THE FUNCTION OF ACC: SOCIAL WELFARE, NOT INSURANCE

It is a compliment for somebody looking at dotage to be asked to say something about the future needs of our New Zealand Society. The Accident Compensation Report was published as long ago as December 1967. If I had been asked then whether anybody would be prepared to listen to me droning on about it 40 years later, George Bernard Shaw would have given me the ready answer. You will remember what he had Eliza Doolittle saying in Pygmalion and My Fair Lady: "*Not bloody likely*".

So I must keep my feet on the ground. At the same time, you deserve a word of explanation. I am not here on some crusade. It is simply that what preceded the accident compensation system is already outside the direct experience of a whole generation. Also I am told that today only a few people like Sir Geoffrey Palmer and myself continue to have the Royal Commission Report beside their bible for regular bedtime reading. We both think that is a great pity.

In this situation, the recovery of a few distant memories may help to point the wise way ahead. For this reason I would like for a moment to look back.

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Before the Royal Commission of 1967 could make acceptable proposals about personal injury, it was necessary to assess its extent, and why. A few of the opening words of the Report are in point.

"One hundred thousand workers are injured in industrial accidents every year. By good fortune most escape with minor incapacities, but many are left with grievous personal

problems. ... This is not all. The same work force must also face grave risks of the road and elsewhere during the rest of every 24 hours."

So much for extent! But what of responsibility? It is easy enough to join the lawyer's view of causation in order to see that usually there are individual causes for individual accidents. But that is only an immediate answer. In the final analysis it is the whole community which has built up and encouraged the modern risk-laden activities which exact such a cost in life and limb. It is a predictable and constant cost and it is tolerated simply because the balance of utility and convenience seems to make it worth-while. To adopt some early words of the Report: *"[The injury problem] is one of the disastrous incidents of social progress. It involves statistically inevitable victims. The community itself is responsible, and those who become the random victims are entitled to receive a co-ordinated response from the nation as a whole".*

Against that conclusion, the associated issue in 1967 was to discover what was being done for the injured. And if changes were needed, how might they be achieved.

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At the time those who suffered injury could hope for assistance only by managing to qualify within one or other of three guarded and entirely different systems.

The negligence action involved battles through the Courts and had become a virtual lottery. After delays which could extend for years, it provided inconsistent answers for barely one victim in every hundred.

For periods which were limited the Workers' Compensation Act gave injured workers meagre compensation, but only if injured at work. The same workers, with the same needs, were

ignored by the Act if injured anywhere else. It is not without interest for any plodding historian that locked away in the attics of more venerable insurance lawyers, there are more than 90 heavy volumes of law reports which collect together and describe their attenuated arguments in support of "anywhere else".

As a kind of backstop, Social Security was the final source of assistance for those who were injured. Subject to a means test it could provide a subsistence benefit.

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A strange aspect of all this tidy discrimination was that in the end a single source of funds supported all three systems. Social security benefits were provided, of course, by the community from taxation. What of the other two systems?

Insurance cover for employers and motorists had been made compulsory. It was done to make certain that their responsibility for work or highway injuries could actually be met. So, in an immediate sense, damages and workers' compensation payments were both supplied by the necessary insurance premiums. I say 'in an immediate sense' because eventually, the cost of those premiums, like taxation for social security, was also supplied by the public. It happened when the item was added into the cost of the product or of transport. It became a kind of disguised sales tax. In the result there were three independent systems, each providing cautiously limited numbers of injured persons with deliberately different levels of aid, and all from funds supplied by society as a whole. But what of the many others who suffered injury. They, too, were members of our New Zealand society. They had been meeting the same responsibilities as everybody else. No matter. They were left to fend for themselves.

It was due to diagnosis by causes and disregard for the similar effects. In the words of the 1967 Report: "*When it is recognised that in each case it is the*

community which pays, the discrimination assumes an air of unreality." To put the matter in another way, a major social welfare problem had been left to the uncertain responses of legal remedies which then had to be supported by the world of private insurers.

For such reasons the Royal Commission made an essential decision. There must be a new and unified approach to the problem of injury, one which would operate upon a few basic, unambiguous, and acceptable criteria. Thus, five essential principles were defined in the Report. They received bi-partisan political support and have been accepted generally ever since. This audience is likely to know of them but for a moment I would like to recapture their gist, by repeating in paraphrased form some of the words of the Report itself:

First, there is the central issue of community responsibility. In the national interest, and as a matter of national obligation, the community must protect everybody, including all women whose work is in the home, from the burden of their individual losses when their ability to contribute to the general welfare has been interrupted by injury.

Second, regardless of cause, all injured persons should be assisted by the community financed scheme and on the same uniform basis.

I interpolate to remark that those two principles both embrace and emphasise the social welfare nature and purpose of the comprehensive assistance that was required.

Third, the scheme must be organised to urge forward the physical and vocational rehabilitation of all these citizens.

Fourth, there must be real compensation for the whole period of incapacity, and for permanent bodily impairment.

Fifth, there must be administrative efficiency. The collection of funds and their distribution as benefits must be handled speedily, consistently, economically, and without contention."

It was important to provide those five critical principles with short labels which would give them added vitality and life. They were summarised in the Report as –

Community responsibility
Comprehensive entitlement
Complete rehabilitation
Real compensation
Administrative efficiency.

As I say, for about 40 years those principles have had acceptance in this country, both in Parliament, and by the professionals and the public generally. I have put a little flesh on the headings, however, because I have wondered at times whether their acceptance has been remembered sufficiently in practice.

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I have explained elsewhere the tight method applied to construction of the Royal Commission Report. It was done to encourage at least the intermittent attention of

the busy reader. It managed to survey within 158 pages the arguments about the old systems, discuss reasons for a new system, define its principles, offer a detailed blue-print for legislation, and provide the economic analysis to support it. But it meant that it was not possible to provide every reason for every proposal. And taken together they were not only unique: they were extremely complex. They offered integrated provisions for matters which now are reflected in a statute which contains 401 sections and 8 schedules and flows across no fewer than 394 pages.

It is worth mentioning some the categories dealt with by the Report, all of which contain numerous individual items. They include the broad objects to be pursued; the priorities between them; the classes of persons to be protected; travelers overseas; visitors to this country; the contingencies to be covered; the kind of compensation to be paid; the level of benefits; the method of assessment; the administrative arrangements needed to supply and control the scheme; the processes of review; its social welfare significance; and its economic implications.

I describe these matters because when decisions were made for legislation to give effect to them, those of us responsible for the Report were careful to keep their distance, as is the convention. On this occasion it may have been a mistake because the only pattern against which legislators and officials were able to compare any suggested amendment was the scheme which formed part of the Report itself.

Some items could, of course be modified or removed. But certain integral parts could not be changed, without departing in some fashion from the five accepted principles upon which the new system was to be based, with the added risk of confusion about its nature as part of our social welfare arrangements. There is the

homely metaphor of taking the pivotal brick from its worried wall! An example or two will suffice.

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First, there is the decision about the method to be applied by ACC when assessing employer levies. It is accurately labeled classification of risk. Acceptance of community responsibility for the injured removed, of course, the earlier need for industry and motorists to meet the cost of work-place injuries by way of insurance. So it was decided that the overall amounts which had been flowing from them into the compulsory insurance schemes should be made available for ACC.

However, for those who translated that decision into practical form, there appeared, in the case of the employers, to be an insurance-based complication. In their case, the cost of workers' compensation cover had been related by the insurance industry to the causes and likely occurrence of accidents. So to assess the premiums to be paid by individual employers they all had been classified in terms of the degree of risk supposed to be inherent in their respective industries.

It was a complicated process. At the time it involved as many as 137 separate, often inaccurate levels of classification. It involved its own additional administrative charges. It had an insurance relevance which disappeared in a community based move to promote the welfare of *all* injured persons, whatever the cause, and so the degree of risk. It equally failed to recognize the interdependence of all industry. How distinguish, for example, the production of fertilizer, and the activity of pilots dropping it from the air, or of those who spread it on arrival.

It had been discarded in the United kingdom as long ago as 1948. Since it had no relevance for the new system the Royal Commission had recommended that it be abandoned in favour of an averaging *tax* equal to 1% of wages to be paid as a levy by all employers. There would be those who gained, others already below 1% would lose a little. But without debate the proposal was put aside, apparently on the advice of officials at the time.

So insurance-type assessments, based on causal risk, have remained to determine the various individual payments which supply a social welfare system concerned only with effect and regardless of cause.

And the result? There are now, not 137 categories but 535 of them. The present levy charges range from 18 cents for each $100 dollars of wages for those in the retail trade to $3.59 for such an industry as meat processing. Remarkably, the figure for top-dressing by air is the relatively modest figure of $2.32. It seems the risk which is noticed is not how serious is likely to be the injury, but how frequent the accident. The figures exclude GST and a temporary supplement to make up for years before introduction of insurance-type funding. Both items for present purposes are irrelevant.

It is worth adding, had the proposal for an average levy been adopted, the charge faced today by employers would have fallen to the grateful figure of 65 cents. As well, such a process of sharing would have removed many of the past reasons for discontent. Of even more importance, however, it has left for many people the idea that the present system is simply insurance of the commercial kind, given over to the State as a monopoly. That, most certainly, it is not.

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It happens that associated with the insurance classification of risk by whole industries, there have been intermittent attempts to include a further level of premium assessment. It is described as experience rating, with discounted premiums based on the accident record of individual employers.

It has the superficial attraction that it may affect care at the work-place. For this reason it is understandable that there are those who believe the offer of reduced premiums is important. However, there have been numerous examinations of the issue, including three carried out at intervals in the United Kingdom. None, anywhere, have found evidence which supports the claims of proponents. Professor Ison of Canada has made a special study of the subject. His published surveys go further. He has said that the process is, indeed, counter-productive. Some employers fail to report the frequent accidents which have lesser effects. Some disguise the work-place cause.

The 1967 Inquiry concluded that interrupted production was a far more significant cost for the employer than the relatively modest saving that might arise from a discounted insurance premium.

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A different, and I think unfortunate departure from the 1967 proposals concerns a more recent decision which requires the annual income needs of ACC to be assessed on the basis of formal funding against future payments. It, too, is related to the essential commercial practice of private enterprise insurers. Regrettably, it too has added to the misconception for some people that ACC is simply a new means of obtaining cover against commercial risks.

Unlike the State the commercial insurers must demonstrate that there will always be monies available to meet any future charges that may result from accidents which happen today. Thus their premiums must include a sufficient supplement to cover all possible future demands. It is not sufficient to collect in the year, what has to be paid out in that year.

The annual actuarial calculation to make provision for the numbers and severity of accidents for the year itself is not simple. When added to it is the need to peer into a distant future, with moving inflation hard at work, the answer becomes ever more uncertain. Uncertain except in one important area: it is *always* more expensive than the straight-forward approach of collecting today what is needed today.

The issues were mentioned in the Royal Commission Report, perhaps too elliptically. There it is explained that as the new system was to be a State scheme, part of the of social welfare structure of the State, it would have the final backing of the State. In other words it should operate on a basis of 'Pay As You Go', to use the convenient shorthand.

I would merely add: nobody would suggest that insurance-type funds must be built up by the State, with all the added cost involved, to secure for future years the education of children entering school today; or those who become social welfare beneficiaries; or are hospitalised with long term illness. All receive services, met and paid for, as the need arises. The very same considerations apply to ACC.

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I have mentioned the tendency to equate the responsibilities of ACC with the legitimate business of the private sector. But in no insurance sense can the New Zealand accident compensation system be regarded as a process which offers for a price, a level of cover against the risk of future losses. To equate the social insurance character of ACC with the business of commercial insurers has created much confusion. Quite properly it has been discussed as part of New Zealand's arrangements for *social insurance* for all its citizens. But as the Law Commision pointed out ten years ago, that convenient piece of short-hand cannot be cut in half with the adjective 'social' omitted in order to avoid the critical distinction that word makes.

So I should make a brief comment about possible interest of some insurers in the work of ACC. If I understand a recent report by Merrill Lynch it seems by that undertaking to be regarded as a well-nourished commercial target.

Often I have tried to emphasise that I am in no sense a general critic of the significance for our society of the insurance industry. It is a central private enterprise component of any modern economy. It offers essential security to all kinds of undertakings. In doing so it frees for good purposes, individual capital sums which otherwise would be held against maturity of some risk. At the same time its own investments give valuable impetus to the gross national product. For those reasons I have publicly described it as "the lubricant of private enterprise". The insurers seemed rather pleased with me at the time!

But that said, how can any of its members reconcile the minutiae of personal injury contracts, with their central role in the free market activity which is their province.

I made a comment about all this in Auckland a few months ago. I was describing 1967 discussions I had in London with leaders of the world-wide insurance companies. In essence they accepted there was little if any profit derived from workers' compensation insurance. And it became clear it was their second tier officials who clung to such business.

At this level of management the reasons were cash flow, and the hope it would lead to other and profitable areas of insurance. It was done despite the duplicated administrative machinery needed to handle the many small details, the considerable marketing and legal costs involved, and the dangerous premium cutting which took place.

I added on the Auckland occasion, and repeat, I find it remarkable that all this is put aside: that there still seems some instinctive belief among sections of the business community, and even some commercially educated and able members of Parliament, that private insurance could profitably employ its resources in this area of social welfare.

I have no wish to enter any debate that may arise, should the industry wish to be accepted into the accident compensation fold. The issues are numerous. Some are very difficult. This morning I will simple make shorthand reference to only three of them.

First, the annual levy income of ACC exceeds $3 billion. What part of that sum would find a destination with insurers overseas? Or remain for investment by New Zealand?

Second, would insurers manage or wish to grapple with the long term money and rehabilitative needs of those most in need of help? And if so, what regulatory oversight would be needed and how provided?

And third, in 1988 the Law Commission demonstrated an economically acceptable path by which sickness incapacities could and should be brought within the system. Would that path continue to be open if the present social welfare arrangements for injury became a field of commerce?

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I will end my breathless journey, this morning, by repeating some final thoughts I had when speaking on a similar occasion recently:

I said that first, I would like to add a brief word about the kind of laws we deserve and need to support one another, as we live together in a modern society. For lawyers there is the constant need to weigh so-called human rights against all those individual responsibilities which jurisprudence defines as legal duties. In other words, it is necessary to spell out the proper balance between self-interest, and what Lord Radcliffe once called 'neighbourly benevolence'.

Then, in terms of ecomic theory. I suggest that John Stuart Mill never felt that the purposes of a successful or a moral society would fall apart without obsessive concentration upon the profit motive, or regular increases in the Gross National Product. My distinguished economist friend, Professor Hazledine, has defined the practical issue. "Decency, trust, behaving well", he has written, " are not just leisure-time activities, to be indulged in after the real work has been done: they are essential to work itself, to a prosperous and stable economic system."

I would add, it is the kind of message which enables a truly caring society to operate. In the end it all becomes a matter of fellow-feeling, and (may I say it) generosity of spirit. I am glad that forty years ago we tried to anticipate that message as basic to the recommendations contained in the Royal Commission Report on "Compensation For Personal Injury In New Zealand".

O.W.

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