensation to people who suffer their injuries in the course of committing certain crimes. Where you draw the line is a problem. I cannot answer your point as to why these bad hats should get all this favoured treatment and the poor old lady cannot get into hospital. That is out of my field.

Question:
Mr Ross:
I am a little bit concerned about the comment you made about the isolated doctor and dentist charging a high fee taking advantage of the fund. Speaking from the dental point of view there is some work that varies. The Act takes a reasonable and fair fee according to New Zealand standards. In the short time the scheme has been operating can you already establish that you have a fair and reasonable fee by New Zealand standards for all this type of work? And your comments that these fees seem too high. Have you already been able to establish fees that a normal dentist should charge?

Reply:
Mr Sandford:
No. We have had great assistance and co-operation with the doctors in this way. We are in the course now of trying to establish with the governing body of the N.Z. Dental Association a similar kind of assistance. Some dental procedures are expensive.

Question:
Mr Ring:
You mentioned the suggestion of allowing firms a rebate if they are not a frequency risk. You said it may take time to establish this and your computers will tell you when. I would like to know how you propose to determine when the frequency and severity rate is correct by computers. If not, what procedures does the Commission propose using?

Reply:
Mr Sandford:
I did not, with respect, say the computers will tell us everything. What the computers will do is to print out information on what accidents have cost us in money for every individual employer in New Zealand; what sort of accidents they were; how frequent they were in relation to his work force, Some will stand out as being very different from a very broad norm and if they stand out so much they are worth looking at. Particularly with penalty ratings we will
need to be very careful about this. If a particular firm's records show we have paid out greater compensation in a particular year, that figure alone means nothing until we can find out why. It may possibly be they had a disaster for which the firm is not responsible at all, and yet the compensation payments get charged on our records. There will be no penal ratings on firms without knowing why they have an accident rating worse than others.

Merit ratings:
I really cannot answer you on what we will rely on in deciding whether a merit rating will be given. We have an official on a world tour at the moment and this will be one of the subjects we are gathering information about.

Question:
Mr Robertshaw:
Mr Sandford has mentioned that the Commission is an autonomous independent body and not a Government department. Would you please explain how that statement fits in with Section 20 of the Act, and second, how then it is envisaged that Section 20 of the Act will be used; Section 20 reads:
"In the exercise of these functions and powers the Commission shall give effect to the policy of Government in relation to those functions and powers as communicated to it from time to time by the Minister."

Reply:
Mr Sandford:
We still claim we are an autonomous body, not a Government department, but a statutory body and all statutory bodies are subject to some restraints. You might think N.A.C. is a pretty individual organisation. They are. They are a statutory organisation regarded as autonomous and independent. They also are subject to the identical words of Section 20. In a crunch the Government can give a policy directive. Of course they couldn't step in daily and take over the running of the show, but I don't think Mr Robertshaw went on to read the rest of the sentence. To give us a directive under Section 20 that directive must be in writing, laid on the table of the House, open for the world and the Opposition to see, and if they attempted to do it too often I should think the Parliamentarians would say "This is no longer an independent body. You are making it a Government organisation."
I do not object to this provision. I believe that if an organisation is set up to which the public are compelled to pay money, I think the representatives of the public, namely Parliament, have an ultimate right to say how we go about dispensing this money. True it is there in theory, but it would only be in the ultimate crunch situation this would be done.
I give you one possible example. The Ontario Workers Compensation
Board runs its own 400 bed hospital. Our Act gives us power to erect a chain of hospitals throughout New Zealand if we wanted to. We could do it and of course that would be totally absurd. But if we did it, I would expect a written directive from Government to say “You are not to use public money to do that”.

It is only in that area of policy that any such directives are expected.
SECOND SESSION
THE MEANING OF "ACCIDENT"

by

P.G. Hillyer Q.C.

I propose to address you on the meaning of the phrase "personal injury by accident". Mrs Vennell will then consider various situations in which there may not be cover under the Act and therefore the old common law rights will still be available. We shall then be joined by Mr Kirker as a panel for discussion and to answer questions on the meaning of "accident" or at least to attempt to do so.

I sat as a member of a Medico-Legal Committee appointed by the Minister of Labour which met on a number of occasions in 1972 and 1973 to consider first the framing of a schedule of injuries which would be compensable as a percentage of total disability. It also had amongst its terms of reference the task of commenting on the question whether the term "accident" should be defined in the Bill and the problem of drawing the boundary in practice between "accident" on the one hand and "illness and disease" on the other. We went through three phases that I think are common to all who consider this problem.

First we thought it would be a good idea to define the terms and give as much assistance as possible to the Commission and those who would be operating the Act. Then we started to try and frame a definition and immediately ran into difficulties which seemed to get worse as we went deeper into the matter until we came to the conclusion that it would be better not to define the terms. We considered that the Commission and ultimately the Courts would look at the case law which had been developed under the Workers' Compensation Acts and ultimately a body of case law would be developed under the Accident Compensation Act which would have the effect of defining the terms.

We did realise with some uneasiness that the case law of the Workers' Compensation Act had been developed with the concept of ability to work uppermost in the minds of the tribunals and that the case law on personal accident insurance might be a more appropriate source of assistance. This, however, has the disadvantage that much depends on the wording of the individual insurance contract.

We were also conscious of the fact that a substantial amount of litigation is necessary before a comprehensive pattern will emerge and that litigation So we kept on and after a large number of meetings eventually evolved a definition which we would be the first to admit is not perfect, but which we think does provide answers to a number of questions which otherwise might have to be asked of the Courts. It could not, of course, answer all questions but if it reduces the number which have to be asked, I am of the opinion that it would be worthwhile including it in the Act. The definition is as follows: -

"Personal injury by accident" -

(a) Means (except as otherwise provided in this definition) damage to the human system which is not designed by the person who suffers it and which -

(i) Is caused or contributed to by a mishap, or an untoward event, external to the body; or (ii)
(ii) Results from an occupational disease to the extent that cover extends in respect of the disease under sections 65 to 68 of this Act:

(b) Includes —
   (i) All bodily and mental consequences of any such damage; and
   (ii) The consequences of medical, surgical, or first-aid treatment, care, or attention in respect of any such damage, whether or not such treatment, care, or attention was proper in the circumstances:

(c) Does not include —
   (i) Normal physiological changes; or
   (ii) Except as provided in paragraph (b) of this definition, abnormal personal reactions to food drugs or other materials introduced into the body; or
   (iii) Damage to the human system which is the result of disease, except as provided in sub-paragraph (ii) of paragraph (a) or paragraph (b) or paragraph (d) of this definition;

And for the purposes of this definition —

(d) Damage to the human system to the extent that it is caused by exposure to conditions of temperature or of moisture, fumes, or other physical factors, shall be deemed to have been caused or contributed to by a mishap or an untoward event only if that damage is caused by special exposures on a particular occasion to abnormal conditions of temperatures or of moisture, fumes, or other physical factors:

(e) The human system includes the body and mind;

And “personal injury” and “accident” have correspondingly been defined.

The legal members of the Committee Mr Dalgety, Mr Neazor and myself, and the medical members Dr Arthur Coombes (who is now the Medical Director of the Commission), Dr Doherty and Mr Kirker were enormously assisted by Mr Duncan, Under-Secretary for Labour, who was the Chairman of the Committee, Mr Hamilton of the Law Drafting Office, and a number of other extremely capable representatives of Government Departments. The definition is a product of all our experience.

I do not propose to take you through the painful steps which produced this definition but it may be helpful if I comment on some of its features. The phrase ‘an unlooked for mishap or untoward event which is not expected or designed’ comes from Lord McNaughton’s speech in Fenton v. Thorley [1903] A.C. 443 and has been adopted in many cases since. We started attempting separate definitions of accident and personal injury but soon came to the conclusion that this would create greater problems than a combined definition of personal injury by accident.

The first problem, of course, is that accident sometimes depends on your point of view. If a thug hits a man over the head so that he may rob him that is not an accident from the thug’s point of view — he intended to — but the whole concept of the Woodhouse scheme is that the fault principle should be abolished whether it is intentional or accidental fault. The first thing that had to be done therefore was to say that an injury would be accidental if it was not intended by the person who suffered it.
This is a first class example of the necessity of a definition. Accident, strictly speaking, does not include something which was intended. If therefore a person intentionally injured wanted to bring an action against the person who injured him, he might seek to establish that the intentional striking was not an accident and that therefore he did not come within the Accident Compensation Act. If he failed a lot of time and money would have been wasted. If he succeeded the law would have to be changed by a definition. We thought it much easier to have the definition first to stop the argument.

Then we got on to the question of nervous shock and accident neurosis. This caused a lot of trouble because the doctors seemed to think that nervous shock which was a well-recognised legal concept was an inexact medical term and that an injury to the mind involved an injury to the brain which was part of the body. Eventually we introduced the concept of damage to the human system which covers both body and mind.

The big problem, of course, is to differentiate between accident and disease. If illness were to be treated in the same way as accident under the Act a lot of problems would be solved and it may be that in the future illness would be brought within the framework of the Act. Lord knows what it would cost of course but there does not seem to be much logic in saying that a man who suffers a heart attack from lifting a heavy weight at work should be compensated even though he already had a bad heart, when another with the same sort of heart who cannot point to any particular incident or accident will not. We considered throughout our deliberations that a person should not be worse off under the Accident Compensation Act and that if he would have received compensation under the Workers' Compensation Act he should also be compensated under the Accident Compensation Act.

Questions of food poisoning are difficult. I suppose and the Committee thought that if a bus-load of people went into a restaurant and were given bad fish and all got sick that would be regarded as a personal injury by accident but if another person simply gets the same sort of symptoms without being able to point to any particular food he ate or because of his own particular aversion to some food that would be more in the nature of an illness or a disease.

Exposure is also difficult. Take the man who falls down the cliff at Ruapehu, stays out all night and gets pneumonia. That, you may think, should be personal injury by accident, but if he merely forgets his parka or goes to a football match and gets wet when it rains and catches pneumonia that would probably be regarded as an illness. You will note that in the definition we have tried to cover the situation by paragraph (d) providing that damage to the human system caused by exposure to conditions of temperature or moisture, fumes or other physical factors should be deemed to have been caused or contributed to by a mishap or untoward event only if that damage is caused by special exposure on a particular occasion to abnormal conditions so that the person who gets sunburnt would not have suffered personal injury by accident in the same way as a person catching cold would not.

Medical misadventure caused some difficulties particularly before the non-earner was brought within the ambit of the Act. We eventually came to the conclusion that if a person is injured in a motorcar accident and has his left leg
cut off in the hospital instead of his right leg that would be an accident, and so also would it be if he got a wrong dose of a drug or even if he got sick as a result of treatment which would not normally have caused illness. We thought that the desirability of settling the position was such that it should be stated clearly that the chain of causation would not be broken by treatment given for an injury even if that treatment was not skilful or careful.

A note in a circular is being sent to legal practitioners. The Accident Compensation Commission has advised that it proposed to construe the phrase “personal injury by accident” to some extent along the lines suggested by the Medico-Legal Committee. It says that in the absence of a statutory definition it is not entitled to state in advance that certain types of claims will not qualify. Any such statement could amount to pre-judgment of claims not yet presented. Each claim will be decided on its own facts and circumstances but it may be important for a person to be out of the ambit of the Act so that he may retain his common law rights. These are to be discussed, as I have said, by Mrs Vennell.

Anything, in my opinion, which can be done to facilitate the smooth working of the Act should be, and I personally believe that the Commission should be given the assistance of an authoritative statement of what the law is rather than endeavouring to make the law itself.

I could go on multiplying the examples of the problems the Committee considered but I have no doubt Mrs Vennell will refer to some in her address and that many of you will have examples and questions to raise from the floor. I shall therefore wait for these to come and thank you for your patient hearing.
THE MEANING OF "ACCIDENT"

by

Mrs M.A. Vennell

As Mr Hillyer has explained, there is no definition of the expression "accident" in the Accident Compensation Act 1972. However, clearly the Commission itself has views on this point, and in fact has issued guide-lines to the Medical and Legal Professions. In fact it may be that to define "accident" is to define the indefinable. Difficulty is, however, likely to arise in a number of situations in which an interpretation of "accident" is needed.

One area which immediately comes to mind is in respect of statements made negligently, which are relied on, so that personal injury is suffered. Can that personal injury really be said to be by accident, if in fact it is directly consequent on the negligent statement. A particular example of the sort of situation I have in mind arose out of the well-known case Smith v Auckland Hospital Board [1965] NZLR 191 in which the plaintiff relied on a statement (which was proved to have been given negligently) to the effect that there was no risk involved in a certain type of examination. In fact the risk was very high; it materialised and resulted in the victim having to have his leg amputated.

I find it very hard to see when the known risk was so high that such a situation was an accident, even from the victim's viewpoint.

My personal interpretation of the word "accident" would not include intentional torts, such as assault and battery, which can result in personal injury, since in my view the term "accident" carries a connotation of something not foreseeable. (Even though liability in negligence is measured by the yardstick of "what ought to be foreseeable to the reasonable defendant".) Nevertheless in my view any intended result cannot be an accident, even though in some circumstances it will be from the victim's point of view. The Commission appears to look at the whole question from the victim's point of view. This may give fair results, but is it really fair in relation to notions such as "voluntary assumption of risk"? Can a volunteer ever really be the victim of an accident?

The scheme of the Act does require a fundamental change in one's view of the legal system, and it is central to the argument which I am about to put forward that one will be required to look at issues relating to liability in ways different from those in which they have been looked at in the past.

One aspect of this which does worry me is that to a large degree the Commission itself will be a judge in its own cause, and it may be that the Courts will not feel free to consider legal questions of the sort which I envisage until after the Commission has first ruled on the matter and then only through the Appeal procedures available under the Act itself (see s. 5(5)). My arguments are based on legal theories which ought to be tested by the usual procedures for trial of civil actions before judges and magistrates, who have the appropriate training to test such questions.

In deciding whether there are any claims for damages arising out of personal injuries, it is crucial to examine the impact of s.5 of the Accident Compensation Act 1972, as amended by the Amendment Act (No 2) 1973, which substitutes a new s.5 stating that:
Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of a personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

Without limiting the generality of subsection (1) of this section, the action for loss of services (known as the action *per quod servitium amisit*) and the cause of action for loss of consortium (known as the action *per quod consortium amisit*) are hereby abolished.

Nothing in this section shall affect-

(a) Any action which lies in accordance with section 131 of this Act; or

(b) Any action for damages by the injured person or his administrator or any other person for breach of a contract of insurance; or

(c) Any proceedings for damages arising out of personal injury by accident or death resulting therefrom, if the accident occurred before the 1st day of April 1974.

No person shall have cover under this Act in respect of personal injury by accident if the accident occurred before the 1st day of April 1974.

Where in any proceedings before a Court a question arises as to whether any person has cover under this Act, the Court shall refer the question to the Accident Compensation Commission for decision, and the Commission shall have exclusive jurisdiction to determine the question.

The Commission may, on the application of any person who is a party to any proceedings or contemplated proceedings before a Court, determine any such question.

Subject to Part VII of this Act, a subsisting decision of the Commission under subsections (5) and (6) of this section shall be conclusive evidence as to whether or not the person to whom the decision relates had cover under this Act.”

It is worth noting in passing that the claim for damages in respect of personal injuries still exists in respect of causes of action arising prior to 1st April 1974 in respect of which all claims in tort and contract are still available (and under the Workers’ Compensation Act 1956). Gradually these claims (after the expiration of limitation periods) will be phased out.

Apart from this small class of claims, what claims are still available?

S.5 (1) declares (inter alia) . . . “no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule or any enactment.”

The use of the words “directly or indirectly” and “whether [brought] by that person or any other person, and whether under any rule of law or any enactment” are important.
In my opinion, this means, in effect, that in respect of personal injuries (and I stress the use of that term for reasons which will become obvious) there can be no claim under what is known as the tort of negligence, no claim arising from an intentional tort (such as Battery and Assault), no claim under the Deaths by Accident Compensation Act 1952, and no claim in Contract (in particular those arising out of the master/servant relationship, or claims in which negligence cannot be established but a breach of an implied warranty can be).

None of these types of claims will be permissible. It is a questionable point whether the Woodhouse Report had it in mind that so many claims would go. The overall impression that one gets from a fairly close reading of the Woodhouse Report is that no more was really intended than that the claim under the tort of negligence should be abolished, rather than that it was intended to remove the claim grounded on the commission of an intentional tort, or a breach of contract.

Be that as it may be, if one holds the view that the law of torts and the law of contract (at least in some respects) can act as a deterrent, in a way that the criminal and quasi-criminal law cannot, then the enactment of the Act in its present form leaves one with a sense of regret.

This may only be because the concept of the availability of the claim for damages, the concept of the adversary process and so on, which lawyers have inculcated into their systems from first days in law school are hard to shake off. The new Act clearly does require a new focus altogether; a focus on the ideal of compensation for all regardless of fault.

Nevertheless, rightly or wrongly it is my contention that there are still some claims for damages available. I will not, however, answer for the success or failure of my theory. I also contend that in spite of the ideals behind the Act, the scheme will prevent some from obtaining fair compensation, and itself will create anomalies. It is central to the theory which I wish to put forward that one must take full cognisance of what the terms: damage and injury mean. In the sense in which I wish to use these terms, damage is of course the loss which flows from the damaging event, and this damage is the injury, whereas the damaging event is the event which gives rise in some circumstances to the right to claim that loss. Damages, on the other hand, can be said to be the measure of damages assessed by a court — in other words, “the Remedy”.

A cause of action is the recognition that a certain type or category of fact situation which, if an event from which damage has flowed has occurred, will give rise to the right to bring a legal action to recover damages. Therefore since s.5 (1) of the Act came into force, no cause of action can give rise to a claim for damages attributable to a personal injury. But the head of damage is removed, not the cause of action.

What is not often fully appreciated, however, is that in some circumstances a damaging event may itself create more than one type of damage or injury from which damages will flow.

The rule in Fetter v Beal (1699) 1 Ld Raym. 399 precludes a person from bringing a second claim based on the same cause of action, and the same head of damages. In other words, where a cause of action gives rise to a right to claim damages, the damages are said to be “once and for all”.

One can, however, look at the Accident Compensation Act as though it
has created a new cause of action solely restricted to personal injury, and giving as a remedy, the right to claim compensation. Where this cause of action is present (i.e. where the damaging event has resulted in personal injury), then clearly no claim for damages for personal injury as such will lie.

But where the damaging event has given rise to another cause of action (even though under the pre-existing law that same cause of action could have given rise to a claim for damages flowing from personal injury) then the cause of action still exists, in my view.

An example may illustrate my point more clearly than pure theory.

The torts of Assault and Battery — the old Trespass to the Person — were the cause of action whereby the victims of a variety of injuries could obtain redress. Battery is any act of the defendant which directly and either intentionally or negligently causes some physical contact with the person of the plaintiff without the plaintiff’s consent. Assault is any act of the defendant which directly and either intentionally or negligently causes the plaintiff immediately to apprehend a contact with his person.

From the point of view of the present discussion an important aspect of both assault and battery is that they are both actionable per se — no “damage” may flow from the damaging event at all, so too, personal injury will not necessarily occur with the commission of the tort. If no personal injury has occurred then presumably, and s.5 would not seem to preclude it, the tort action of assault and battery must still lie. These actions also recognise that damages may flow from humiliation or loss of reputation, and are certainly comparable to this extent with the tort of false imprisonment (where personal injury is an unlikely result).

Conversely there will be situations where assault and battery have been committed and personal injury suffered. Then there can be no action for damages flowing from the personal injury. But clearly if the actions lie whether or not there is personal injury, then personal injury cannot be the gist of the tort. This would suggest that personal injury is clearly not the damaging event, in the legal sense, but is in fact merely the damage or loss which flows from the damaging event, so that if some other quite different type of injury flows from the damaging event, (such as injury to reputation — see Foggs v McKnight [1968] NZLR 330) then a claim in tort will lie even though the damaging event happens also to have resulted in personal injury. Such damages would not be related to the personal injury but would include general damages, aggravated damages, and even exemplary damages. (This would seem to accord with the decision in Darley Main Colliery Company v Mitchell (1886) II App.Cas. 127.)

The tort actions in assault and battery by their very nature perhaps illustrate the point quite clearly that the damaging event is quite separate from the damage (or injury) and that more than one injury may flow from the damaging event and that the Accident Compensation Act only abolishes a common law claim in so far as the assessment of damages flowing from damage or injury which in turn was caused by a damaging event (covered by the generic term “accident”). The cause of action giving rise to a claim in damages remains intact (so long as a particular kind of damage is not included in the claim).

In respect of other areas of tort liability (such as negligence) and in actions for breach of contract resulting in personal injury it may be more difficult to
separate the damaging event from the damage, in order to show that more than one kind of damage has occurred, or it may be that in the majority of cases (at least in negligence, but the same may not be true of actions alleging breach of an implied warranty in contract) only one kind of damage, namely personal injuries, in fact occurs. There will be cases, however, from time to time when more than one injury will flow although these will probably be rare.

It can be argued that the claim for exemplary damages (tied as it must be to the damaging event and the cause of action) does not flow from the damage or injury, but rather from the conduct of the defendant. If this is so, then, bearing in mind that the law in relation to exemplary damages may be different in New Zealand from England after *Australian Consolidated Press v Uren*, [1969] I A.C. 590 and *Uren v John Fairfax & Sons Ltd* (1967) 117 CLR 118, there could be many circumstances where it might be desirable and possible for a claim for exemplary damages to be brought.

The kind of situation which I envisage is that in which a factory owner has in his factory some sort of machine which he has a statutory duty to fence in a particular way. But the necessary fence will mean that the machine is slow to operate and can only put through ten articles an hour, whereas with a less adequate fence it can produce thirty articles in the same hour. The employer is of course aware of the provisions of the Accident Compensation Act, he is also aware that a factory inspector is likely to discover what is going on; but the employer decides that he will “give it a go” without adequate fencing for as long as possible. After his employee is injured, in spite of his successful claim for compensation from the Accident Compensation Commission, and in spite of the penalty available under the appropriate safety legislation, it might not be unreasonable, undesirable or legally impossible for the employee to bring a claim alleging breach of statutory duty not in respect of damages arising from his personal injury, but for damages arising from his employer’s conduct.

A similar argument can be used to show that when there is a breach of an implied warranty, although there may be damage in the form of personal injury (for which a claim is not precluded by the Act), damage by way of humiliation has also been suffered. Although *Addis v Gramaphone Co.* [1909] A.C. 488 suggested that a claim for exemplary damages cannot arise out of actions in contract, there is strong argument in recent cases to suggest that this strict rule may no longer be adhered to. In particular see the judgments in *Jarvis v Swan Tours Ltd* [1973] I All E.R. 71 and *Jackson v Horizon Holidays Ltd* (C.A.) _The Times_, Feb 5, 1974, where damages for injury included non-pecuniary damages being part of the expectation interest, were awarded. In fact, the law of contract recognises that damages will be for the loss of a variety of non-pecuniary benefits, but it is argued that these are quite distinct from damages flowing from personal injury.

It may be that there will be actions in which damages which smack of an exemplary or punitive character can only be regarded as parasitic so that if the damages claim for personal injuries no longer lies, then neither would an action for the exemplary damages be available. But I suggest that at least in respect of claims in tort based on causes of action which are actionable per se that an action for damages different in kind from that flowing from the personal injury claim will still be available. The same would apply to an action in contract since
damages in contract flow from the breach of the contractual duty rather than from the damage or injury, and can also be described as being actionable per se.

In addition there are causes of action which whilst they may give rise to an action for damages also give the right to ask the court to exercise its equitable jurisdiction and grant an injunction (usually if there is a strong likelihood of damage), but at that point of time damage will not have occurred at all. (This most frequently arises in respect of the tort nuisance). The damages which could occur might be damage flowing from personal injuries, but presumably s.5 of the Act will not affect the right to ask for an injunction. Once an injunction is granted the Court can, under its powers, make an award of damages in lieu of granting an injunction, under the provisions of Lord Cairn's Act (21 & 22 Vict. C.27) which is in force in New Zealand. Whether a Court will still consider it has power to follow this procedure, since the passing of the Act, and in view of s.5 (5) remains to be seen, but it seems that there could be circumstances in which either the granting of an injunction, or damages in lieu thereof, would be the equitable course for the courts to follow.

It has also been suggested to me that the appropriate dependants will still retain their right to claim under the provisions of the Deaths by Accident Compensation Act, 1952. Certainly that Act is not repeated by the Accident Compensation Act, but it is my opinion that the words in s.5 (1):

"no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment"

would preclude a claim under that Act, since the proceedings for damages are such as arise indirectly out of death.

It may be that my arguments are based on a logical fallacy of reasoning, but it is my opinion that whilst one cannot deny that the scheme of the Accident Compensation Act will benefit the community there will be some victims of accidents, particularly those (but there will be others) who are the victims of intentional torts, or breach of contract, who, unless they retain their right to claim at common law, will be inequably treated in relation to some other members of the community. It is my hope that there is a way round their problem within the existing framework of the law. One must, however, not lose sight of the fact that the introduction of this Act does require one to look, not only at the theory of "fault", but at the whole theory of damage and the assessment of damages in an entirely new way from that in which common lawyers have looked at these concepts in the past.
THE MEANING OF "ACCIDENT"

by

J.R. Kirker

After that learned erudite exposition by Mrs Vennell I am virtually speechless. Luckily however, I was not asked to prepare a paper or anything of that nature but there are just one or two things I would like to say from a medical point of view. I of course sit on the Medico-Legal committee which was set up by the previous Government that Mr Hillyer has already mentioned and we drew up a schedule of disability and various other things we were asked to do and one of the things as he said that we were asked to do was to try to define "accident". Well we turned out by defining personal injury by accident. The definition is not included in the Act at the moment but I think it should be.

It is of no real interest to the medical profession to try and bring down a definition of "accident" as such. We as medical practitioners are not concerned with the mechanics of the accident very much. It is of no interest to us really. We are concerned with the treatment and rehabilitation of the injury resulting from the accident and carrying that through to its ultimate if there is any residuum left of assessing the residuum when in a final state for it to be done. So to us personal injury by accident (which is what we came down to defining) although at the end of the definition it says that this is the same thing as "accident" is the thing that is of interest to my profession not to try to legally define accident as such which could be fraught with peril, a lot of wordiness which could be misconstrued or of course construed very well by lawyers depending on how they are thinking at the time. In my profession it is an intellectual exercise only. I am sure the intent of the Woodhouse concept was to accept accident just as a layman interprets it, "Some unexpected untoward type of event or mishap". I think the average man in the street knows in his own mind what constitutes an accident in the commonly accepted way and I think that is as far as one needs to go with the term accident as such, and to a medical man the interpretation of the Act which is the law of the country now, the personal injury by accident is the important thing to us and of course most of it particularly in Orthopaedics is very obvious. If somebody falls over and barks his shin and knocks a bit of skin off that is an accident and he's got the personal injury from it.

There are still going to be lots of grey areas however, particularly in other disciplines in medicine outside of Orthopaedics even if the definition we came down with is incorporated in the Act because medicine is not a completely precise science. These grey areas will just have to be argued out and quite a lot of decisions will have to be made by the Commission itself, no doubt acting with the help of expert medical opinion. I am sure a sort of case law will develop in respect of these grey areas. Despite the grey areas I would still like to see a definition, whether or not it is exactly what we brought down, in the Act because I think it would be a guide to the Commission in getting this thing going. It would also be a guide to the populace at large once it gets to know a bit more about the Act it will help them to understand what sort of claim situation they have and I am quite sure it would be of help to my own profession.
My profession is split almost straight down the middle in this thing as it nearly always is over most things. One attends meetings and my profession argue back and forth. Some take the attitude “why should we be mucking about over these things when we have patients to treat”. “Why should I have to nut out whether this is personal injury resulting from an accident. If the patient says he has had an accident then of course his condition, as far as I am concerned is attributable. Lets tick it off as such and Mr Sandford can decide. What we are concerned in is treating the injury.” That roughly is the attitude of half my profession and the other half I think would welcome some guidance so that irrespective of their duties as a Doctor treating people, as ordinary citizens they can do their duty to society by trying to help implement something that is now the law of this country and for these reasons I would like to see some guideline definition in the Act.

In actual fact at the present time the two professions legal and medical have been sent addendums to the medical handbook issued by the Commission saying what the Commission will accept at the moment as being compensatable and really the material in the addendum is basically the definition that we brought down but it is still at the moment not part of the law of the land and one of our quandries as an example is that until it is the law of the land we do not know whether to stop paying insurance policies for negligence or not brought against members of the profession, and that is one of the things that is worrying my profession. They think at the present that in future negligent actions resulting in personal injury will come under this scheme and that they will not need private insurance to cover themselves through the Medical Protection Society or some other body, but they of course are not sure of this because the definition is not in the Act at the present time. I am sure the definition has got loopholes in it, I am sure also any definition always will have. These loopholes will just have to be ironed out as they arise in due course and the definition no doubt will have to be added to or altered at various times by other legislation.

The only other thing I wanted to say and this is more or less a politico-philosophical thing and perhaps not strictly pertinent to today's discussion; there is concern in my profession as to whether compensation for accident is really a good thing at all, or rather compensation for personal injury by accident because of the grey areas I have mentioned, particularly the difficulties of sometimes sorting out what is the personal injury by accident and what is a result purely of a disease process or maybe a combination of both. We feel really, should there be a privileged class of accident victims? If you take the Woodhouse concept I would think to its logical conclusion although Mr Justice Woodhouse was just at the time considering accident compensation he did intimate that perhaps in due course sickness may also come into it and I think his overall concept philosophically was that he just wanted to get people who were out of the work force for some medical reason or other back into the work force without them being economically embarrassed, give them adequate quick treatment and sound rehabilitation. If that is so then really there is no reason to have a privileged group of accident victims. If you are out of action from production by sickness why should you not be encouraged or allowed to get back again in just the same way as the accident victim and helped along the
line and maybe if you’ve got a permanent residuum depleting capacity as a result of sickness you could even get compensation for that too.

There is this feeling amongst a lot of my profession that whereas for sickness under the Social Security Act after a means test has been applied you get a miserly sum a week, under the Accident Compensation Act if you are a privileged class accident victim you can get 80% of anything up to $160 a week. A lot of members of my profession feel that is unfair and they are seriously concerned about it. It is I know a politico-philosophical argument but the extension of this sort of scheme to sickness ultimately much as I hate to say it is inevitable and that of course would mean the complete socialisation of medicine, something I am sure is going to come one of these days.

QUESTIONS TO PANEL

Question:
It has been claimed that in the draft the accident compensation amendment was struck out. Page 5.

Reply:
Mr Hillyer:
Yes. It was in the Bill.

Question:
Might I ask either one or both of the members of the panel what members of the Medico-Legal Committee who suggested definitions to the Commission think the Commission would do in the most likely occupational hazard or untoward event that would face the average professional person here who might find himself working 60-80 hours a week, getting grey hairs at a very fast pace and then ending up with a stroke or heart attack. That seemed to me the sort of grey area. Do those two members think that sort of fate would be compensated under the Act.

Reply:
Mr Hillyer:
Speaking personally I do not think it would be. It is more in the nature of an illness and would come under “damage to the human system as the result of disease”.

Mr Kirker:
In actual fact I do not think although as an Orthopaedic Surgeon I am not versed in these matters that there is any medical evidence
that you get a stroke or heart attack in this way. That is largely a layman's theory of events.

**Question:**

Might I ask a broad question. Do we need a definition at all because it is only going to lead as far as I can see, in spite of the magnificent efforts of the committee, to a lot of legal “argy bargy” over what it is designed to cover and it is going to lead to a lot of curious things. We had an excellent address from Mrs Vennell. It was a magnificent address and may I compliment her on it and that means of course that it will lead to a lot of legal argument. Has anyone considered the effect of *Marsh v Absolum* round about 1939 dealing with the death of a wife? The Court of Appeal chastised me for daring to suggest that an action for damages might lie. Their Honours held to the contrary. The only one who supported me was the late Sir Archibald Blair. Someone I seem to recall waxed eloquent in the Law Journal as to whether although the decision was probably right in law was it in accord with justice and equity? There was no reply.

**Reply:**

**Mr Kirker:**

My profession are aware of that sort of argument, but the thing is that if we did not have guidelines and I am not talking about me or other Orthopaedic surgeons, we of course have been in the assessing game for a long time and orthopaedics lends itself to this sort of legal argument and after a time one almost thinks like a lawyer. The average General Practitioner is not in the same position. He is not faced with giving expert reports over the years and he is not really au fait with the legal approach. Most of them also don't want to be bothered with trying to make this type of decision. They just want to get on and treat their patient. If there are no guidelines for them in respect of this Act, I think they are going to be over-sloppy. The sort of approach “he says he fell over, I don’t know if he did or not, has he an injury by accident or not, I do not know, I will sign the form and let Mr Sandford decide”. Now I don’t like that sloppy attitude in medicine and I think the average Practitioner does need some guidelines in this respect.

**Mr Hillyer:**

Doctors in the majority of cases will not have any doubt as to whether there has been an injury by accident but there are undoubtedly a large number of questions that can be asked. The effect of a definition is to reduce the number of questions.
THIRD SESSION
THE ASSESSMENT OF COMPENSATION

by

L.M. Graham

I think it would be fair to say that the philosophy behind the Report of the Royal Commission on personal injury by accident in N.Z. has now won fairly general support throughout the country. The concepts of community responsibility for the injured and comprehensive entitlement to care, treatment, rehabilitation and compensation are not now seriously challenged.

That philosophy had, of course, already been partially applied in the limited areas of Workers’ Compensation and Motor Vehicle (Third Party) Compulsory Insurance Schemes. It also is the basis on which insurance generally rests. The Accident Compensation Act 1972 and the Accident Compensation Amendment Act (No.2) 1973, were both passed by Parliament without a division and with the support of both Parties in the House.

And so N.Z. has accomplished its quiet revolution in the field of accident compensation without a drop of blood being shed except as a result of personal injury by accident. I do not for a moment suggest that the new system is now winning unanimous support. On the contrary there are some in both the legal and medical professions who regard the scheme still as too revolutionary. And I have no doubt that there will always be those who will look back with nostalgia to the good old days when the law of Torts had a bit of body in it.

But if the scheme, which we now have, embraces the main principles of Woodhouse it departs quite radically from some of the recommendations which were made in the report of the Royal Commission. It differs in that we have three separate schemes separately funded and separately financed, it differs also in that the levies payable by employers are graded according to risk in the particular industrial activity whereas the Royal Commission proposed a flat rate of levy on employers at 1% of wages paid by them. Again, both the Earners’ Scheme and the Motor Vehicle Accident Scheme are to be entirely self supporting whereas under the Royal Commission’s proposals any short fall in finance was to be met by grant from the Consolidated Revenue Account.

It is in the area of the assessment of compensation that probably the greatest divergence between what was recommended by the Royal Commission and what is now contained in the legislation occurs. Although under both systems, periodic payments rather than lump sums are accepted as the main method of compensating the incapacitated earner, the way in which the amount of periodic payments is assessed differs markedly. Woodhouse recommended broadly three main ways of providing compensation:-

Firstly, a flat rate with a maximum of $25 per week for a period of four weeks from the date of the accident;

Secondly, for temporary incapacity lasting beyond the four weeks, assessment at 80% of loss of earnings;

Thirdly, for permanent incapacity compensation based on a broad schedule of percentages for particular kinds of permanent injury. The schedule would give greater emphasis to the more serious injuries and less emphasis to trivial injuries than the corresponding
schedule in the Workers' Compensation Act. The periodic payments for the more trivial injuries would be commuted to lump sums not exceeding $1,200.

The main compensation provisions in the Accident Compensation Act are contained in 18 sections from Section 107 to Section 124. These sections may be grouped into the following five groups:

(a) Five sections, namely Sections 107 to 111, deal with rights to conveyance, medical, hospital and related benefits.

(b) A group of seven sections from Section 112 to 118 deal with earnings related compensation. In the main they concern earners but Section 118 can also provide compensation for non-earners in certain circumstances where, although not earning at the time of the accident, they become entitled to earnings related compensation in respect of loss of potential earning capacity.

(c) Two sections, Section 119 and 120 provide compensation by way of lump sums.

(d) Section 121 provides compensation for pecuniary losses not related to earnings.

(e) Three sections, namely, Sections 122, 123 and 124 deal with the compensation payable in the event of death.

There are, of course, a number of other sections which go on to provide conditions, additions, limitations and refinements to the way in which compensation is assessed or payable under these sections. Section 107 and Sections 112 to 117 apply to earners only but the remaining sections apply to both earners and non-earners.

In the time available it is not possible to deal with all these sections and the way in which compensation is assessed under them in detail. I propose to confine myself, therefore, to three main areas:-

Firstly, Sections 112 to 118 dealing with earnings related compensation;
Secondly, Sections 119 and 120 dealing with the assessment of lump sums;
Thirdly, Sections 123 and 124 dealing with the compensation payable to dependents in the event of death.

It will be assumed that the fact of personal injury by accident having been suffered has been established and that the necessary documents including claim form, medical certificate and earnings have been properly lodged with the Commission's Agent.

To claim earnings related compensation, a person who suffers personal injury by accident must establish that at the time of the accident he was an earner, that is, that he was a self-employed person or an employee as those terms are defined in the Act. Of course the person can be, and often is, both. There are however, two exceptions to this rule. Firstly, under Section 59 cover under the Earners' Scheme may be extended beyond the date when a person ceased to be either an employee or a self-employed person or both. The second exception is the case of the person who becomes entitled to compensation for loss of potential earning capacity under Section 118. I shall deal with that later.

The way in which compensation is assessed varies according to the period of incapacity. There are four different periods which require consideration:

Firstly, the first week of incapacity (that is, the day of the accident and the six days thereafter);
Secondly, the period of short term incapacity, defined in the Act as commencing with the seventh day after the accident and ending with the 28th day of the period (that is, the 34th day after the accident) or earlier recovery;

Thirdly, temporary incapacity lasting beyond the period of short term incapacity;

Fourthly, permanent incapacity.

It is necessary to look at all these different situations separately.

**The First Week.** No compensation is payable for the first week to employers who suffer non-work accidents or to self-employed persons. The provisions for payment for the first week apply only to employees and only where the accident arises out of and in the course of employment. Sections 84 to 89 provide for certain other accidents to be deemed accidents which arise out of and in the course of employment. For example, certain accidents during meal breaks and while travelling to and from work directly by a route that is reasonable in the circumstances, are covered as work accidents.

The relevant section (112) provides that the employer in whose employment the accident occurred is liable to pay full wages, exclusive of overtime, for the time lost in the first week as a result of the accident. In certain circumstances, such as where a worker has been with his employer for less than seven days, or where secondary employment is involved, the Commission pays the first week. In this case however, payment is limited to 80% of earnings and the total amount of payment to $160 per week. There are other details regarding the payment of compensation for the first week which are set out in the pamphlet “Guide to Employers on claims for compensation”.

It has sometimes been asked why employers should be saddled with responsibility for paying compensation for the first week of their employee's incapacity resulting from work accidents. The Commission would have to pay this compensation from the Earners' Fund, a fund which is, in the main, provided by levies paid by employers on wages paid by them to their employees. If the amount of money in this fund was insufficient then the rates of levies would have to be increased so that, whether the employer pays the first week in respect of accidents arising at work, directly, or whether it is paid out of the fund which is provided by him it would still be the employer who is meeting the cost. There is the further factor that administration of the fund is greatly simplified and control over short periods of absence for minor disabilities is much more direct and practicable.

**Earnings Related Compensation for incapacity after the first week.**

The broad basis for the assessment of all compensation after the first week of incapacity is 80% of loss of earning capacity. Loss of earning capacity is ascertained by deducting from what is known as a person's relevant earnings, the amount that he earns or is capable of earning during any period of incapacity. Relevant earnings are ascertained by applying the various formulae which are set out in detail in Section 104 of the Act. It is also necessary to look at the definitions of earnings as an employee and earnings as a self-employed person set out in Section 103 of the Act. Relevant earnings are broadly average weekly
earnings, and separate formulae are provided for calculating these, firstly in the case of employees, and secondly, in the case of self-employed persons. I do not propose to go into the detail of the various calculations in this paper. For the purpose of assessing the compensation payable to employees during the period of short term incapacity, relevant earnings are the average weekly earnings during the period of 28 days prior to the date of the accident. After the period of short term incapacity relevant earnings are assessed as the average weekly earnings during the period of 12 months prior to the date of the accident. In the case of self-employed persons relevant earnings are the average weekly earnings during the last financial year before the date of the accident. In no case however, is compensation to be assessed or paid on any average weekly earnings of a higher amount than $200 per week. This means that the highest award of earnings related compensation for total incapacity that can be made is $160 per week, whether as an employee or as a self-employed person, or both.

In Section 104 there are quite comprehensive provisions enabling alternative methods to be used if the basic formula does not give a fair and reasonable assessment of the person's average weekly earnings or relevant earnings at the time of the accident. The computation of relevant earnings is, therefore, reasonably straightforward.

But to arrive at the loss of earning capacity on which to base compensation, it is necessary to deduct from the relevant earnings the amount of earnings derived during the period. Again in the case of employees this amount can fairly readily be ascertained. The employee is either on pay or not on pay and there are various provisions which have now been written into Section 113 enabling an employer to pay the difference between earnings related compensation and full wages without this difference being deducted from compensation, and also providing for reimbursement of employers if they keep employees on wages and if the Commission decides that the circumstances warrant reimbursement.

Before dealing with the assessment of earnings related compensation for permanent incapacity I want to touch briefly on the assessment of compensation for the self-employed. The broad basis of assessing compensation for loss of earning capacity in the case of self-employed persons is the same as it is for employees. It involves a comparison of pre-accident earnings with post-accident earnings. But the problems are much more complex and the Act, of necessity, contains somewhat wider discretions which the Commission may exercise in arriving at a fair and just assessment of loss of earning capacity in the case of the self-employed.

There are three provisions in the Act which call for mention and which are designed to assist the Commission in its task. These are:

Firstly, subsection (4B) of Section 113 dealing with the assessment of compensation for self-employed persons during the period of short term incapacity;

Secondly, subsection (5) of Section 113 dealing with the payment of interim compensation up to 50% of entitlement until an assessment has been made;

Thirdly, Section 134 giving authority to the Commission to make advances in anticipation of payment of compensation.
In some occupations such as the music teacher, the medical practitioner or the solo tradesman, the loss resulting from temporary physical incapacity may be fairly readily ascertainable. In other occupations however, the loss resulting from incapacity may be very difficult, if not impossible, to ascertain. In some cases there may even be no loss at all.

In these cases, unless it was quite certain there would be no loss, the Commission has decided to use the powers conferred on it by subsection (4B) of Section 113. If there would be undue delay in obtaining figures for pre-accident relevant earnings and/or post-accident earnings as a self-employed person, then compensation will be assessed for the period of short term incapacity under the following rules:-

(a) If the claimant's accounts for his previous financial year are available and show that earnings as a self-employed person were earned in that year, compensation will be paid at the rate of 80% of the average weekly amount of those earnings, up to a maximum of $60 per week. This will apply whether he was employed as a self-employed person full-time or part-time, but if, of course, he derived earnings also as an employee the rules regarding maximum compensable aggregate earnings will apply.

(b) If those accounts show a loss, or show earnings as a self-employed person of $1,000 or less, and he is able to show that he was employed full-time as a self-employed person during the financial year and at the time of the accident, compensation will be paid at the rate of $16 per week (that is, compensation based on 80% of annual earnings of $1,000 per annum which is the minimum sum on which levy is paid by self-employed persons).

(c) If the claimant was not in business as a self-employed person for a sufficiently long period to be able to produce accounts for his preceding financial year, then compensation will be assessed at such amount, up to a maximum of $60 per week, as the Commission deems appropriate having regard to:
   (i) The estimated gross takings and expenses of the business at the time of the accident;
   (ii) The extent to which the claimant was actively engaged in running the business at the time of the accident;
   (iii) The estimated extent to which the claimant is continuing to receive “earnings as a self-employed person” during his incapacity.
   (iv) The time occupied by the claimant in any other employment and the income received by him from any other employment.

(d) If within 12 months of the accident the claimant produces accounts or evidence demonstrating the true loss of his earning capacity, and showing that the assessment made under the above rules has been too low, the decision will be revised and the arrears paid.

Compensation under these rules can be paid only during the period of short term incapacity, that is, the period commencing on the seventh day and ending with the 34th day after the accident (if incapacity lasts that long). It is estimated that nearly 90% of all accident victims will have fully recovered within this period.

If the incapacity of the self-employed person continues beyond the 34th
day after the accident and if pre-accident relevant earnings and/or post-accident earnings are still not ascertainable to enable an accurate assessment of loss of earning capacity to be made, interim payments may be continued under the provisions of either subsection (5) of Section 113 or Section 134. Subsection (5) of Section 113 authorises an interim determination to be made and compensation to be paid at 50% of the loss of earning capacity thus arrived at. Section 134 authorises payments on account of compensation before a claim or the correct amount of compensation has been established.

If a person suffers permanent incapacity, then an assessment is made in accordance with the provisions of Section 114. The assessment is not made on a schedule or quasi schedule basis such as Woodhouse contemplated, instead, as with temporary incapacity, it is based on a comparison of pre-accident earnings with post-accident capacity to earn. Assessments of these amounts must be made in each individual case but they cannot be made until the medical condition of the claimant is stabilised and until all practical measures have been taken towards his retraining and rehabilitation. If he is then found to be totally incapacitated earnings related compensation assessed at 80% of his relevant earnings will be paid for the remainder of his working life. In cases of partial incapacity the measure of the percentage of loss of earning capacity will be established from medical and other evidence. In most cases the injured person will, it is hoped, have been found some employment and this will be a guide towards the degree of incapacity suffered. There is a great deal more that could be said on the subject of earnings related compensation that time does not permit me to deal with but there are three further sections to which, before leaving the subject, I would like to make reference. These are Sections 116, 117 and 118. Section 116 provides for increasing to a minimum amount, the earnings related compensation payable to a full time earner, but within prescribed limits. The present prescribed limits are $40 per week compensation plus $3 per week for a dependent spouse and $1.50 per week for each dependent child. If earnings related compensation for the full-time earner who is totally incapacitated does not reach these figures it may be increased to 90% of his relevant earnings provided the total payable does not exceed the total of the prescribed amounts. The amount is apportionable for partial incapacity.

The next section, 117, authorises increased rates of compensation to employees who are under the age of 21 years at the date of the accident or who are apprentices or are employed under a contract or service requiring them to undergo training, instruction or examination for the purpose of qualifying for that occupation. In these cases, the earnings related compensation may be re-assessed step by step as the incapacitated employee would have progressed up the scale until he reached adult status or until he qualified for the occupation for which he was training as an employee. The prescribed maximum amount of relevant earnings on which compensation may ultimately be assessed under this provision is $100 per week.

The last section to which reference should be made under this heading, is Section 118. Section 118 is quite a complex section and its main purpose is to provide earnings related compensation to certain classes of persons who, but for the accident, would have become earners and would have qualified for earnings related compensation. The maximum prescribed amount on which compensation
may be assessed in these cases is $50 per week but this may be increased by 50% to $75 per week if the Commission is satisfied that, but for the accident, the injured person would have reached a salary or wage level warranting the higher amount because of the kind of career or profession he was studying for.

Let us now look briefly at the two Sections, 119 and 120, which deal with the payment of lump sums of compensation. They apply to persons who are covered under all three compensation schemes provided for in the Act. The main concern about these two sections at present is whether the sums provided in them are adequate. Under Section 119 the maximum sum which may be paid out for permanent loss or impairment of bodily function (including the loss of any part of the body) is $5,000. Under Section 120 which deals with lump sum payments of compensation for loss of amenities or capacity for enjoying life, including loss from disfigurement, and pain and mental suffering, the maximum sum that may be paid out is $7,500, subject, however, to this sum being increased in appropriate cases provided the total amount paid under both Section 119 and 120 does not exceed $12,500.

As with the assessment of earnings related compensation for permanent incapacity, the Commission has not delegated to its agent authority to assess and make decisions on compensation for lump sum payments under these two sections. The Commission will make assessments under both sections having regard to the medical and other evidence that is available to it in much the same way as general damages were assessed under common law claims, but of course, in Section 119 cases, the amount of compensation will be determined having regard to the percentage of $5,000 fixed for the injuries listed in the Second Schedule.

The maximum amounts payable under both sections will be subject to annual review to keep them in line with current money values but whether there should be any increase in the amounts beyond this is a matter on which there are differences of opinion. It is my personal view, and I emphasise that it is a personal view, that we require more experience of the operation of the scheme before any dramatic increase in the lump sums, over and above the increase required by the escalation of money values, could be recommended to Government.

Before concluding, let me discuss briefly Sections 123 and 124 dealing with compensation for the dependants of persons who die as the result of personal injury by accident. Section 123 gives entitlement to periodic payments of earnings related compensation to the dependants of deceased earners. Section 124 gives entitlement to lump sum payments to certain dependants of anyone who dies as a result of personal injury by accident whether at the time of death or at the time of the accident they were earners or not. In both cases the test of entitlement is dependency.

The aggregate of periodic payment to dependants under Section 123 is limited to the amount of earnings related compensation which the deceased earner would have been entitled to had he suffered total incapacity. In general, payments continue until the dependant spouse dies, remarries or attains the age of 65, though some flexibility is introduced in the age at which payments finally cease. The lump sum payments under Section 124 are limited to a total of $2,500. The sum of $500 is provided for each dependent child or other
dependant regarded as a child, provided the total payment under this head does not exceed $1,500. The amount payable to a totally dependent spouse or de facto spouse is $1,000. There is provision under both sections for the Commission to apportion compensation between conflicting claimants.

It has sometimes been suggested that to limit the widow’s entitlement to half the earnings related compensation that her husband would have received had he been totally incapacitated is unfair on her. It has been suggested that this might be raised to say 60%. At the suggestion of the Select Committee of the House which sat to study submissions on the Woodhouse Report, this question was carefully studied. It was found in practice that to increase the widow’s entitlement beyond 50% would, except for the higher income bracket not provide her with relief if she were bringing up a young family. This position arises by reason of her entitlement to supplement her earnings related compensation with a widow’s benefit. To increase earnings related compensation would merely result in a reduction of the amount payable under the widow’s benefit.

And now, although I feel like Marco Polo that more than half the story has been left unsaid, I must conclude. I have no doubt that as our experience of the new system builds up, new methods of assessing compensation and new legislative authorities will suggest themselves. But although we have had thus far only seven weeks experience, we have already received a wide variety of claims, and we have no reason to doubt but that the basic principles on which the new system of compensation is founded, are sound.
PANEL DISCUSSION

Panel members: Mr L.M. Graham
Mr W.R. Caldwell
Dr M.D. Matich
Mr R.B. Guise
Mr C.L. Purdue

Question:
Mr Philson:

1. If a member of a partnership (doctors, solicitors, accountants etc.) is injured at work or elsewhere, can he claim for an income related benefit when although he has been away from work his income at the end of the year may not show any reduction because of extra work and effort put in by his partner or partners during his absence and by himself when he returns to work?

2. If such a person has a personal accident policy and he receives a weekly benefit from his insurance company, whilst off work as a result of an accident, how does such payment affect any income related benefit due to him under the Accident Compensation Act during the period of his incapacity?

In both 1 and 2 above it is assumed that no income is known until the end of the financial year although drawings may be made as required and charged against the salary declared at the end of the financial year.

Reply:
Mr Caldwell:

This is one question, which is regularly raised to me and to members of the Commission. Paraphrased it is this:

"If a working proprietor of a limited liability company, managing director, general manager, or someone such as that, has a Personal Accident policy with an Insurance Company
and has an accident and wants to claim Accident Compensation from the Commission, can he claim under his personal accident policy as well?"

**The answer to that question is:**

Depending upon whom the insured person is, the personal accident policy may have no effect. Let me clarify that point:

1. If the limited liability company takes out a policy in its name – Jas. Smith Ltd – and pays the proceeds of that policy to the employee, then those are earnings and are taxable and therefore the loss of earning capacity under our Act would be reduced and less compensation would be paid.

2. But if the same company, Jas Smith Ltd, takes out a personal accident policy with an insurance company and names the beneficiaries and names these persons as beneficiaries, meaning that the company has no right to the benefits of the policy and the insurance company pays directly to that person, then the money paid out, the benefits, are not earnings and there would be no reduction in compensation.

3. If the working proprietor himself, or any employee for that matter, takes out a personal accident policy personally, not with the blessing of his firm – his firm may never know of it – and the benefits are paid to him by the insurance company, then it has no effect on earning related compensation.

I think Mr Graham did in fact answer the first part of your question. This was a problem the Commission recognised and grappled with and bearing in mind that most accidents are over and finished with within the first four weeks (i.e. the 35 days referred to), the formula which the Commission has produced will take care of this in 90% of cases.

We recognised that in a partnership where there are 8-9 lawyers or 4-5 doctors the remaining partners may work a wee bit harder or put in extra effort to catch up with their incapacitated partner’s briefs, or see his patients. There is a presumption here that probably, and only probably, his absence would cause a loss to himself or his partnership. There is nothing tangible, and probably even at the end of the year when the partnership accounts are drawn up there could be no proof that a loss had been suffered, so for that reason the Commission formulated the administrative rules that if the claimant has accounts for the previous financial year and is able to show earnings as a self-employed person then compensation will be paid – 80% of the average weekly earnings up to a maximum of $60 per week for the first four weeks. Now that is only for the first four weeks. If the incapacity continues beyond four weeks then there is a pretty strong assumption that a loss will in fact be suffered, and at that time, to pay continuing compensation, the other provisions of the Act can be used – Sections 113(5) and 134, as Mr Graham
mentioned — to make interim determinations or to make advance payments. The amounts paid under those sections are very high by professional standards. The Commission has recognised this. You can come back at the end of the year and, if by your books of account, (it is an accountancy exercise not a legal one) you can demonstrate that you had a loss and show what your loss of earnings has been, we will readjust not only the period of short term, but also the period of continuing incapacity, because the period of continuing incapacity allows for payments on an interim basis. So the answer is:

Yes. The claim can be made although there is no direct indication that earnings can be lost.

The second part of the question—
Can the person receive benefits from his insurance company whilst he is off work?
The answer I think would be the same as the answer to the point I dealt with at the outset. Yes. If he has a policy with an insurance company, providing him with $100 per week, or any figure he can claim that and it will not alter his earnings under the related compensation in any way at all.

**Question:**

**Mr Dickie:** My question follows on from the answer you have just given. I can contemplate partnerships where they are going to decide now they will assess what the sick or incapacitated partner is prepared to deduct for his incapacity for his working brethren while he is off work. I am contemplating changing my Partnership Agreement. I am prepared to accept a reduction of salary if I am sick which is set at a reduction of $160 per week of $160, to assess contemplated loss of earnings; loss of profits would be paid directly from my insurance policy to my other partners for their doing my work while I am sick.

**Reply:**

**Mr Caldwell:**

In the first place I must speak with tongue in cheek because I have not investigated this thoroughly. This proposition was put to me by a firm of chartered accountants in New Zealand. On looking into it we discovered that we think it would be a breach of the Partnership Act if you were to alter your Partnership Deed or Partnership Agreement to provide for this.

**Mr Dickie:**

What happens to that $160 at the end of the year? Is it simply a postponement of the $160 which is paid back out of general dividend at the end of the year when the profits are tallied up?
Reply:
Mr Caldwell:
No, you pay it to your partners and you lose it entirely. What you are talking about here is not in fact salary. What you are talking about here are drawings.

Mr Dickie:
No Sir. I am talking about salary. I will never receive that $160. It is compensation I am prepared to pay my partners for carrying the can for me while I am off work.

Reply:
Mr Caldwell:
You are not getting salary. You are drawing against earnings. You are a self-employed person. What you are saying — you will be living on capital. You won't be drawing anything from the partnership.

Mr Dickie:
No. You are drawing your normal percentage of your partnership earnings less $160 and that would show at the end of the year's accounts that you have earned X% less $160 for those weeks. You would in fact have earned less, and the other partners would have earned that much more because they worked hard.

Reply:
Mr Caldwell:
I am not embarrassed when I say I cannot immediately answer your question. We have had eleven different propositions from chartered accountants all with schemes whereby an incapacitated partner will get compensation from the Accident Compensation Act. We are looking into this whole matter across the board at this very moment and I cannot answer your question specifically here today, but this will be published in the near future — what we are going to do about this sort of thing. If you would like a specific answer I will be delighted to take your name and address after the meeting and write to you specifically after this afternoon.

I am sorry I cannot give you a definitive answer to that question but this is a pretty complex one because we have suddenly within the last few weeks been besieged by accountants round the country finding ways and means to ensure, probably correctly, that their partners do not ostensibly suffer a loss. But the question will be answered.

Question:
Mr Marshall:
At a recent meeting of the Insurance Association, we had the Council president, Mr Olsen, as well as some of the Executive, there and the question of this Act came up, especially Personal Accident policies, Mr Olsen told us that the Personal Accident Policy taken by
an injured person does in no way affect his rights under the Act. In Wellington there has now been some re-thought on this and there have been some claims which had been temporarily declined because the insured worker had a personal accident policy before. Is Mr Caldwell aware of this and is his decision as given before?

Reply:
Mr Caldwell:
That is an easy one which I can answer. In the Commission we are aware there was confused thinking over this and in fact Mr Sandford was telephoned by an executive member of the N.Z. Council from Christchurch most concerned that there may be claims by employed people, workers, who had Personal Accident policies and who may have their earnings related compensation reduced. The chairman thought this had been cleared up with the whole of the insurance industry. I do not know of any specific case of a claim being delayed or suspended, but there certainly has not been one declined on these grounds. There has not been any refusal of full earnings compensation because there has been a Personal Accident policy, and what I said in response to the question before still stands.

If a worker has a Personal Accident policy, or an employee, then he can receive the full benefit of that and still get his related compensation under the Accident Compensation Act. I am sorry if there has been the confusion that there has been in the insurance industry. I don't know why the confusion arose but it was cleared up by the Chairman of the Commission more than a month ago and we thought that was the end of the matter.

Question:
In Section 113(2) the words used are:
"A person's loss of earning capacity during any period shall be determined by deducting the amount he is capable of earning directly from his personal earnings during the period involved."

Does that by implication mean that it is accepted that a person who say breaks his leg, which affects only his mobility but not his ability to carry on his employment, is in fact expected to carry on his employment to mitigate his loss?

Reply:
Mr Graham:
The remarks that I made previously were prefaced by the words "unless it was certain that no loss would occur". It is not for the Commission to start to say how a man should occupy himself if he is on the flat of his back incapacitated, and as long as it is not quite certain that no loss will occur then these rules, or these administrative arrangements, which I have mentioned are the arrangements that will be followed during the term of the short term incapacity. So if
while he is lying with his leg trussed to the ceiling the man can still give directions on the running of his business which will reduce the inconvenience or the problems that may arise in his business during his accident, good luck to him. We will not stop payments if during this period he does give directions as to how his business is carried on. I would like to emphasise this point regarding the self-employed. We have not got a great backlog or great reserve of money we can pay out willy nilly unless losses occur and the only money we have is the money that self-employed persons provide. It is their levy of 1% on their earnings which provides the pool of funds from which we pay compensation.

We do not want to get into the position of having amendments to the Act every year to plug loopholes such as we see happening in the case of the Income Tax Act, where voluminous amendments occur every year. We don’t want to get into that position but we must see as far as possible that the compensation that is paid is fair and just compensation and that it is not a scheme where some persons who do not really suffer any loss whatever are going to find a means of obtaining benefits. And if at the end of the year the accounts show a substantial improvement in the returns of a firm have occurred by reason of the fact that perhaps some method has been devised whereby more than the entitlement was attained from the compensation, the Commission can employ powers in the Act as it is, to make adjustments. It does not intend to make adjustments for short term incapacity that may result in collecting refunds. It considers this is a fair and reasonable way of meeting people during this period.

In the cases that are being discussed, after all, it is not the Commission’s money that is going to suffer. It is the money you people pay. If 1% is not sufficient to meet the claims of the self-employed persons the only alternative is that the 1% will have to be reconsidered and arrangements made for some increase in this 1% levy to be made. We do not in our present estimates of our responsibility for the compensation claims that are likely to be received under the Act contemplate any change in this 1% levy on the self-employed. Please don’t misunderstand me in this respect. But if this is going to be the means of over-compensation being paid in some cases, difficulties could arise.

**Question:**

**Mr Rogers:**

What discrimination can a medical practitioner exercise when he is looking at a patient who has reported some injury or disability which can be attributed back beyond 1st April or can also be attributed to his doing his ordinary work in the course of a work accident? Can he say, “this is a recurrence of an old injury” or can he say “I don’t know, this may be a recurrence, or it may be the result of an accident yesterday”? 
Dr Matich:
I think we would probably use the same yardstick as is used in regard to War Pensions. The words used there are: "aggravated by or attributable to".
If for example you have arthritis, what will the result be if you fall over and you end up with a very painful hip as the result of your fall? This is directly an accident under the terms of Accident Compensation.

Mr Fowler:
How would you qualify a person employed on labour only — as an employee or employer under Accident Compensation?

Mr Graham:
The definition of who is an employee under the Accident Compensation Act differs slightly from the corresponding definition under the Workers' Compensation Act. A labour-only building contractor under the Accident Compensation Act is deemed to be an employee. There is a provision that only a percentage of his earnings are treated as his wages both for the purpose of payment of levy and also for the purpose of compensation, but the labour only building contractor is the only kind of contractor who is deemed to be an employee under the Accident Compensation legislation.

Mr McFarlane:
Can we have the direct sentiments of the Commission to make it absolutely clear. If you cannot in a partnership account prove an accountancy loss, then as far as I can see there is no compensation because it seems to me you are just never going to be able to get such proof. In other words, all your real losses are always going to be concealed It seems as it stands at the moment simply no compensation. Is that correct?

Mr Graham:
This is a difficult area. No-one will deny that it is a difficult complex area. What I said earlier was — unless it is clearly demonstrable that there would be no loss whatever this administrative arrangement would be followed. Now the member of a partnership who is lying flat on his back for a month is going to lose contact with a lot of clients. It is quite clear that if he is not doing any work for a whole month in an accountancy practice that accountancy practice cannot help but suffer some inconvenience and some loss because of this, I can only speak for myself. I would suggest that where it was quite
clear that the partnership could not operate without suffering some
inconvenience and loss, which would be inevitable in my view, if one
of the partners was to lose contact with all his clients in the
operation of a partnership for a month, then the payments would be
made.
The position might be a little different if a man was running a
business where he had a very competent manager running the
business and he spent six months of the year up in Hawaii or Fiji.
That was his normal pattern of living, and there are cases of this kind
of self-employed persons who do this. It may be that he is living in
the Bay of Islands or somewhere like that but has a business
somewhere else in New Zealand where he has a manager or share
milker running that business. Where it is quite clear that he will
suffer no loss whatever if he is incapacitated for a month, and during
that month he was not going to take any part in supervising that
business operation, I think the other self-employed persons who are
providing the money for the self-employed fund would be the very
first to criticise the Commission for paying out something for a loss
that was non-existent. In the case of the practising accountant or
practising lawyer, in my view no partnership of this kind could
continue to operate without inconvenience or loss if one of the
active partners in the partnership was flat on his back for a month.

Question:

(1) Section 5 of the Act obviates an individual’s right to press for
a common law redress in the case of injury. The Act lays down
certain limits of compensation payable by the Commission.
Does the Commission propose to revise these limits periodic-
ally?

(2) The work accident portion of the scheme. We have an earners
scheme and this relates to individuals who have lived or resided
in New Zealand for twelve months. Under that scheme they
are completely covered whether the accident occurs in work or
out of work. But you have the other person who is coming to
this country, perhaps within the last 12 months, and he is
covered but in a limited form.
Is this correct?

Reply:

Mr Caldwell:

I am not quite sure what your second question was going to be but
perhaps we can short-cut it a little because what you are referring to
there was the old Section 57 of the Act which had continuing cover
and work cover. That has been repealed entirely.
Mr Graham reminds me here that there has just been produced a
reprint of the Act. These are available from the Government Printer.
They contain the No.1 and No.2 Amendment Acts.
Dealing with your first question, we are obliged under the Act to recommend to Parliament that compensation limits, etc. be increased. By way of example. Under Section 114, the permanent disability section, if an injured claimant is awarded $100 week today and he is so badly incapacitated that he will never work again, that $100 is increased perhaps yearly certain yearly, perhaps more often, because compensation under the Act keeps pace with inflation. It doesn’t lag behind it like the Workers’ Compensation payments and the Social Security payments are said to do. All benefits under the Act are subject to review and subject to recommendation to Parliament by the Commission themselves.

**Question:**

I would like to ask Mr Graham how much compensation a self-employed man would receive earning an income in excess of $6,000 and also in receipt of an investment income of $6,000. If I understand correctly one would cancel the other out and he would receive precisely nothing.

**Reply:**

Mr Graham:

I am sorry if I did not make myself clear on this point. The Accident Compensation Act is based on the definition of “earnings as a self-employed person” or “earnings as an employee” and these are set out in Section 103 of the Act. Investment income is disregarded entirely for the purpose of compensation. So if a man received $100,000 per year but only has $6,000 self-employed, he would still be entitled to earnings related compensation if he lost that $6,000 per year self-employed income.
FOURTH SESSION
INSURANCE ASPECTS

by

R.V. Bell-Booth

As the "cover" provided by the state via the Accident Compensation Act replaces the "indemnity" provided by insurance companies via Employers Liability and Motor Vehicle Third Party Insurance it is axiomatic that there must be insurance aspects related to this new legislation which affect both the insurance market and the insuring public.

To bring these insurance aspects into perspective let me first define insurance and refer to respective rights and interests of the state, commercial insurers and the public.

INSURANCE

*Insurance* is simply defined in Mozley & Whiteley’s New Zealand Law Dictionary as:--
*Protection* purchased by the payment of a *premium* against the *Risk of loss* or liability.

RISK

The risk of loss referred to in this definition is of course the *financial loss* that may result from the occurrence of certain events. i.e. financial risk measurable in money.

PROTECTION

The protection is the undertaking to make good such financial loss in full or in part, i.e. indemnity expressed in money. Financial risk may be classified in several ways,

Speculative and Pure Risk

There is for example a distinction between speculative and pure risks.

*Speculative* risks hold forth both the promise of gain and the chance of loss, which can be influenced by certain events e.g. marketing a new product presents a wide variety of risks relative to financial gain or loss.

With *pure* risks the prospect is either loss or no loss, and the events that affect pure risks can only have a down grading affect which may result in financial loss, e.g. destruction or damage of products by fire etc.

*Insurance* is only concerned with protecting potential financial loss from "accidental" or unintended causes, which can result in injury to people, damage to property or interruption to the production or the earning capacity of people and property.

The insurance market has traditionally provided protection for the whole ambit of such risks to people and property, including of course financial loss resulting from personal injury by accident, and also disease and sickness suffered by people, *part of which* protection is now provided by the Accident Compensation Act.
Fundamental & Particular Risk

The second division of risk relevant to insurance and the Accident Compensation Act is the distinction between fundamental and particular risks. Fundamental risks arise from losses that are impersonal in origin and in consequence; losses that are not caused by individuals, the impact of which falls upon an entire group.

Most fundamental risks originate from the economic, political and social interdependency of society, but they also arise from various physical occurrences which generally are beyond, or difficult to control.

Thus unemployment, inflation, war, earthquake, storm, flood are fundamental risks. Acts of governments and God if you like.

On the other hand particular risks are essentially personal in both cause and effect; losses that originate from individual people or acts, resulting in localised consequences. e.g. fire, burglary, explosion, are particular risks, those arising from unsafe conditions and/or unsafe acts of man perhaps.

The distinction between fundamental and particular risk is not definite and risks may shift from one category to the other.

The insurance market has been and still is concerned with both. It is significant that in the main fundamental risks are those that the state eventually accepts responsibility to control and/or protect for the benefit of the community as a whole, and may also decide to “underwrite”.

Particular risks may be said to be those that the state leaves to the individual to insure or not, according to his needs. We could thus classify the protection of such risks in two main categories -

STATUTORY & VOLUNTARY INSURANCE

At one time work injury accidents were believed to be the particular fault of the employee or employer, and similarly motor vehicle injury accidents the fault of drivers and pedestrians. Many people still hold this opinion.

However, today it is more widely accepted that such accidents are an inevitable consequence of our modern industrial and transportation systems and in our New Zealand society they have become fundamental risks, and the state in its wisdom has progressively extended its control over the protection and insurance of such risks, leading inevitably it seems to the Accident Compensation Act, and consequently loss of business to the Commercial Market.

THE STATE’S CONTROL OF RISK

The state of course for some considerable time has exercised a varying degree of control of fundamental risks, and the insurance thereof e.g.

(i) By safety and insurance legislation.
(ii) Again the state self-insures the majority of public property; government buildings and chattels, bridges, dams and other public assets. It could be said that the premiums are built into taxes, the claims being paid out of the income therefrom being part of the public funds.
(iii) The social security scheme is a form of insurance underwritten by the state. Originally a premium of 1/6 in the £1 was payable by taxpayers for the protection or benefits specified in the relevant
legislation. Now of course the premiums are buried in the overall tax rates.

(iv) In terms of the Earthquake and War Damage Act, the state requires private property to be insured by a state commission, but this requirement only applies to certain property on which the owner has effected fire insurance.

(v) Employers liability and motor third party insurance was compulsory by law but the insured could voluntarily select the commercial insurer he wished to underwrite the statutory liabilities referred to in the relevant legislation.

(vi) The Accident Compensation Act brings into being a different state insurance system.

The premiums for two of the schemes are in the form of levies payable by employers, self-employed persons and motor vehicle owners at varying rates according to specified classes of industrial activity and/or type and use of vehicle, BUT the premiums for the "non-earners" cover under the Supplementary Scheme are paid out of public funds i.e. taxes.

The protection which is defined as "cover is provided to every person who suffers personal injury by accident in New Zealand, and is extended for some New Zealanders whilst overseas. However, a new concept of state insurance in this Act is that by reason of the provision that the injured person no longer has a right of claim for damages, the state in effect is now providing what is commonly known as public liability cover to those who cause personal injury.

**COMMERICAL INSURERS**

With the progressive extensions of statutory control of fundamental risks, commercial insurers have of course been adversely affected and will no doubt be further affected by future legislation.

As you know the Superannuation Scheme is next on the list! What will follow? Perhaps government insurance of all housing as the state already self-insures state houses.

State insurance of all local body risks? Many local authorities are already members of mutual insurance companies; perhaps the state will absorb or replace these underwriters.

This is one side of the coin.

The Accident Compensation Act like other state insurance schemes has cost the insurance market money and they have lost substantial premium income from employers liability, Transport Act insurance and perhaps from other insurance contracts that provide protection for loss or liability resulting from personal injury by accident.

The last insurance statistics of 1972 show in round figures:-

- Employer Liability Premiums $23,000,000
- Motor Vehicle Third Party $11,000,000
- Personal Accident $10,000,000
- Other Accidents $16,000,000
Perhaps the insurance market has lost something in the way of gross income of $40,000,000 a year. Whether this trend is good or bad I leave to you to judge.

**SCOPE OF STATUTORY PROTECTION**

The other side of the coin is related to the level of protection or cover provided by the state.

(i) The state inevitably fixes a level of cover that it considers *adequate for the majority* of the people the legislation is designed to protect *i.e.* it has universal application.

The Accident Compensation Act provides maximum weekly compensation of 80% of $200 and a basic capital benefit of $5,000 irrespective of weekly earnings. This level of compensation may be inadequate protection for many individuals and should be increased.

(ii) Again as such legislation creates a greater awareness by individuals and companies of the financial value of the people or property at risk, it generates a greater awareness of whether the statutory *cover* provided for the majority is adequate or inadequate protection for the individuals concerned — you and I.

(iii) There are inevitably “gaps” in the scope of the cover that may need to be filled by or for individuals, and separately insured on the commercial market *e.g.* the Earthquake and War Damage Act insurance cover offered by the Commission has limited application.

It only pays indemnity value and excludes from insurance certain property. Property owners, particularly those in earthquake risk areas, are or should be more conscious of the need to consider replacement value cover on their property and earthquake loss of profit insurance protection which the state commission will not insure.

Therefore insurance for the difference between indemnity and replacement value and loss of profit must be purchased on the commercial market, albeit at higher rates than that charged by the commission, because the insurer cannot tax every property owner as the state does.

Thus statutory insurance often generates new business for the commercial insurance market.

As you know the inadequacy of the Social Security Scheme for medical and hospital benefits have generated the protection offered by medicare schemes.

From the National Business Review Magazine of 1st May I note that there are over 350,000 members of four schemes paying a total premium per annum of $3,500,000. This has developed from the demand by individuals — you and I — for medicare schemes because of the inadequacy of the state cover.

*So it is with the ACCIDENT COMPENSATION ACT* Indemnity previously provided by the market for loss or liability resulting from personal injury by accident has been taken over by the state, but only to the extent defined in the Act.

The insurance market will exclude this statutory indemnity from its various policies, as has been done in the past relative to the Transport Act
insurance for example, in respect of which public liability insurance policies embody an exception stating that the policy will not provide indemnity for any liability which is or should be provided by the Act insurance.

The market will continue to provide cover for risks which are not insured or not adequately protected by the Act.

There are such "gaps" left by the Accident Compensation Act, for example:

(i) The first week's loss of earnings for work and non-work accidents.

   Employers are at risk for these losses as they will pay employees normal wages (not 80% of loss of earnings) for work accident incapacity, and perhaps "sick pay" benefits for non-work accidents. Self employed persons will carry the first week's loss themselves.

   Thus the first week's loss is an insurable risk and the commercial market will provide protection at a premium.

(ii) The maximum compensation benefits may be inadequate for many individuals, whether they earn more or less than $200 per week.

   Is $160 per week adequate for every executive or self employed person? I doubt it.

   Is $5,000 Death benefit, or a percentage thereof for schedule injuries, adequate for every person? I doubt it.

   Is $5,000 the maximum for permanent total impairment or a percentage thereof per schedule?

   Additional insurance is of course available on the market.

(iii) Overseas Travel "cover" is restricted by the current wording of the Act for the earners, and non-earners have no cover. — These gaps can be insured.

(iv) "Personal Injury by accident" is not defined in the Act, and as you know the proposed definition in the draft of the second Amendment as referred to by previous speakers was struck out.

   What then is the line of demarkation between "accident", and disease, sickness and illness?

   Accident and specified diseases, sickness medical benefits etc., which are quite clearly defined in insurance terms, are still insurable on that basis.

   But whether the intended definition of personal injury by accident per the Act is synonymous with that defined in insurance policies or by insurance case law is yet to be determined it seems, which is unfortunate.

(v) Again public liability and professional negligence insurance will still be required from the insurance market to provide cover for any liability to people and property not protected by the Act. It will however be necessary to carefully examine the conditions or wordings in the various contracts to ensure that the required protection is provided either by the Act or the insurance policy.

   For example, the extent to which a doctor is protected by the Act for injury to a patient is still a grey area to me if not to you, and must be clarified.
The definition of "employee" is virtually synonymous with that of "worker" in the Workers’ Compensation Act i.e. “a person who enters into a contract of service”.

Does this mean that some bread winners are not or are inadequately protected. For example are ecclesiastics “earners” (employees or “self employed” persons) or “non-earners”, and what protection do they and their dependants enjoy? Are other people inadequately protected because of such wording in the Act?

Again should current superannuation schemes be reviewed because of the pension type benefits payable under the Accident Compensation Act for “death and permanent incapacity by accident”.

I believe that the introduction of this and any other new legislation concerned with the protection of risk, commands careful examination to determine under what circumstances and to what extent protection is afforded by such legislation and thus what other cover is desirable and available from the traditional insurance market.

SAFETY AND “ACCIDENT” PREVENTION

One further aspect which I believe may have an affect on the insurance market, is referred to in the preamble of the Act wherein is stated that the Accident Compensation Act is:-

"An act to make provision for safety and the prevention of accidents; for the rehabilitation and compensation of persons who suffer personal injury by accident in respect of which they have cover under this Act; for the compensation of certain dependants of those persons where death results from the injury; and for the abolition as far as practicable of actions for damages arising directly or indirectly out of personal injury by accident and death resulting therefrom and certain other actions”.

I like to think that safety and prevention of accidents has deliberately been given priority over rehabilitation and compensation in this and in other sections of the Act, as prevention is a prerequisite of insurance protection in controlling the risk of financial loss resulting from accidents.

I am therefore encouraged by the direction given to the Commission in Section 43 (i) of the Act that:

It shall be a matter of prime importance for the Commission to take an active and co-ordinating role in all the different areas where accidents can occur in New Zealand.

I would like to draw your attention to the wording of the sections referring to safety and prevention. You will note that the Act does not say “prevention of personal injury” nor “prevention of personal injury accidents”.

The Act refers to “provisions for general safety and the prevention of accidents”, meaning I believe “all accidents” that is accidents which may, or may not, cause personal injury, or damage to property, or interruption to earning capacity of people and/or property, any or all of which may result from a single occurrence.
Naturally the Commission will be concerned primarily with personal injury but I trust acknowledges the inter-relationship of injury and damage. Many people concerned with accident prevention will be interested to see what action the Commission takes in fulfilling its prime responsibilities in this respect, and when it will proceed.

In promoting safety the Commission of course has some teeth in imposing economic disciplines which again parallels insurance practice in rating and underwriting risks.

\[(i)\] The Act imposes an *excess* of the first week’s loss of earnings to be borne by the levy payer.

\[(ii)\] *Varying rates* are applicable for varying industrial activities according to the risks of accidents to earners.

The principle of sharing is applied in providing for funding by common classes of employers to meet their collective claims, thus encouraging collective safety. In effect employers will self-fund their own claims.

\[(iii)\] Provision is made for rebate and penalty rates to be applied to individuals according to whether their accident record is better or worse than the average for the class.

In effect the premiums collectively and individually will equate the financial losses or compensation payout and overheads, and the insureds will pay rates of levies commensurate with their risks.

If the Commission is successful in “promoting general safety and prevention of all accidents” not only will personal injury accidents be reduced but hopefully “accidents causing damage to property and loss of earnings therefore” will also be reduced. Thus in consequence of this provision in the Act the cost of insurance by the Act and on the commercial market will be controlled, and perhaps premiums reduced, and the profitability of the parties to the various contracts increased e.g. The cost of insurance of motor vehicles will be reduced because of the actions of the Commission in promoting road safety. We hope so!

**SUMMARY OF INSURANCE ASPECTS**

Thus there are several insurance factors related to the Accident Compensation Act which affect the market.

*Yes* the commercial insurance market has lost a source of income from the personal injury by accident insurance previously insured employers liability, third party motor and other policies.

*But* the Act will undoubtedly generate a demand for additional covers for personal injury and related risks.

The insurance industry has a reputation for innovation. Most if not all the past demands for the protection or sharing of risks have been met by the insurance market. Indeed new insurance contracts have been and will continue to be developed by the market in advance of future demands.
Hopefully by the actions of the Commissions the emphasis on general safety may reduce the cost of all "accident" insurance, which means every class of cover; property damage from any cause; professional negligence and other risks.

INSURANCE CONDITIONS OF CONTRACT

There is one more aspect which I believe should not be lost sight of by either the Commission or the public, and this is perhaps the major issue concerning insurers.

The cover provided by the Act is clearly insurance by definition in N.Z. and elsewhere. In accordance with Mozley & Whiteley’s definition, the Commission (as the insurer) provides protection purchased by the payment of a premium (as levies) against the risk of loss and liability arising from personal injury by accident.

In effect the Commission now provides personal accident and specified diseases insurance to every person in New Zealand.

Such persons may effect additional insurance with commercial insurers who will issue personal accident and sickness policies, in the main, but other policies also, according to the risks. It is of course desirable, in fact I believe it is imperative, that the two covers provided by the respective insurers, the state and the commercial market, are not in conflict, in effect that the terms are synonymous.

As the traditional insurance terminology in personal accident and sickness contracts and employers liability insurance have been clarified by law over a long period this “legal foundation” should not be lightly cast aside.

Thus

1. “As The Accident Compensation Act does not define personal injury by accident, why not maintain the insurance definitions that have been clarified in law, in New Zealand and elsewhere?”

If wider cover is desirable under the Act insurance, it is surely sensible to extend the cover as has been done in Sections 65 to 68 for specified occupational diseases. Thus if heart attacks are to be covered, the Act should define the type of injuries and circumstances of the accident to be covered, as applicable with hernia in the Act, (per Section 66).

By so doing other insurers and the public and their legal advisers will know exactly where they stand in regard to the protection provided by the Act and can thus fill the “gaps” with concurrent or additional insurance on the commercial market.

2. There is still some doubt as to the “cover” provided to certain classes of persons e.g. travellers overseas, ecclesiastics, farmers and other seasonal earners.

The contract specifically caters for some categories e.g. Section 62 for husband and wives employed by a spouse,

Section 61 Seamen & Airmen
Section 64 Diplomatic Missions

Section 88 caters for waterside workers being deemed to enter into “a contract of service” when registered with the Bureau.

Surely the Act can be further amended to provide cover for specific categories of persons in a similar manner. In my view the cover for New Zealand
residents overseas as provided by Section 60 is not only inequitable but poorly
drafted from an Insurance point of view, as it leaves considerable doubt as to
when earners are covered overseas.

3. Again I see no good reason why the Commission should not provide
"voluntary" cover where desirable, provided the risk is insurable and one which
should be underwritten by them in the spirit of the Act. "Voluntary" cover was
available under employers liability insurance, and the Accident Compensation
Act originally gave the Commission some powers to grant cover under Section
58 (b) on application of any organisation or person who provided or received the
benefit of services free of charge — but this section was deleted by the 2nd
Amendment.

Section 179A gives the Commission power to make ex gratia payments in
certain cases, which is standard insurance practice. But ex gratia payments are to
be avoided and should be unnecessary in insurance if the conditions of contract
are correctly drafted, tested by law, and understood by both parties. Similarly
discretionary powers provided for the Commission to determine the rights of the
"insured" are to be applauded by humane reasons, but create insurance
problems.

In effect if there are "grey areas and I gather there are from previous
discussions, the contract of insurance by the Act should be amended rather than
decisions being left to the Commission to be made on the basis of "treating each
case on its merits" as they arise.

Unless the Act is at least as clear as the insurance contracts it replaces the
insuring public and the commercial insurance market cannot be confident that
adequate protection is otherwise available, which I believe is currently of some
concern to many of us.

We the risk bearers, the insuring public have lost our rights to negotiate
our protection with selected insurers on the open market. As we still require
cover in excess of that provided by the Act we are entitled surely to clear and
concise written conditions to be embodied in the Act which is in essence an
insurance contract.

Thank you Mr Chairman.
Mr Chairman, ladies and gentlemen.

During the tea break I stayed behind and was talking to a few people. I mentioned that somewhere amongst all this debris I felt there were some human beings and they said "Who are they?". And I feel that some of this discussion has been directed to insurance people; some of it has been to lawyers; my address is more to the average man.

I think it is always advisable to define ergonomics for this kind of address to most people. It is not a disease and it is not economics pronounced badly - eek! Ergonomics is in fact the study of man's total environmental relationship with work; examining and measuring the effects of fatigue, noise, illumination, vibration, psychological stress, ageing and behavioural changes; on his safety, well being, on his performance.

Although I will deal with this in a little more depth later, it is essential at the beginning to define "ergonomics". Its A,B,C is anatomy and physiology and psychology. It utilises other disciplines such as sociology, systems analysis and design and statistics for human sciences. It works with architects, engineers and, of course, safety officers. Its objective is to adapt the man to the job, and we do this by selection and training, and the job to the man by design. The selection element of ergonomics in this country of course doesn't exist; we don't have selection. So emphasis must be placed on training.

In considering the Accident Compensation Act therefore I am concerned with prevention and rehabilitation. I am concerned with how much prevention and rehabilitation; when we are going to get adequate prevention and rehabilitation and who is going to do the prevention and rehabilitation, because for me if I walk on to a construction site and I fall and I am a paraplegic for the rest of my life, or if I walk into a factory and I use a machine and I am totally blind for the rest of my life, I don't care whether I get $12,000 and 80% and an extra gratia payment of $250,000 - I want to walk again and I want to see again and I am concerned about the person. I am concerned about - how did the accident happen? Why did it happen?

To me the Accident Compensation Act is the most significant piece of social legislation since the Social Security Act. It removed in one stroke the fear and insecurity of accidental physical incapacity whilst retaining the motivation to be gainfully employed.

But it has added nothing yet to the prevention of accidents nor the rehabilitation of its victims. I used the word "yet" because I accept that the Commission feel that the public wanted the compensation element of the Act functioning first. But in reversing the Act's priorities it has created more difficulties than it needed. It must now either prevent accidents or pay up; rehabilitate or redress; and the cost is likely to be as unpredictable as the Sydney Opera House.
In 1973 after the Act was brought down the Secretary of the Workers' Compensation Board and now its National Director of Safety — Ian Campbell — was speaking at Victoria University. He said; I quote:-

"One cannot stress too much the fact that the Act gives first priority to increasing attention to prevention whilst naming the second target as rehabilitation. For too long have our attention and efforts been focussed on compensation. It is clear that in some direction the Commission itself could take the initiative. There thus exists a great opportunity for the expansion of accident prevention activities, this being only limited by the resources which can be made available."

I quote from the Woodhouse Reports:-

"We recommend Section 310; we recommend that an annual sum of approximately $600,000 be set aside out of the Compensation fund for the promotion of rehabilitation and safety."

From the Government White Paper which followed in 1969, Section 26:-

"Intensified efforts will be made if the Commission's proposals are implemented to promote safety with a view to minimising injury. An additional sum of $400,000 set aside for the purpose".

On Rehabilitation — Mr Ian Campbell:-

"In this field I would suggest there is even greater room for improvement in the field of accident prevention."

The Act by ending the indeterminate litigation provided motivation for rehabilitation that was long overdue and was a permanent problem for many of the doctors in this field. But it must now be matched with adequate facilities. At the moment they are fragmented and inadequate. Sophisticated assessment techniques, scientific job analysis and complete occupational rehabilitation are unheard of. And when I talk about sophisticated assessment techniques I mean accurate, but completely accurate, assessing of joint range, muscle power, the things that are essential for rehabilitation. I know the Otara scene very well. I phoned them up and said "What happens when a person is permanently disabled and you have to do this type of assessment to determine what job they will be eligible for", and they said "When we get this we send it to the Disabled Resettlement League in Dominion Road". I phoned up the Disabled Resettlement League and I said "What do you do when you get a person of this kind who needs sophisticated assessment. It will have to be pretty exact. He is only good for two or three jobs maybe" and they said "We send him to Otara".

But let me first define the problem.

For more than half our lives the people in New Zealand and many western countries are more likely to be killed by accidents than any other cause and even in the world as a whole accidents as a cause of death are now outranked only by cancer and cardiovascular disease. If I were to tell you that of all the people here 50 of you would be injured between now and next year and that out of that 50 three of you will be permanently disabled and that one of you might die, I don’t think you would like it very much. You may not do a great deal about it but if I were to say that 50 of you are going to have polio or tuberculosis between now and May 15th next year and that three of you are going to be permanently disabled and one might die, you would make a hell of a stink with your Parliament for medical research, preventative treatment, ordinary treat-
ment, and everything possible. There would be a hue and cry from one end of the country to the other. We had a small attack some while ago — 2 or 3 people — and the newspapers were full of it. Of accidents one doesn’t hear very much.

But that is the statistical probability of you suffering an accident or an injury.

Accidents remain the only major source of morbidity and mortality viewed in essentially extra rational terms — luck, chance, fate, Act of God, — all are acceptable explanations.

Between now and next May in 1975 there will be over three million accidents in industry. 63,000 of these are going to suffer a compensable injury. 1,000 will be permanently disabled and at least 80 will die. At this very moment up and down the country there may be a young farmer driving a tractor wondering about his TV tonight; there may be a miner or a quarry man thinking about his retirement; there may be — I don’t know — a young mother in a supermarket wondering what to cook for supper; and in the next hour they will be seriously injured or will be dead because 22 people are injured every hour, every day, 365 days a year in industry. Whether or not the accident is a cut finger or an amputation; whether or not it is a fall and there is a bruise or a fractured skull; whether they have an electric shock and it ends up as a minor burn or they die, is a question of absolute luck. That is pure chance. And the trouble with all of us is that we believe that accidents are a collection of abstract numbers that isn’t going to happen to us. That has come through very evidently I think to-day.

It is always somebody else who has an accident. It is always somebody else’s child that is run over. Well I’ve got news for you. You and I make up these statistics. They are not a collection of abstract numbers. They are human beings, feeling, thinking people, you and me, and it can be your turn tonight as you go out of this room, or my turn on the way home. Somebody is going to make these statistics and they are you and me.

The cost is $75,000,000 a year; medical expenses and insurances and loss of productivity. Over $300,000 for every working day and this is infinitesimal compared to the money and suffering in its wake.

Over 3½ million days a year are lost in industrial accidents. This is equal to withdrawing 15,000 people from the labour force, equal to the people who work in the entire city of Wellington minus the Lower Hutt. It is 26 times more than the number of days lost by industrial disputes and I find it incredible the publicity that is devoted to industrial disputes and so little to industrial injuries. Especially when some of the disputes concern safe conditions at work. Absolutely incredible.

The fact that it is difficult to raise public opinion over works accidents is probably due to a feeling that work accidents are primarily between employers and individual workers and if further concern were necessary then the expert Government departments and the trade unions would be dealing with it. How dangerous this apathy is can be seen if you want to have a look at the 1973 report of the Labour Department’s factories inspectorate. In recent years the inspectorate has been fielding a front line strength of under 160 inspectors to cope with 21,090 factories. Some of the inspectors have been little more than trainees. They are not only responsible for safety under the Factories and
Machines Acts, and this has 12 sections alone, but 23 other Acts as well and they relate to everything; from the Industrial Relations Act to the Minimum Wage Act.

During 1973 53% of factories were visited. The factories are visited therefore once in two years. In Auckland only 38% were inspected. That means a factory gets seen once in three years. Obviously a 3-yearly interval between general inspections is much too long for many hazardous processes and in fact many of the building sites take less than three years to build.

Of the 21,000 factories, 858 employ over 100 workers, which is a large work force by New Zealand standards, 187 employ over 500 workers. Yet there are not more than 30 full-time safety officers and some 68 or so part-time safety officers employed by management throughout the country.

The preventative arm of the Accident Commission, the New Zealand National Safety Association, is at the moment fielding a strength of 17 safety officers of whom no more than six have had practical factory experience. No single officer of the factory inspectorate and the National Safety Association has a recognised qualification in occupational health, hygiene, ergonomics or safety. And I am talking now of degrees.

In 1973 there were 18,970 breaches of the Factories Act by employers disclosed by inspections. Of the total 15,000 related to safety health and welfare. Yet there were only 20 prosecutions. In the construction industry there were 565 accidents that resulted in serious injury or fatalities. Yet there were only prosecutions against 32 employers. Five of the prosecutions were taken for breaches of the Regulations resulting in fatal accidents and for which the maximum fine in the construction industry is $1,000 — for other industries $500. The average fine is about $300. The maximum penalty is of course rarely imposed and to imagine it is a deterrent to many firms, especially in construction, operating under obvious unsafe conditions because it is cheaper and quicker, is to live in cloud cuckoo land.

Every worker in Auckland as he steps into his factory every day is playing Russian Roulette for one in six Auckland workers is injured annually and the figure varies only marginally throughout the country. One in six. Despite the activities of the Occupational Health Department, of the Factories Inspectorate, of the National Safety Association, industrial accidents are not significantly decreasing. Between 1966 and 1969 accidents increased by 10%. And the severity or days lost increased by 20%. The population only increased by 4.2%.

Although there is a need for caution in drawing conclusions about statistics of this nature, whatever qualifications and reservations are made the orders of magnitude are plain enough. It is unnecessary to dwell on what the bare statistics mean in terms of human tragedy and suffering. The figures, however approximate, speak for themselves. For both humanitarian and economic reasons no society can accept with complacency that such levels of death and injury are the inevitable price for meeting the needs for goods and services.

Now, let me have a word about ergonomics. One of the worst problems with the safety business is that for a number of years, actually since its inception, it has suffered from a disease in that it puts accidents into two categories — unsafe acts and unsafe conditions. It says that unsafe acts account
for 85% of accidents; unsafe conditions account for 15%. Now this is a climate which suggests that no matter what you do the worker is always to blame and this is how it has been and I often hear — "There will always be accidents as long as there are people; as long as there are workers." Which is a lot of nonsense. There will always be accidents as long as there are employers too. And it is also the reason why among employers in 35 industries investigated in Britain, it was found that between .01% and .5% was being spent on safety. Something like $1.20 per head per year.

Let's have a look at ergonomics, since that is the main object of this exercise. And we are looking at ergonomics in a particular point of view because ergonomics I think is the very heart of safety and the very heart of accident prevention. Ergonomics looks at accidents with its own disciplines and the disciplines of ergonomics are firstly anatomy. It looks at the worker in terms of his fatigue levels. It looks at the machine design of a worker. As you know the average lathe to operate it you need to be a dwarf; you need to be 4' high and you have to have an arm spread of 12'. In England while I was there they built a train to run from London to Scotland and you must know that before you become a train driver in Britain you are at least 55 years old. It is the top of the tree. But when you are 55 years old you are running into what we call the degenerative age group — you are wearing out. They built this train, the train ran, (there were several of them); the train ran from London to Scotland; the journey took six hours. In six months they went through 28 train drivers. Nobody knew what was wrong. They finally found out, because they sent in engineers and economists eventually, and there it was. They had built the train with a console right down to the floor complete with no room for his knees. The driving seat was of course fixed but to operate the train the driver had to sit at right angles to his console and direction of travel. If any of you here had to sit with your spine twisted through a 90° angle for six hours you would also be a chronic back condition in no time at all. A designer merely forgot a driver has knees and it cost $196,000 for modifications and compensation in about six trains.

So we look at machine design — and we look at seats and the chairs. And you know at the end of each holiday period every office plays musical chairs and it's to find the most comfortable chair; it's not for what you're thinking. And of course we look at tools too. You may feel that when you are screwing a screw to the right, you may think this is perfectly obvious — a nut; why not screw to the left? Has this occurred to you? The reason you screw to the right is anatomical. The muscles that turn your hand that way are very much stronger than the muscles that turn your hand the other way. It is therefore designed so that you screw in a particular way. The Americans did not screw the same as we do and this caused a great deal of annoyance. Up until the last war indeed the Americans screwed the wrong way and we had to put a lot of pressure on them to get them to screw the same as we do. Seriously, this is a fact and these things are designed anatomically. It plays a very important part in work design because all these things lead to fatigue.

I have here a very simple example of machine tool design to eliminate fatigue, and by doing that eliminate accidents. If you made a fist. From this you will see — your wrist goes up slightly, like that, and you get a very good grip.
you do that with it and lessen the grip your hand is very much weaker. An ordinary pair of pliers for somebody working on a conveyor belt — he must adopt that position all day and, what is more, he must use his hands to open the pliers. At the end of the day he will be very tired and he is liable to have an accident.

If you re-design a pair of pliers like that so that you can hold it and it will point straight ahead and at the same time have a spring loading base so it merely relaxes, you minimise the fatigue levels — in fact you cut the fatigue levels down in this by something like 50%.

We are concerned about minimising fatigue and reducing errors and so stopping accidents.

We look at the physiology of the human being. We look at noise; you may or may not know it but in New Zealand the noise limit is a figure called 90 D.B.A. It’s a decibel scale. 90 D.B.A. is the top limit above which irreversible hearing loss occurs. Many many factories in New Zealand are working on the upper limit, the 90 D.B.A. limit, and we still don’t know the long term results of this kind of exposure. If I shouted as loud as I could in your ear from 6” I would be recording a noise level of 85 D.B.A. Now see what this means if you are working in a factory and you need to make a person aware of danger and you can only do it audibly, and this has occurred time and again. The noise level in the factory is completely above the audible range, the audible conversation, the audible shouting range, so he must rely entirely on vision for any kind of danger signal. In some of the operations I have done on the waterfront, some of the investigations where people have been killed, the story was always the same — “We shouted, but he didn’t hear”. Of course he didn’t hear. The noise level on the waterfront is at least 90 D.B.A. on a ship.

We look at illumination levels. In most factories the level, the accepted legal level, of illumination is much lower than the subjective comfort level of illumination and this will cause eye fatigue and that will cause accidents. There is a code, an I.E.S. Code, which can be readily looked at and seen, and if the will was there could be implemented, at which the minimum levels could be ascertained.

Ageing is a problem we have to look at very closely in accidents because after the age of 35 for every decade you lose 5% of vision and you lose 10% of hearing. You not only lose that but you lose co-ordination and you lose strength. All this is only equated by increased experience. If you don’t get increased experience you are that much poorer off physically. This is why when the elderly get an injury it is very very much more severe. It is very difficult to deal with ageing.

When I was in practice quite often you get patients coming in and you say “Well, what is wrong with you?” and he says “I’m stiff in the mornings” and you say “You’re stiff in the mornings? I don’t quite understand.” At this point you are thinking he ought to see a urologist, and he says “I never used to be as stiff as this in the morning” and you feel or you are wondering if you ought to congratulate him, but of course he is in trouble — he is doing a job where he cannot afford to be stiff in the mornings. But that is what happens when you get older.
We look at vibration. It is only now beginning to be appreciated what vibration will do on a pathological level. There are conditions affecting the blood vessels called "white finger" and contractions of the hand called Dupuytren's Contracture which occur as a result of vibration. And at frequencies which happen to coincide with the natural frequencies of certain organs a constant vibration creates tremendous pain and pathological change.

These are areas which badly need investigation.

We look at vigilence because it is only possible for you to maintain vigilence for a prescribed time. This was proved when radar was introduced. They had a great deal of difficulty learning how to cope with it because the radar operators would fall asleep. After half an hour anybody, no matter who he is, his vigilence decreases. The classic example of this of course was Pearl Harbour. Where they looked at the radar screen and saw a lot of things which looked like snow and turned over and went back to sleep. Half an hour later they wiped out Pearl Harbour. They should have identified it but after a prescribed period it is impossible. Now we put a stimulus into these kinds of vigilence exercises which stops this, but we could learn from this in terms of traffic accidents; when you are travelling at night, it's when lots of road accidents occur because of decreased vigilence. They are a big proportion of them. Travelling at night, and all you have as a stimulus is the oncoming lights of a car you know what happens; you begin to get drowsy, you open the windows, you turn on the radio; you turn it off, you need a constant stimulus to stay awake. It is possible that if they put at every 10 miles some artificial stimulus like a light of varying colours it would help you to stay awake.

These are areas in which ergonomics can be applied.

We look at temperature. Thermal changes. And this is so important I cannot stress it too much. You rarely find on an accident investigation report that it was a hot day; that the man's co-ordination had deteriorated and bang, he had an accident. But this is a very common occurrence.

We need to do a great deal of investigation on temperature changes. We have a cold store, a freezing works, which gives us the greatest amount of industrial problems and here most of the labour force are Polynesian and Maoris. Now the length of time in which workers can work in a freezing chamber and then have to come out is determined by standards which have been set in Britain in Walls Ice Cream factory. There is no question at all that the physiological differences between a Polynesian who has just arrived from Samoa and an Englishman working in the Walls Ice Cream factory is very much different and therefore his work and rest periods must be changed - not in any way increased, but changed, because they lose their sensitivity in their fingers and they have an accident and they cut them off.

We look at the psychology and we look at environmental stress which is terribly important; communications, because all the communications that most people see in factories are by posters; generally hidden behind the Factories Act and so out of date and so irrelevant that nobody sees it any more.

The lectures which people are often given in industry are not given to the workers. They are given to management and supervisors and they don't need them. They are not getting injured. The workers are getting injured. They are the ones who need to be instructed. But the average supervisor has his own
problems. Conveying this kind of technical information is not really his forte and even when supervisors and middle management are given lectures of this nature they are invariably told that you can do what you like in terms of instruction to the workers providing they don’t stop work.

We look at small cycle times which is becoming much more prevalent now, and boredom. As jobs become more and more automated the cycle times become less and less and less. And boredom and monotony are one of the biggest factors in producing accidents because workers will take chances under these conditions.

So these are some of the areas in which ergonomics can play a part and this is why I am so concerned with prevention and I am also concerned with rehabilitation because if you wanted rehabilitation at this moment you would have a great deal of difficulty getting it. I can tell you that, Not that it isn’t available. It is. And quite good rehabilitation of its kind. But you would have difficulty getting it because the average doctor either doesn’t know it exists or is reluctant to send you there or you may not fancy going all the way out to Otahuhu for some kind of rehabilitation. So it wouldn’t be easy to get, but if it were, all that Otahuhu can take – Otara – is 400 a year. At the moment the numbers coming through at the Disabled Resettlement League are 193 a year and we have 17,000 accidents in Auckland alone. These are compensable injuries. So if there were a sudden rush for rehabilitation you might have difficulty getting in. I have no doubt that the matter will be solved, I am sure. And I was very pleased to hear Mr Sandford’s comments that of course these things will be looked at and they will be given the priority they deserve.

Finally I would like to stress that ergonomics looks at things quantifyingly and qualifyingly; it looks at approaches to safety by scientific research and methodology. I believe that we should be initiating now a complete job analysis of most of the operations up and down the country so that from this we could arrive at suitable safety standards and also from this we would have a blueprint for rehabilitating the disabled so that you could say “Yes, he has a weakness of this muscle or that muscle; he has a limited joint range eligible for X number of jobs; he will be able to do this”. This is very very important. This is a basic blueprint, It needs to be done now because it is a year’s exercise to carry this out alone. And there is no reason why it can’t be done. It’s the work of a small team.

We need to know the contribution to accidents made by mild disorders like colds and flu, by menstruation, by alcohol, by drugs such as aspirin, by ageing, by changes in the weather. They have significance — and by smoking. We need to investigate efficiency costs and techniques of safety propaganda. There is an incredible dirth of scientific research which is particular to New Zealand; particular to New Zealand’s ethnic groups. We cannot accept any longer because of the changing pattern of our work population — factories now are being more and more populated by Polynesians and Maoris and they have problems peculiar to themselves. And we cannot accept other people’s work, other people’s standards.

But even apart from that there is a lot of research being done in other countries that isn’t applied here. I searched in vain for one piece of industrial accident prevention research which had been done and there is none. There is none, none that has been done overseas which is significant which has been
implemented here. Many things have been done. New techniques of lifting and communicating accidents in industry which have been done and proven overseas are not used here yet and 30% of our accidents involve back injuries.

These things must be done by the University or responsible agencies like the D.S.I.R.

And so, that is about it. I think this kind of approach is the only real approach we can make towards prevention of accidents and rehabilitation. I would like to stress again the importance in prevention. This Act is going to cost us a great deal of money. The only way we can stop the overheads from reaching a fantastic level and the only way in which it can be carried out in a really humane way is to prevent the accidents from happening.

Almost all we have sat here and listened to today is what happens after the accident.

I want to know what is going to happen before the accident occurs.

Thank you very much.
The Legal Research Foundation, which works in very close association with the Law School at the University of Auckland and the Auckland District Law Society, was established in 1965, following a successful seminar on law reform, arranged by the Auckland Law Students’ Association.

Originally it was founded by Law students and young legal practitioners but members now include representatives of the commercial community, local bodies, law and commerce students, as well as legal practitioners.

The purpose of the Foundation is to encourage legal research, and to this end it publishes “Recent Law”, a monthly journal which contains notes of recent legislation and decisions of New Zealand courts. Articles are also published giving “points of view”. The contributors are members of the Law School staff and some practitioners. Over the years the Foundation has published eight Occasional Papers, as follows:

No. 1 Australia – N.Z. Relations
No. 2 Reform of the Law as to Chattels Securities
No. 3 Land & Income Tax Amendment Act 1969
No. 4 The Quagmire of Chattels Security in New Zealand
No. 5 Legislation for Surveys and Subdivisions
No. 6 Legal Education in the Seventies

Proceedings from the Forum on Legal Education 1970
No. 7 Regulation Making Powers & Procedures of the Executive of N.Z.
No. 8 A Code of Procedure for Administrative Tribunals

Rt. Hon. Paul Hasluck
A report by an Auckland Research Group
J.R. Fahy
S.A. Riesenfeld
L. Esterman
G. Cain
K.J. Keith

Of these, copies of Nos. 6, 7 and 8 may be obtained from the Secretary to the Foundation.

In addition, the proceedings of various seminars have been published, and submissions have been made to select committees regarding pending legislation. The Foundation holds copies of the following booklets covering the proceedings of seminars:

1967 Business Law Symposium
1968 International Business Law Symposium (Reprint)
1970 Australasian Mining Symposium
1971 Computers and the Law
1973 Professional Liability Symposium
1973 Third Business Law Symposium

The Foundation is managed by a Council which consists of a practitioner president, the Dean of the Law Faculty, a representative of the Law Society, members of the Law School Staff, practitioners and students.

The Foundation has established a prize for the best paper written in New Zealand, involving substantial research in a legal topic. This is an annual award and the first prize was presented earlier this year. The Foundation's sources of income are confined to subscriptions from members, profits from seminars and the sale of publications.
The subscription is $2.00 p.a. for ordinary members and $1.00 p.a. for student members, payable to the Treasurer, Legal Research Foundation, School of Law, University of Auckland, Private Bag, Auckland, 1.