Changes to the accident compensation system: An international perspective

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New Zealand has had a comprehensive accident compensation scheme since 1974. In 1992 substantial alterations were made to the scheme. Professor Ison, one of the world's most respected authorities on the subject, is critical of both the changes and the process by which those changes were determined. Among other things, he notes the disincentives to rehabilitation, the major drawbacks in experience rating, and the revival of adversarial processes. The article is a revision of a staff seminar that was presented at the Faculty of Law, Victoria University on 16 March 1993 while the author was a visiting professor.

I INTRODUCTION

This article relates to some of the changes in the accident compensation system of New Zealand that were legislated in 1992.[1] Some of these changes are currently in effect. Others are being implemented.

These comments do not reflect any detailed familiarity with the current operation of the system. Indeed, I have not made a detailed study of the system in New Zealand since 1978.[2] Most of the recent changes, however, are similar to changes made in workers' compensation systems in Canada and some of the United States over the last decade. One of the changes is similar to a feature of the workers' compensation system in the Australian State of Victoria. Thus a comment on these changes from the vantage point of a Canadian scholar may be of some interest, even though this perspective is necessarily limited by a lack of familiarity with the context in which the changes will operate.

II REHABILITATION AND COMPENSATION

A paramount theme is a shift in the relationship of compensation and rehabilitation. It has been traditional for compensation to be a statutory right and for rehabilitation assistance to be discretionary. That tradition was reflected in the accident compensation legislation of New Zealand. The 1992 changes shift the emphasis by purporting to make rehabilitation more of a right, and by making earnings related compensation after the first year more discretionary, or at least more judgmental.

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1 *Accident Rehabilitation and Compensation Insurance Act.*

2 For the results of that study, see T G Ison *Accident Compensation: A Commentary on the New Zealand Scheme* (1980, Croom Helm, London).

Of course vocational rehabilitation is generally good public policy, and in most cases, it is in the interests of the claimant. The problem is the risk that the new emphasis on vocational rehabilitation will be merely an illusion while the loss of compensation for permanent disability is not. Several contemporary developments enhance this concern. The first is the incompatibility of the new emphasis on vocational rehabilitation with the pace and scope of technological change. Whether we look at the primary producing industries, at manufacturing, construction, distribution, the service industries, or even at brewing, technological development is proceeding with such scope and pace that there is progressively less and less human work that needs to be done. It would be a natural consequence of this that we should expect to find more people in receipt of disability pensions, not fewer.

Secondly, we have seen a move to international "free trade", "globalisation" and increasing "competitiveness". Whatever view one may take about the overall merits of this, most people would probably recognise that at least it has a downside. Part of that downside is that the elimination of tariffs and the increase in "competitiveness", particularly competitiveness in the labour market, is bound to make it more difficult for disabled people to obtain jobs, and to retain them.

Thirdly, we have seen a heavy ideological commitment to "deregulation", and several aspects of this impede the employment of disabled people. One is the refusal or failure to regulate for ergonomic control. Another is the refusal or failure to prevent or curtail compulsory overtime. Some disabled people who can work a regular shift would have difficulty with compulsory overtime. So these, too, are factors that can make the employment of disabled people more difficult.

Thus the statutory shift to an expectation that more accident victims with permanent residual disability will obtain employment, rather than continue to receive compensation, has occurred at a time when that is less likely to happen.

The concern that "rehabilitation" will become more illusory is enhanced by the particular provisions. For example, section 19 provides that the Corporation (the Accident Rehabilitation and Compensation Insurance Corporation, commonly known as the "ACC") must not meet the costs of any rehabilitation after the first 13 weeks unless it is provided under an approved individual programme. Yet section 20 requires such a programme to be documented in writing and agreed to by the claimant before being approved by the Corporation. This process is not conducive to the provision of a genuine rehabilitation service. Such a service requires rehabilitation consultants to function as field workers, to establish a good *rapport* with the claimants, to alleviate anxiety, to assist claimants in finding employment and to overcome any other residual problems. Also, to avoid a loss of momentum in rehabilitation, the consultants must have some spending authority. This informal and constructive context for rehabilitation is undermined by the introduction of written contracts, and it is undermined further when the decisions are made by people who have no personal contact with the claimant. Indeed, it is hard to see a purpose in documenting an "individual rehabilitation programme" in a contractual form, signed by the claimant, except to create a paper record that can be used to justify a termination of benefits. Even if that is not the

purpose, the risk of claimants believing that it is can create enough anxiety to impede the rehabilitation process.

A related problem is the change that this type of structure produces in the role of rehabilitation personnel. The shift from personal liaison to a documented programme tends to be associated with rehabilitation personnel becoming office workers, rather than field workers. When that happens, rehabilitation is no longer a service that is offered and tends to become merely a euphemism for imposed controls.

The heading of section 22 is "Right to vocational rehabilitation", but that is clearly an illusion. Unless a government is willing to legislate a right to a job, and to specify upon whom the corresponding obligation lies, there is no such thing as a right to vocational rehabilitation. The section authorises payments for rehabilitation assistance, but only if the Corporation "is satisfied that the provision or payment is *necessary* to enable the person to obtain or maintain employment, and is expected to be cost-effective *for the Corporation*" (emphasis added). Despite the language of "rights", the provision of rehabilitation assistance is now very confined. Even within those confines, it is still judgmental. Moreover, regulations may prescribe the maximum amounts and other conditions. Thus there is a power to confine the provision of vocational rehabilitation assistance even further, but no power of expansion.

The language of "rights" also implies that vocational rehabilitation is achievable. When read in conjunction with the curtailment of the right to compensation, it becomes part of a conceptual framework in which compensation tends to be temporary, notwithstanding that a disability is permanent and that vocational rehabilitation may be impossible.

Another negative impact of "rights" in this context is the propensity to legislate limits to the "right", which never applied when the provision of rehabilitation assistance was officially perceived as discretionary. An example appears in section 23, where it is provided that the vocational element of an individual rehabilitation programme that is provided by the Corporation must not exceed one year, though with the possibility of an extension for a further year. A concern about such limitations is that their curtailing impact may fall upon those who have the greatest need for rehabilitation assistance.

Of course retraining beyond one year is not necessary or productive in most cases. Indeed, no retraining is required in most cases. The problem with such an arbitrary limit is that it precludes the exercise of judgment in those few cases in which a longer period of education or retraining would be constructive. Indeed, well-educated disabled people usually find jobs. Moreover, when the one-year time limit is read in the context of a "Right to vocational rehabilitation", there could be a risk of waste through programmes of less than one year becoming too automatic.

Another concern about such limitations is that they have usually been imposed without any enquiry or supporting evidence that would justify their creation. The traditional problem in the provision of rehabilitation assistance has not usually been extravagance. It has been a reluctance to spend.

The provision of social rehabilitation has survived, but again, it is subject to new limitations, and it is confined to provisions or payments that are required or permitted by regulations. According to section 26, one goal of this change is to ensure consistency. On the compensation side, consistency is a component of fairness. As a goal in relation to rehabilitation, however, consistency has the same difficulties as it would have if it were used as a goal in relation to medical treatment. The same injury can produce different social consequences, and among the claimants whose disabilities are of sufficient gravity to require rehabilitation assistance, there will be such a diversity of conditions, aspirations and needs that an effective rehabilitation programme must embrace a corresponding diversity of possible responses. A good rehabilitation service will be one that promotes initiative to meet the needs of the particular case, not one that stifles initiative in the cause of consistency, or that requires adherence to standard routines.

III COMPENSATION CLAIMS

The most difficult problem in the design of any compensation system is how to compensate for permanent partial disability. There is no ideal way of doing it, and how well a compensation system copes with this problem is a key test of its effectiveness. Unfortunately, the recent amendments on this point provide for a significant deterioration in adjudicative and administrative efficiency, as well as in the benefits.

In relation to disabilities that have lasted for longer than twelve months, section 37 provides that "... whether... a person... is incapacitated shall be determined by whether... the person is, by reason of his or her personal injury, for the time being unable to engage in... any... employment for which the person is qualified by reason of experience, education, or training, or any combination of them". This is the language used by the insurance industry in policies of disability insurance. It is the language that has traditionally been used to terminate periodic payments after an initial period. However, some policies of disability insurance refer to any employment for which the claimant is "suited" (as well as qualified); and that term has sometimes been interpreted to mean that the proposed employment should be at a level of earnings roughly comparable to what the claimant was earning before the injury. The words "suitable" or "suited" are not used in section 37, and there does not appear to be any other provision to require that earnings in the new employment should be comparable, or roughly so, to the former earnings. Thus if a person with a permanent residual disability is not able to return to the former employment, and is able to find some alternative employment only at a level of earnings of, say, 50 percent of the pre-morbid earnings, that person would not seem to qualify as "incapacitated" under section 37. The significance of this is not as clear as it might be, but when that section is read in conjunction with sections 39 and 49, it would appear that such a person is not now entitled to any permanent compensation benefits, notwithstanding the permanent residual disability and permanent loss of earnings. For those who sustain a significant permanent disability, the word "insurance" that is now in the title of the Act can be as much of an illusion as the "Right to vocational rehabilitation". This is a major problem, because it is common for disabled people to find that they can only obtain employment at low rates of pay.

Those who have not returned to some employment will be subject to assessment under section 49. This provides that "Where 12 months have elapsed since the incapacity of a person first commenced, and that person has a capacity for work of 85 percent or more... that person shall cease to be eligible to receive compensation for loss of earnings... in respect of any further incapacity arising from the same personal injury irrespective of whether... there are any employment opportunities existing in any employment for which the person is then suited". If sections 37 and 49 were read literally, almost anyone who was not bedridden would have an 85 percent capacity for some kind of unavailable work for which that person would be suited. However, section 51 provides that the assessment of the degree of incapacity resulting from the injury is to be done by using scales to be prescribed in regulations, which may take into account impairment, disability, and handicap for work. It is not yet known what the results will be of applying these scales.

It does seem, however, that if a person is adjudged to have 85 percent or more capacity for work, albeit in an employment that pays less than the pre-morbid earnings, and albeit in some employment that is unavailable to the claimant, earnings related compensation will be terminated. Conversely, if the capacity for work is assessed at less than 85 percent, full payment of earnings related compensation continues, whether the capacity for work is estimated at, say, 10 percent or 80 percent. Thus the response to the difficulties of compensating for permanent partial disability has not been to strive for an improved formula, but to back away altogether from partial compensation for permanent partial disability. After the first year, it is to be all or nothing.

The problems of this structure are legion. One is the disincentive that it creates to clinical and vocational rehabilitation. For someone who will, in any event, have a significant residual disability, the fear of a total termination of benefits can be very threatening, and a much greater disincentive to rehabilitation than the risk of a graduated reduction in benefits according to the degree of recovery.

Another concern is the disqualification from further benefits if a claimant is adjudged to have a capacity of 85 percent to perform a "phantom job" (a job that is unavailable to the claimant). The theory behind this provision is that employment opportunities reflect conditions in the labour market, and that therefore any unemployment of people in this position should be seen as a matter for the social security unemployment benefit (if applicable) rather than for accident compensation. The difficulty in this rationale is that, except in times of full employment, there are generally several applicants for any one job, at least if it pays the market rate, and it is usually legitimate for an employer to select the applicant who seems likely to be the most productive. It is normal in these situations for applicants who appear able-bodied to be preferred over those who have a disability. This is so, even though a person with a disability might well have been hired at a time of full employment when there was a shortage of applicants. If these are the realities, the failure of an accident victim to find employment can be seen as caused by the residual disability as well as being caused by the condition of the labour market. This amendment may reduce the costs of an accident as they appear in the records of the Corporation, but it will achieve that by shifting the losses onto the social security system, the victim, or elsewhere.

A third concern is the distortions that this structure will create in the provision of rehabilitation assistance, particularly bearing in mind the statutory requirement that vocational rehabilitation assistance must "be cost-effective for the Corporation".[3] Where a person is adjudged to have less than 85 percent capacity for work, the Corporation has the authority and the incentive to provide vocational rehabilitation assistance. Where a person is adjudged to have 85 percent or more capacity for work, but is unable to obtain employment without vocational rehabilitation assistance, and the 12 months limit is approaching, the Corporation has neither the incentive nor the authority to provide that assistance. This is a far cry from a "Right to vocational rehabilitation". This does not merely limit the clientele for whom rehabilitation assistance can be provided, it also limits the type of assistance. For claimants with a permanent disability, the Corporation now has an incentive to bring them to the point at which they are job-ready, but not to place them in employment. In other words, these provisions undermine the incentive to provide a placement service for those with a permanent disability that will be assessed as less than 15 percent. Disabled people do not generally fare well in finding employment if the only placement service that is available to them is the one that is available to the general population.

This is also relevant to the methods of assessing "impairment, disability, and handicap for work", which are to be prescribed by regulations. Because the lack of actual employment is irrelevant to eligibility for compensation, there is no labour market test of the validity of the conclusions reached when applying the formulae that will be developed in the regulations. In other words, there will be no labour market test inherent in the system of whether, in measuring capacity for work, the Corporation is getting it right. This will be unknown unless it is the subject of a research project.

It is also difficult to see how these provisions can be administered in relation to a disability the gravity of which is subject to cyclical or irregular fluctuations, or to episodic recurrences.

The difficulties of applying these provisions are likely to be even greater in cases of multiple disability. To take a simple example, consider a person who has sustained an amputated leg and who also has abdominal cancer. Is the question seriously going to be addressed of whether this person, absent the cancer, would have had an 85 percent capacity for some employment, regardless of whether that employment would, in any event, have been available? For anyone with ordinary human compassion, or any other sense of purpose, there is surely something repulsive about that type of inquiry. This problem was inherent to a large extent in the decisions to maintain an *accident* compensation system, rather than moving to a system of compensation for disablement; but it is aggravated by failing to provide for ongoing pensions in cases of permanent partial disability.[4]

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3 Section 22(3).

4 The *Report of the Royal Commission on Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1967) paras 303 and 494 recommended permanent partial disability pensions calculated by the degree of impairment.

Another disturbing feature is that the socio-economic group likely to be most adversely affected by these changes is the group upon which the rest of society depends the most, ie, workers in the primary producing industries, in manufacturing, in distribution, and in construction.

The provisions of section 51 could also undermine the notion of justice according to law. Scales for assessing disability, impairment and handicap for work are to be prescribed by regulation. Their content will not be challengeable upon adjudication case by case, and the mathematical calculations would seem to be relatively simple. The difficulties will lie in placing a particular claimant at a point on each of three separate scales. This is likely to be done by multi-disciplinary teamwork. As well as being expensive, this will technicalise the process to a point at which verification is difficult. That will make the role of any advocate more demanding, and it could also tend to impede the effectiveness of rights of appeal.

A final concern is the curtailment of the basic right of mobility. It is normally considered a prerequisite of a "free country" that people should be entitled to move and settle elsewhere if they so choose. Where pensions have been awarded under a compensation system, it has been normal for those pensions to be payable to claimants who have moved overseas, and the basic right to move has been preserved. Under the new provisions, however, where a claimant with a continuing disability has been assessed as having a capacity for work of 85 percent or less, earnings related compensation continues to be payable, but the Corporation must "... redetermine the incapacity of the person resulting from the personal injury at intervals of not less than 6 months" unless "it is satisfied that no purpose will be served by a further assessment".[5] Presumably, the Corporation will apply this provision with common sense, so that a substantial proportion of those currently receiving earnings related compensation would be safe in moving overseas after the first assessment. However, it appears that a substantial proportion of those who are continuing to receive earnings related compensation will be required to attend for periodic reassessments in New Zealand at their own expense, and even among those who are not so required to be reassessed, the concern that they may be so required at some future time may be a constraint on the right to move.

IV EXPERIENCE RATING

The most damaging change is the introduction of experience rating in relation to the employers' premiums. The premium to be paid by each employer is at a rate for the industrial class or group to which the employer has been assigned, but it is now subject to variation, up or down, according to the claims cost experience of that employer. There is a variation on this for small employers.

The idea of experience rating for the employers' levy was carefully considered in the Woodhouse Report and rejected.[6] The experience of other jurisdictions since that time

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5 Section 51(4).

6 Above n 4, 134-5.

shows the wisdom of that recommendation. The introduction of experience rating in other jurisdictions has commonly been explained on the ground that it will tend to promote occupational health and safety. That is unsupportable, and indeed, this was recognised by the Government in New Zealand.[7]

Unfortunately, the introduction of experience rating was not preceded by a cost-benefit analysis. It was said that the experience rating of employer premiums could "be justified on equity grounds".[8] It is correct that experience rating can contribute in some ways to equity in cost distribution among employers, but in other ways, it creates new inequities in cost distribution. There is no mention of that in the Government report, nor is there any appraisal or even any mention of the other damaging consequences of experience rating. The report simply asserts a reason for doing it, with no attempt to weigh that in the balance with the reasons for not doing it. Indeed, there is no reference to any analysis of the predictable consequences.

The report also mentions that experience rating "overcomes the problems of broad industry classifications".[9] Again, there is some truth in that. Experience rating can help to smooth the rough edges of a classification system, though it will not resolve any serious problems in classification. These problems, like many others, would not have arisen in the first place if the Government had adhered more faithfully to the recommendations in the Woodhouse Report.[10] Moreover, this possible benefit of experience rating was not compared with more efficient ways of resolving the problems, and again, the damage done by experience rating was not identified and weighed in the balance.

Over the last two decades, there has been a widespread expansion of experience rating in workers' compensation in Canada. Its overall influence on occupational health and safety is negative. It causes therapeutic harm, increasing the gravity of disabilities. Its influence on rehabilitation is probably beneficial in some circumstances, but in aggregate and on balance, is probably negative. Its influence on the efficiency of claims administration and on the quality of adjudication is negative. It is uncertain whether experience rating increases or decreases the employer's contributions to workers' compensation, but it certainly increases the other costs of occupational disability, including the other costs to employers. The reasons for these conclusions have been explained elsewhere.[11]

Because an employer's rate of contribution is varied according to recorded claims cost experience, it creates an incentive to reduce the recorded claims cost experience. The easiest and cheapest way of doing that is usually by a programme of claims control. Of course some monitoring of claims by employers is desirable, but like many other

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7 *Accident Compensation: A Fairer Scheme* (1991, Minister of Labour, Wellington) 23.

8 Above n 7.

9 Above n 7, 24.

10 Above n 4, para 314.

11 T G Ison "The Significance of Experience Rating" (1986) 24 Osgoode Hall L J 723.

things in life, only a certain amount of it is optimum. The problem with experience rating is that it creates an economic incentive to undertake a programme of claims control, but it creates no incentive to stop at the right amount.

The programmes of claims control that have been adopted in Canada include legitimate and illegitimate features. The legitimate features include opposition to claims, applications for the termination of benefits, appeals by employers, and opposition to appeals by workers. These processes convert the adjudicative structure from an enquiry system to an adversarial one. Hence they increase the administrative and adjudicative costs. These activities can reduce the compensation costs in some cases, but the therapeutic harm that they inflict can increase the compensation costs in others.

As part of the process, employers' advocates demand access to the claim file at the compensation board, including the medical evidence. Perusal of the file is commonly followed by a demand for a further medical examination of the worker, and in Ontario, this takes the form of an examination by a physician appointed by a representative of the employer. These aspects of the process account for part of the therapeutic damage, and the consequential increase in compensation costs.

Apart from taking an adversarial position in relation to a worker, much of the advocacy from employers' representatives is to have the cost of a claim transferred from the experience account of the particular employer to the general fund. These applications now produce a significant portion of the appeals. These processes are costly to the compensation boards and to employers. When an application fails, this cost has been incurred with no benefit to anyone. When an application succeeds, this may reduce the immediate cost to the particular employer, but the aggregate effect of these applications is to increase the aggregate cost that is paid by employers as a whole.

Some of the advocacy is stimulated by various consulting firms, paralegal groups, paramedical groups and detective agencies that advertise and promote their services to employers for this purpose. Together with the claims control personnel in corporations, they constitute a distinct interest group. They are active participants in legislative and quasi-legislative developments, and because of their numbers, familiarity with the subject, and constant presence, they have political power. Their activities promote the adversary system, and their interests in system development do not coincide with the interests of workers or employers. For this reason too, experience rating is likely to produce an increase in aggregate cost. From the perspective of the national economy, the creation of this interest group also adds to the proportion of the population whose occupations are not productive.

In New Zealand, the recorded claims cost experience that is to be used for experience rating includes rehabilitation expenditures as well as compensation costs. Hence rehabilitation expenditures too can become the subject of adversarial proceedings, with consequential risks of delay in the commencement of rehabilitation.

The illegitimate practices that have been adopted in Canada include:

1. Discouraging workers from reporting claims. The discouragements have included threats of dismissal.
2, Failing to report claims to the compensation board, and refusing to file a report even when requested to do so.
3. Adopting a gimmick type of "safety programme" that creates peer group pressures on workers not to make claims.
4. Delaying the decisions on claims by postponing the completion of forms, or omitting relevant information, so that some claimants will go on welfare (social security) rather than pursuing their compensation claims.
5. Pressing claimants to return to work too soon.
6. Requiring claimants to report for work as a form of harassment or degradation when there is no available work that they are fit to do.
7. Creating "light work" programmes that do not involve genuine work, or which only involve work that is unsuitable for the condition of the claimant.
8. Communicating directly with the attending physician, sometimes seeking confidential medical information, sometimes pressing for a claimant to be certified as "fit for light work", but in any event, interfering with the confidentiality of the physician/patient relationship.

No survey work has been done to assess the extent of these practices, but there is clear evidence that they occur, and that to some extent they are systematic. Also the first attempt at any survey work on this confirms that these practices tend to be associated with experience rating.[12]

Experience rating also tends to increase the incidence of injustice. It provides an economic incentive for an employer to supply information relating to a claim, but only neutral or negative information. This is not a significant point in most cases. The positive information is supplied by the claimant. It can be very significant, however, in some cases, such as claims for occupational disease, where the exposure history may be exclusively within the knowledge of the employer. Moreover, when disabilities result from occupational diseases, there are commonly multiple claimants, or other victims who will claim if the etiology of the disabilities becomes known. The potential cost to the employer can then be many times the compensation cost of a single claim, and the disincentive to supply positive information can be very strong. Under a social insurance system, without experience rating, an employer usually has a duty to supply relevant information and can do so without fear of adverse consequences in the employer's rate of contribution; though in some situations, there will still be other adverse economic consequences.

After an experience rating plan has been introduced, it is normal for a compensation board to proclaim it to be a success; but such proclamations have not been based on any mode of measuring the significance of what has been done. It is also normal to report

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12 C Walker *A Labour Perspective* (Conference on Experience Rating: Incentive or Disincentives, Corpus, Toronto, 1986).

that employers are enthusiastic about the experience rating programme, but those reports come from internal and external employers' representatives who normally communicate with the compensation boards. They are the people whose own career opportunities have been created or enhanced by experience rating.

A further difficulty in New Zealand is that experience rating applies only to claims for "work accidents". A new earners' premium has been established to cover the cost of non-work (except motor vehicle) accidents. The distinction between these and work accidents is made by classifying each claim as one or the other. Thus the dependency of the system on the distinction between work and non-work accidents has been increased at the same time as an incentive has been created to distort the application of that distinction. Employers now have an incentive to have as many claims as possible classified as non-work accidents. For a worker to challenge that classification could involve an undesired conflict with the employer, and if an employer is willing to pay for the first week in any event, the worker may have no interest in which way the claim is classified. It should be no surprise if the earners' premium rises in the next few years in relation to the employers' premium. Because of the difficulties in many cases of drawing the line, and because a large proportion of claims result from soft tissue injuries, it would not be difficult for many claims to be misclassified as a result of wishful thinking, even without dishonest intent. If the Corporation does not undertake a sophisticated monitoring programme, this is bound to create a distortion in cost distribution, and if it does undertake such a programme, that will add further to the aggregate cost of the system.

The extent to which experience rating increases employers' premiums will be obscured by the reduction of those premiums that results from the abolition of the lump sums, and by the transfer of costs to the new earners' premiums. The extent to which experience rating adds to the non-premium costs of employers and others will never be known.

Once experience rating has been established for about three years, it becomes extremely hard to abolish. A large proportion, and probably a majority, of the people who are then politically active on the compensation scene are beneficiaries of the waste that is generated by experience rating.

Under a Bill introduced on 20 April 1993, it is proposed that the experience rating of employers' premiums be permissive, rather than mandatory, and that the premium adjustments be "by reference to the accident experience of or attributed to" the employer.[13] Since the Corporation will have no record of the "accident experience" of any employer, the amendment would not make any sense unless it is read as referring to claims experience. Unless there are some surprises in future regulations, the proposed amendments would not make a significant difference to the points mentioned above.

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13 Cl 29 Accident Rehabilitation and Compensation Insurance Amendment (No 3) Bill 1993.

V ADVERSARIAL PROCEEDINGS

Apart from experience rating, there are other new features that promote a revival or further entrenchment of the adversary system. One is that a claimant must now apply for each benefit, rather than benefits being provided at the initiative of the Corporation or the claimant. Also, the second level of appeal is now the District Court (rather than the former "Appeal Authority").

The adoption of adversarial processes also encourages the thought that a burden of proof lies on the claimant. When the evidence is incomplete, that view justifies a denial of the claim to see if the claimant complains, rather than the conduct of an inquiry to complete the evidence. Adversarial processes are not usually the most constructive way of responding to the needs of someone whose self-confidence has been shaken by disablement. They cause therapeutic damage, with consequential increases in compensation costs as well as in administrative and adjudicative costs.[14]

There may also be a risk that a renewed emphasis on adversarial processes may tend, in practice, to be a form of sex discrimination.[15] If it is correct that women, on average, feel less comfortable with the adversary system than men, on average, it would follow that a greater use of adversarial proceedings will tend to put women at a greater disadvantage.

VI SYSTEM PERIMETERS

The system was created in the first place to compensate for "personal injury by accident", and a decision was made not to attempt a definition of that term. The main problem is that the phrase does not relate to any discrete and clearly identifiable category of disabilities. Of course many are obviously covered, and many others are obviously not, but the proportion of disabilities that involve a question of injury or disease etiology is relatively high. Probably about 30-40 percent of the total claims involve that question to some extent, either when a claim is first decided, or at a subsequent stage in the determination of ongoing eligibility for benefits.[16]

The initial decision to confine the system to personal injuries by accident was defensible for reasons of political and administrative feasibility in getting the system started, and I would not doubt that it was the right decision to make at the time. It was pointed out in the Woodhouse Report, however, that the coverage of injuries would "leave the way entirely open for sickness to follow whenever the relevant decision is

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14 For further discussion, see T G Ison "The Therapeutic Significance of Compensation Structures" (1986) 64 Can BR 605.

15 For a discussion of sex discrimination in the system generally, see L Delany "Accident Rehabilitation and Compensation Bill: A Feminist Assessment" (1992) 22 VUWLR 79.

16 This rough estimate is based on a review of about 200 claims made in 1978. See also above n 2.

taken".[17] The ongoing failure to make that extension was bound to lead to ongoing problems. In the 1992 amendments, a gallant attempt was made to resolve some of those problems by polishing the drafting and introducing new definitions; but the basic problem cannot be resolved in that way, and the new definitions may well have introduced more confusion. For example, the new definition of "accident" requires "a force or resistance external to the human body". Yet a substantial proportion of claims are for "bad backs". I understand that there is no intention of denying such claims under the 1992 amendments. Yet it is predictable that the new wording will be a ground for objecting to bad back claims, and it would be an expensive exercise in sophistry to decide which of them resulted from an external force or resistance.[18]

As another example, "medical mishap" (which is a species of "medical misadventure") is defined to mean "an adverse consequence of treatment by a registered health professional, properly given, if... the likelihood of the adverse consequence of the treatment occurring is rare...",[19] and "rare" is now defined to mean that the adverse consequence would not occur in more than 1 percent of cases where that treatment is given. That responds to the question "how rare?", but it still leaves substantial problems in adjudication. In most cases, there will be no databank from which any percentage probability can be determined. The adjudication of such claims is still likely to be an expensive process, and the conclusions are still likely to reflect a substantial component of guesswork.

Another problem relates to occupational stress. Given the pace of technological change, "globalisation" and other government policies to increase "competitiveness" in the labour market, it is reasonable to expect an increase in the incidence of occupational stress. It now appears from section 7(4), however, that occupational stress will not be compensatable, even if it results in physical injury. In other jurisdictions, such claims are compensatable under workers' compensation legislation, and in Japan, a substantial number of claims have been paid for *karoshi* (death from overwork). In New Zealand, it now appears that any such claims will take the form of tort actions against the employer, and they will probably not be covered by insurance.

An expensive body of caselaw had been produced under the previous legislation. By creating a semi-new start, the new definitions add to the complexity and uncertainty of the system perimeters, and they are bound to increase litigation costs, including the cost of deciding how much of the earlier jurisprudence is relevant under the new provisions.

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17 Above n 4, para 17.

18 For further discussion of some of the problems created by the new perimeter definitions, see I Campbell "Accident Compensation and Prevention: A Step Back in Time" (1993) 17 NZJ of Ind Rel 347.

19 Section 5.

VII HEALTH AND SAFETY

The changes seem unlikely to make very much difference with regard to health and safety. Nothing in them is calculated to produce an improvement. For reasons that I have explained elsewhere,[20] the application of experience rating to employers' premiums is likely to be a detrimental influence. Moreover, when this is combined with other changes that tend to entrench adversarial proceedings, a predictable consequence is an increase in stress among claimants. In Canada, several claims have been paid for stress-related disorders that have resulted from the processes of dealing with a compensation board, and there have been at least two claims for suicide resulting from those processes. I have not heard of such claims for stress-related disorders so far in New Zealand, but it would not come as a surprise if they arise in the future.

VIII THE INDEMNITY PRINCIPLE

Another change of recent years, though not of the 1992 amendments, is the abandonment of the indemnity principle. This never applied to earnings related compensation, but the cost of medical care and many other services used to be paid by the Corporation on an indemnity basis. Now the Corporation is required to "contribute to the cost of"[21] medical treatment, physical rehabilitation assistance, and other services.

This shift was a response to escalating medical and paramedical costs, which were seen to result largely from over-servicing. There are problems, however, with the chosen response. First, there is no prohibition on extra-billing, so that service providers can charge what the market will bear. The Corporation is, in effect, subsidising the buyer side of the market, so that except where there is strong competition on the supply side, the market can now bear higher levels of cost than it otherwise would. Faced with rising medical and other costs, the response has been to control the contribution of the Corporation, rather than to control the aggregate cost, even though this decision may increase the aggregate cost.

Secondly, the remedy is indiscriminate. Among claimants who must live on a tight budget, it could cause under-servicing. The reduction of over-servicing among those who can afford the additional fees may be only marginal, and continued over-servicing may create a continuing burden on earnings related compensation, perhaps greater than the burden that it created on fees for service. Any health care system or compensation system, if it is to operate efficiently, must include monitoring and controls on over-servicing.[22]

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20 See above n 11.

21 Section 27.

22 Possibilities that might be considered include reviewing the reports of service providers, particularly to check whether there is a credible explanation for repeat visits, statistical checks, spot checks, brochures informing clients of the risks of over-servicing, prosecutions for fraud, and for extreme cases, maintaining lists of acceptable (or unacceptable) practitioners.

IX EXEMPT EMPLOYERS

Under sections 105-107, large employers may apply to the Minister to become "exempt employers". Upon being granted that status, an employer is responsible for the administration, payment, and adjudication of claims for work injuries. The employer decides the validity of the claim, the types and amounts of benefits, and whether the injury was a "work injury". This last question determines whether the claim is payable by the employer, or whether the claim will go to the Corporation and the cost be borne (except in motor vehicle cases) by the fund that is financed from the earners' premiums.

Exempt employers will, presumably, use the same software programme as the Corporation, so that they will be likely to use the right criteria of adjudication. Even so, the accuracy of the answers depends upon the initial conclusions of fact, and these cannot be made in any automated way. This structure could reduce delay in the processing of claims, and thereby promote income continuity, but it is open to many of the same objections as experience rating. Also to students of natural justice, trained in the doctrine that one should not be a judge in one's own cause, this structure seems odd.

Of course a worker who is dissatisfied with a decision can appeal, but section 90 provides that at the first level of appeal (called a "review") the hearing is to be conducted and the matter decided by a person appointed by the employer. Again, it is not consistent with ordinary notions of natural justice that an appellate tribunal should be appointed by one of the parties to the dispute. An employee of an exempt employer could then appeal to the District Court, but this structure means that, on disputed claims, such an employee must jump two hurdles and face considerable delay before finally obtaining an impartial adjudication.

X PRINCIPLES OF EFFICIENCY

It may be interesting to compare the system, as amended, with the basic principles of efficiency in a social insurance system of compensation for disablement.

1 **Keep it simple.** On balance, the amendments have made the system more complicated.

2 **Maintain the momentum in rehabilitation.** The amendments tend to entrench delays. This is crucial because delay does not merely postpone the commencement of rehabilitation. In some cases, it inflicts permanent damage to rehabilitation prospects.

3 **Meet the insurance needs of able-bodied people.** As amended, the system is less effective in this respect than it was before.

4 **Avoid adversarial proceedings.** By the introduction of experience rating of employers' premiums and in other ways, the amendments promote adversarial proceedings.

5 **Protect the social security budget, and protect disabled people from the indignity of applying for means-tested benefits.** The amendments are calculated to increase demands on the social security system.

6 **Ensure personal contact between claimants and decision-makers, as well as personal contact by decision-makers with employers and treatment providers.** It is unclear whether the amendments will produce any change in this respect. The decision to establish regional registries for claims may tend to postpone local contact, though only briefly.

7 **Avoid wasteful drain-off to parasitic occupations.** The amendments generate wasteful drain-off to such occupations.

8 **Avoid constant change.** This is very costly, and it includes a high risk of consequential harm. The processes through which the amendments were made, as well as the amendments themselves, increase the risk of further and constant change.

9 **Protect other public policies.** It is a reasonable expectation of a social insurance system that decisions will be made in a way that is sensitive to other public policies, and that contributes to the overall efficiency of government. The amendments deny that role for the Corporation. For example, under section 22(3), the Corporation must deny any provision or payment for vocational rehabilitation unless it is expected to be "cost-effective for the Corporation", regardless of how much cost such a decision may impose on other public or private accounts.

This abandonment of social insurance principles suggests that the system is no longer intended to be perceived as one of social insurance, and that the Corporation is to function more like an insurance company with a statutory monopoly. It has not been explained why.

XI CONSEQUENCES FOR INTEREST GROUPS

Those who lose by the changes include the workers, employers, disabled people, taxpayers, and indeed, most of the population. The gains in New Zealand are likely to be for those officials in lower management who conduct claims control programmes, and some others, including some lawyers, some physicians, paralegal advocacy groups (mainly acting for employers but some acting for claimants), paramedical agencies that monitor claims, detective agencies and photographers.

Outside New Zealand, a substantial benefit may well accrue to the international insurance industry. For 16 years, the Corporation was an example of how a government could provide better coverage at lower cost than any policies offered by insurance companies. That is no longer so.

XII THE EXPLANATION

I cannot explain, from any knowledge of New Zealand, how the amendments came about. The distribution of political power, the connections and the personalities are unfamiliar to me. It is, however, interesting that similar deteriorations have taken place in workers' compensation systems in Canada over the last 15 years, and perhaps some of the explanations for those changes may be relevant in New Zealand.

When workers' compensation began in Ontario in 1914, it resulted from a Royal Commission conducted by a knowledgeable person with long experience in the subject area, a man of inspiration and with a dedication to the public interest. The *modus operandi* of the Commission included visits to the logging camps and to the mine sites to talk to the workers there. The accident compensation system in New Zealand originated in a similar way. In Canada, our systems of workers' compensation were subsequently improved by further royal commissions; but we have not had a royal commission report now since 1967, the same year as the report in New Zealand.

The royal commissions had great advantages. They were conducted or led by people of long experience in at least some aspects of the subject area, people whose career experience included a recognition of the need to eschew rumour, to conduct an inquiry, to seek the best available evidence, and to weigh the evidence carefully before coming to conclusions. They usually had two or three years for the task, unencumbered by the distractions of other work. They were relatively isolated from political pressures, and the advocacy of interest groups was exposed to public view. Their appointments reflected a recognition by government that the design of a good social insurance system requires a design architect. In Canada, the royal commission reports were always implemented, usually without change. The system was then allowed to settle down, and its administrators were protected from demands for change, usually for at least a decade.

During the last 15 years in Canada, we have seen the use of external consultants, management consulting firms, actuarial firms, task forces, working parties, legislative committees and other groups. These resources can sometimes be useful for defined functions as long as someone else is providing the overview and coordination that is necessary to maintain stability, consistency and efficiency in system design. Unfortunately, that has commonly not been the case. Sometimes these groups have provided an input of professional sophistication, but with no one exercising a coordinating control to prevent an excess of professional sophistication. One result is a tendency to unnecessary complexity. Moreover, the work has often been done by people with no background in the subject and who work under the distraction of other concurrent demands. Sometimes the *modus operandi* has been to thrash out a compromise among interest groups, and the environment of these processes has often been one that is hostile to any enquiry into the facts. Many of these processes can fairly be described as a reflection of government by fumble and tumble.

The use of such mechanisms, rather than a royal commission, has tended to produce the result that changes to parts of a system are made without contemplation of the significance of those changes on other parts, and changes are made without any adequate background of research. "Short sighted answers are bound to follow from short sighted methods of examination".[23] The buzz-words of management consulting pervade the literature and become another diversion from serious decision-making. "Thrusts" were

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23 The Rt Hon Sir Owen Woodhouse *Aspects of the Accident Compensation Scheme* (Lecture to the Medico-Legal Society of Wellington, 1979) 4.

followed by "strategies". "Mission Statements" and "Strategic Plans" are now being followed by "outreach" and "quality assurance".

Another aggravation has been the employment of "policy analysts" at compensation boards and in government departments, and the expansion of experience rating has made things worse. It has spawned a large number of "representatives", and collectively, they constitute a new interest group that demands consultation and that demands change. These demands are reinforced by asserting the status of "stakeholder". These developments impede real communication with employers, and to a lesser extent, with workers. Because change in system design has become an ongoing process, it has been pushed down the pyramid at the compensation boards as well as elsewhere, with the result that there are now far too many fingers in the pie, and far too many of those who recommend or decide on system changes do not have the vantage point from which to recognise the significance of what they do. Because of the burgeoning numbers of people involved in the discussion of system development, the processes of consultation on proposals for system change have become more extensive, but at the same time, less realistic. These developments create an atmosphere in which everything is up for grabs all the time; and that is not conducive to sound judgment, constructive development, or efficient administration.

Added to this is a lack of continuity, idealism, or ethical principle, and a lack of knowledge of history. One result has been the making of changes as if they were the output of modern inspiration when, in truth, they reintroduce features of the system that were abandoned decades ago when their damaging consequences were recognised.

Such processes generate changes that are damaging to the interests of disabled people, and that is predictable. Disabled people have no bargaining power. They have no political clout. Similarly, the able-bodied population will never be an organised political force in relation to its need for disability insurance. No system of compensation for disablement can be designed with integrity and efficiency, or maintain those features, unless the design process is established with a measure of independence from ordinary politics, and with protection from interest group pressures.

Whether some of these explanations apply in New Zealand, or whether it was for other reasons, the Government report introducing the changes did not indicate any rational basis for them. For example, it was stated that "there is a significant level of abuse",[24] but no particulars were given of the alleged abuse and there was no footnote reference to any evidence. There was nothing to indicate the nature and extent of the alleged abuse. Indeed, it was not even stated whether the abuse was by claimants, employers, service providers or system administrators. Moreover, there was nothing in the report to show any rational basis upon which a government could have concluded that the changes being made were the optimum solution to any perceived problem, or indeed any solution at all.

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24 Above n 7, Introductory Note.

Another feature of the Canadian scene, and perhaps also of New Zealand, has been some shift in policy-making authority from lawyers to accountants, and to others who work with numbers. Related to this, top managements in several jurisdictions have become more isolated from the realities of the systems that they administer. For example, in New Zealand in the 1970s, the Head Office of the Corporation was a place where many of the claims were decided, and top management was rubbing shoulders on a regular basis with the claims officers. Moreover, the Commissioners and departmental directors functioned as hearing officers on reviews. They read claims files, and they met claimants when they conducted hearings. This was bound to generate an understanding of the way in which the system worked, and if any changes were proposed, it would help to facilitate an understanding of the significance of the options. That was lost with the change to a corporate structure.

Another change in New Zealand seems to be a loss of national self-confidence. When the Royal Commission was appointed in 1966, it went overseas. It saw the absurdities, the injustices and the waste that were occurring in other jurisdictions. It returned with a sense of the national purpose that included a willingness to reject foreign examples and to devise an original system in the interests of the general population. It recommended the adoption of features from overseas systems only selectively and after a well-considered judgment. In more recent years, the features of overseas systems that produce the absurdities, the injustices and the waste appear to have been treated as examples to be followed.

XIII CONCLUSION

For 16 years, New Zealand enjoyed an accident compensation system that was, compared with other systems in other nations, effective, cheap, efficient, and with a high level of benefits. Even with the broader coverage, the levies and other costs to employers were incredibly low compared with the costs to employers of workers' compensation and tort liability in other jurisdictions.

If there is any hope now of restoring the system to a rational basis, one possibility might be to implement more faithfully the recommendations of the Woodhouse Report. Alternatively, it could be valuable to appoint a new royal commission, select the commissioner very carefully, allow it the time for a thorough job, direct all submissions to the commission and not elsewhere, implement its report without allowing a further round of interest group pressures, and then protect the system from ongoing pressures for change. If a system of compensation for disablement is subject to constant change by discussions in the backrooms, the political judgments are unlikely to be preceded by fact-finding processes and rational analysis, the system is bound to deteriorate, and the interests of disabled people, as well as the public interest, are bound to suffer. A royal commission is no guarantee that integrity and efficiency will be restored to the system, particularly if its recommendations are subjected to the buffeting of political pressures and then ignored. But it might be the only hope.