

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.

COMMERCIAL 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.

- (vi) 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?

- (vi) 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.

viz.

- (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 therefrom" 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.