

Le régime universel néo-zélandais

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Colloque sur l'avenir de l'indemnisation du préjudice corporel, à la lumière du droit comparé

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Le régime universel néo-zélandais *

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My first contact with the New Zealand system occurred about twenty-one years ago. I was in Vancouver when I received a letter from someone of whom I had not heard by the name of Woodhouse. The letter told me that he was conducting a Royal Commission in New Zealand to consider primarily the reform of workers' compensation. He wanted to talk to me about it, and I met him a few months later in New York. At that time, I had just received the page-proofs of my first book on this subject *The Forensic Lottery*. I showed the page-proofs to him including my plan for the reform of personal injury compensation. He had begun at that time to formulate his working-notes for the plan that he was developing in New Zealand, and we were both amazed to find that the two plans were very similar. The only major feature on which we differed was on the coverage of disease.

Woodhouse produced his report in 1967 recommending the new plan for New Zealand. It stalled in the political process for a few years but was enacted in 1972. The Bill covered all accidents to earners, that is, people who are employed or self-employed, and all victims of motor vehicle accidents. However, the plan was amended, even before it was implemented, to cover all victims of all accidents. The system began operation in 1974.

This morning I will try to describe the main features of the plan. What usually happens with an academic audience is that somebody asks a question about the exotic, for example, what happens if a Russian warship runs into a Chinese fishing vessel off the coast of Somalia and some of the crew wash up on the shores of New Zealand? I would see that type of question as a recreational diversion. My research has been focused on how the system affects ordinary people most of the time.

The main feature of the Plan is that it is comprehensive for all accidents. Thus with regard to any personal injury by accident, the plan replaces tort liability, workers' compensation, compensation for the victims of crime, and military pensions; all of the previous systems dealing with compensation for trauma. Ordinary accident insurance is not prohibited, but of course it's unnecessary for most people, given the coverage that's provided by this plan. Because it replaced workers' compensation, the plan is also supposed to cover occupational diseases,

* Edited transcript of *ex tempore* presentation.

but of course as a practical matter it does not cover occupational disease any more than we do under workers' compensation in Canada.

The revenue of the system is derived by a levy upon employers and the self-employed (similar to workers' compensation assessments in Canada), a levy upon the owners of motor vehicles, (similar to motor vehicle insurance), and a supplementary contribution by general revenue to cover the costs of accidents to people who are not earners and not the victims of motor vehicle accidents. Thus the supplementary levy covers, for example, accidents to children, to housewives, and to retired people.

The benefits provided by the Plan are, first, medical care. A substantial portion of medical care is provided for under the general health budget, and so it is separate from this Plan. For example, care in public hospitals is provided for by the health budget, but not elective surgery in private hospitals. Doctors' fees are only paid partly out of the health budget and so are certain other types of medical costs. Thus the Plan covers all costs of medical care that are not provided for out of the health budget. Medical care is a big item in the cost of the Plan, and the fastest growing item.

The second benefit is the earnings related compensation. The general principle is that this benefit is calculated to cover 80 % of the lost earnings. There is a maximum, but it's higher than under Canadian schemes and should be now about one thousand dollars a week. So there are a very few people whose benefit is limited by the maximum. For most claims, the rate of benefit is 80 % of lost earnings.

Then there are lump sums, mainly for permanent disability cases but sometimes also for serious disabilities that are not permanent. The lump sums are for physical impairment, pain and suffering, loss of amenities, etc.; in other words for what we would call at common law the non-tangible damages.

Another benefit is rehabilitation expenses. These include, for example, the provision of equipment, wheelchairs, etc., adjustments to motor vehicles, the provision of ramps, the costs of services of therapists, etc.

There are also general provisions for indemnity for other losses resulting from the accident.

In fatal cases funeral expenses are compensated and there are ongoing payments to dependants.

The levies are relatively modest compared with anything that we know in Canada. The rate paid by employers varies from .50 cents to \$ 5 per 100 dollars of payroll, depending on the hazard classification of the industry. The average at the moment is about .79 cents per 100 dollars of payroll. That is unduly low because of transitory circumstances, and it will be going up next year probably to about \$ 1.30 per 100 dollars of payroll. The rate for motor vehicles is about \$ 30 dollars per year per

motor vehicle. This is relatively low compared with Canada, but of course property damage has to be provided for by separate insurance.

The administrative structure is relatively simple. The Accident Compensation Corporation administers the funds, provides all the benefits and acts as the first level of adjudication on claims. It was initially a very centralized operation, but it was gradually decentralized and now it operates through regional offices and almost everything is done in the regions. The revenue collection system is also very simple. The Revenue Department of the Government collects the levies from employers along with their other tax returns, and the Post Office collects the payments by the owners of motor vehicles along with the annual renewals of their motor vehicle licences.

The claims decisions are made initially by the Accident Compensation Corporation, but there may be an appeal to an outside Appeal Authority, and then the possibility of appeals to the Courts. In practice, there are very few appeals to the Courts.

Apart from administering the compensation system, the ACC is responsible for « co-ordinating role in rehabilitation », and it also has a role in health and safety. I will not talk much about those roles because they are not particularly significant to us. There's not much that we can learn from what they have done in health and safety, but I will say some more about the compensation system, because that is the aspect of the Plan that is of the greatest interest to us.

After the Plan came into effect, I was naturally interested to see exactly how it was working out. So I went down in 1978 and spent about three months in the head-office of the ACC in Wellington, and then several weeks visiting regional offices, hospitals, State Insurance Offices, the homes of claimants, hearing offices, and various industrial plants, etc., to see how the system was working, not merely at the Corporation but also at other places inter-acting with it. I was also able to make a brief return visit for a few days last year.

Let me first say a few words about the achievements and then I will talk about some of the problems. The main achievement of course was the substantial expansion and rationalization of the coverage. Under the previous systems, there had been great scope for dispute about whether or to what extent a particular injury was compensable. Under the new Plan there is hardly ever scope for dispute about whether an injury is compensable. This has an enormous beneficial impact on rehabilitation. It means that injured people do not have (as they do in Canada) anxieties about whether they will receive any kind of payment,

1. For a more detailed account of the system resulting from that research, see *Accident Compensation: A Commentary on the New Zealand Scheme*, 1980, Croom Helm, London.

and if so how much and when. In the vast majority of cases, the claim is processed very quickly, and very simply. The forms come in, the cheques go out, and that's all there is to it. There are very few cases that involve any dispute. When I say few, I mean few in relation to the total. There are still significant numbers.

Another advantage of having one system is that life is easier for the medical profession. They report to one system. They do not have the complication, as we do in Ontario, of having one style of report for motor vehicle insurance, another for workers' compensation, another for the victims of crimes, and so on.

Another advantage of the system is income continuity. There are arrangements which permit employers to pay the compensation and claim reimbursement from the ACC, the same as sometimes happens in workers' compensation in Canada. Those provisions enable income continuity to be maintained; but even where employers don't pay the benefits and they're paid directly by the ACC, the time-lag is still relatively short, because there is not much to inquire into in the vast majority of cases.

If one asks people in New Zealand for comments on the system, there are many criticisms. If one goes to any country one finds criticisms of the system that we have, and the feeling that it must be better somewhere else. But neither in 1978 nor last year did I find anyone wanting to go back to the old systems. All of the proposals for change were for change within the context of the current system.

Having said that, I'll talk about some of the problem areas. The greatest is still the coverage of disease. In New Zealand, they do a little better than we do with regard to disablement from disease. They have a Social Security benefit, but the rate is lower than for accident compensation and it's a means-tested benefit. The accident compensation benefit is not means-tested. It's payable to anyone who sustains a loss of earnings by reason of an accident, but regardless of any other income, and regardless of wealth. The Social Security sickness benefit is only paid to people who do not have sufficient other income or sufficient capital. So there are still great difficulties with this distinction between accident and disease.

One of course is the moral dilemma. How can you really justify paying the victims of accidents and not the victims of disease. When we think about the causes of disability in moral terms, (as we often do in tort liability for example) we often talk about blame. Yet if we look at these groups in aggregate and meditate on the causes of their disabilities, and think about blame, the victims of disease on the whole and in aggregate are probably more innocent of any contribution to the cause of their disabilities than the victims of accidents. That's one ground on which it is

very difficult to justify the preferential treatment for accidents. There is a sense of injustice about it particularly when the disabilities are the same.

I remember visiting a hospice for spinal disability patients. They were all paraplegics, hemiplegics or quadraplegics. Some were the victims of an accident and others were the victims of disease. Here of course is where the contrast becomes most pronounced. Some were receiving the higher levels of benefits and others were not, though they had substantially the same disabilities and in moral terms, there was no real difference with regard to the causes.

The distinction between injury and disease has a variety of adverse consequences apart from the sense of injustice. It causes delay in some cases because of difficulties in making the distinction. For example, there are the sprains, the strains and always the bad backs. Even heart attack cases can be far from simple. Consider the example of a motor vehicle going off the road and crashing down a precipice or into a tree. The pathologist's report indicates : « Cause of death — heart failure ». Then of course the question arises for accident compensation purposes, « Did he have a heart attack because he was going off the road, or did he go off the road because he was having a heart attack? » Of course the answer usually is, nobody knows; and yet eligibility for compensation depends upon knowing the answer. So to this extent they still have the same sort of problems as we have in Canada.

I remember another occasion in Wellington when I went out with one of the rehabilitation counsellors, and we went to visit a lady who was about ninety-two. She lived on one of those terraces in Wellington where you have to walk. You park the car at the bottom and you walk up a steep hill to the house. She was suffering from a combination of natural aging and arthritis, rather severe arthritis. She was receiving home help from the Accident Compensation Commission because she had suffered an accident. She had fallen over and fractured her femur. Now she was recovering from the fractured femur, and the purpose of the visit was to determine whether her home help should now be terminated because she had recovered from the accident. It was, surely a moral outrage that this was the relevant question. The conclusion was that she was still suffering from her fractured femur. That case surely illustrates the dilemma.

Another case involved a motor vehicle accident. The victim went to hospital with various traumatic injuries. While he was in hospital, they ran a battery of diagnostic tests, including X-rays, and they discovered that he was suffering from severe cancer that had not previously been diagnosed. It transpired some months later that the cancer was progressing, and that it would be terminal. Meanwhile, he was recovering from the traumatic injuries. So the question arose : « When do we say to this person that we are now terminating your compensation

benefits because there is nothing wrong with you except terminal cancer? » Again this case illustrates the dilemma.

The practical problems of administering the disease/trauma distinction are very substantial, although there are few cases in which they become manifest. There are probably something like 40 % of the cases in which there has been, will be, or could be a problem of distinguishing injury from disease. One reason why the problem is not generally manifest is because it tends to be hidden behind the medical certificates. The treating doctor is asked to certify whether the patient sustained a personal injury by accident, yes or no. The answers on the medical certificates of this type tend to conceal rather than reveal many of the problems of distinguishing injury from disease.

One of the problems with a system of ongoing payments under which there is an etiological criterion for eligibility is that it becomes necessary to determine the cause of disability on an ongoing basis. What often happens, of course, is that someone suffers a traumatic disability and is assessed a rate of benefit, and then after about ten, fifteen, or twenty years, the claimant says that he is now worse. Problems can arise at that time of determining, for example, whether the arthritis that the claimant now has results from the injury, or whether it's something that would have happened anyway : alternatively, whether the deterioration of the condition results from subsequent events, subsequent trauma, subsequent disease, or natural aging. These problems will arise under the New Zealand system (just as they do under workers' compensation in Canada). They haven't been affected by them so much yet because of the relatively short time that the Plan has been in operation. The obvious solution is to abolish the distinction between injury and disease and reallocate priorities by reference to the gravity of disability rather than the cause.

One other problem that tends to affect all systems (it's generally reported in relation to government-operated systems but it also affects insurance company systems) is the bureaucratic propensity to adopt line management structures of administration, and the difficulty of reconciling that with what we would call procedural fairness. In the legal system we are accustomed to decisions being made by a judge who receives the evidence, receives the argument, thinks about it himself and comes to a conclusion. In administrative structures in government, it's unusual to do things that way. It's more normal to have a variety of people each contributing something to the final outcome. For example, it is normal in bureaucratic processes to have one person completing the forms, another person receiving certain items of information, another person speaking to the claimant, and after the involvement of several other people, someone else makes a decision. Now it's not quite as bad as that in the accident compensation system in New Zealand, but there is an

obvious risk of it becoming that way, and there are many bureaucratic pressures to make it that way.

There has been a problem of too many people being involved in a claim and of too much remoteness of decision-makers from claimants. One reason for this is the bureaucratic propensity to delegate authority to decide certain questions rather than to decide certain cases. Thus if a case involves a series of different questions, of different degrees of gravity, a series of different people may be answering those questions. Then of course there is a risk of inconsistent or ill-informed decisions. The obvious solution is to have one person, as far as possible, responsible for all of the decisions on a case, making the delegations by type of case and not by type of decision. One advantage of tort liability incidentally (and it's hard to think of any advantages in tort liability compared with almost any alternative) is that in the cases that go to trial, the decision-maker sees the claimant. It's very important to preserve that feature in any other system.

With regard to the impact of the system on New Zealand society, I found that almost everybody had adjusted to it. For example the legal profession, the medical profession, the hospitals, the para-medical services, the public service, and the Treasury had all adjusted to it. The only institutions in New Zealand society which seemed incapable of adjusting to the new system were the faculties of law. They were still giving courses on the law of tort as if nothing had changed. They were including two or three weeks of instruction on the new accident compensation system, and it was better in Wellington where they had eight weeks. But in all of the faculties, accident compensation was being taught in the torts course, as if it were some aberrant deviation from the law of torts, rather than being recognized as part of a substantive subject of social insurance.

There is a serious problem of abuse of the system which is now emerging. There is no evidence of any serious problem of abuse by claimants. Allegations of such abuse are common, but generally unsupported by evidence. There are few, if any, abuses by the legal profession under the new system, or abuses by the insurance industry; but abuses by the medical profession are now becoming a very serious problem. Some years ago, a section of the medical profession established private hospitals, and over a period of years, gradually contracted the availability of surgical services at the public hospitals. Not much more than emergency surgery is now done at the public hospitals. Elective surgery is done for the most part at the private hospitals at substantially higher costs, and this is becoming a very significant drain on the system. There are also complaints of over-servicing by some categories of para-medicals. The position here seems to be much the same as in Canada.

With regard to rehabilitation, the system hasn't achieved the changes that might have been hoped for. Probably the biggest gain in terms of rehabilitation is the financial security that the system brings. There is an enormous contrast between talking to disabled people there and to disabled people in Canada. Also in talking to treatment personnel at clinical facilities in New Zealand, compared with talking to treatment personnel at clinical facilities in Canada, the contrast is striking. There is a great sense of security among the people who are receiving the payments, who know that they will continue to receive the payments and to have no financial problem. This sense of security is a tremendous aid in rehabilitation.

But as far as the actual system of rehabilitation is concerned, the ACC has not developed anything in any way that is significantly better than here. They still have the major problem that we have of not having a clear leadership role in rehabilitation. What happens there is roughly the same as what happens here when somebody suffers a serious disability and goes to the hospital. During the period of the acute care, everybody knows who is in charge of the case, usually some type of surgeon. Everybody knows that this is the key person in charge of the management of this case, and the person who gives direction to the others. Once the patient has passed the acute care stage and reaches the latter stages of recovery, the surgeon will often fade into the background. The therapists take over, but they don't have the authority to give instructions to each other, so that there is often no clear leadership role.

It's better in the specialized rehabilitation clinics where they have all this worked out, but for the patients who don't go to a specialized clinic there is still a problem of leadership in rehabilitation.

One respect in which it is better than in Canada is that they have co-ordinated hospital services with home care. For example, if someone is recovering in hospital from a serious disability the chances are that (at least in some parts of the country) the same occupational therapist will see that person in hospital and will also visit the home to see what sort of home adjustments will be required for discharge. Thus they have the interaction of home care and hospital care much better co-ordinated than we have, certainly in parts of Canada that I have been familiar with.

They are running into problems of financial pressure, partly from the corporate world and also of course from Treasury. One problem is the way in which auditors operate. Government auditors tend to be sensitive to over-payment; they want to ensure that all the revenue comes in, and that not too much goes out. When I was running the Workers' Compensation Board in British Columbia, the audit system was revised to ensure that the internal auditor would look for under-payment as well as overpayment. In most systems, that is not done.

Obviously it should be a function of auditors to monitor underpayment as well as overpayment. Otherwise any resulting auditors' report can give a very one-sided impression.

The administrative cost of the system is relatively low, and it's lower than it should be at the moment. They've cut back in recent years, and I think they have infused some inefficiency through underspending on administration. It is now equivalent to about 12 % of the amount received by claimants. On any view, it compares very favorably with tort liability, for example, where the administrative cost is probably equivalent to about 100 % of the amount received by claimants.

There are currently some pressures on the system. Lawyers, as I say, have adapted to it. The insurance industry has adapted to it to the extent of not campaigning for any return to tort liability, but they are campaigning for a reduction in the benefits. What is happening is this : There is a lot of feeling coinciding with the views that I expressed earlier that it makes no sense to distinguish between accidents and diseases. There seems to be a growing feeling in New Zealand that this must end and that the coverage must be extended to diseases as well as accidents. Now that creates, of course, a new opportunity for the insurance industry, because what they can do and what they seem to be doing is to say : « Meet the cost of extending the coverage to disease by reducing the benefit levels. » Thus they seem to be adopting the same political strategy as they have in other countries of saying : If it's a government-operated system, keep the benefits low so that we can provide disability insurance for the higher levels of earnings. Of course that creates a whole range of problems that I need not mention now, but that is the way the political scene appears to stand at the moment.

There is a paradox that one finds in New Zealand, as in Canada, and that is the contrast between the people who take what they would call a hard-headed approach and the people who take what would be described in a denigrating way as a soft-headed approach ; a contrast between I suppose what one might call the liberals and the reactionaries. The paradox is that the hard-headed approach tends to be soft, while the soft approach tends to be hard-headed. The hard-headed approach in the long run tends to be bull-headed, and probably increases cost. It does this by creating anxiety. One aspect of reactionary pressure in New Zealand at the moment is a pressure to introduce experience rating in relation to the levy for earners. But we have experience rating in workers' compensation in Canada, and it creates a range of problems. It creates more opposition to claims, it creates pressures for adversarial processes, it creates anxiety, which increases the incidence of disablement, and that increases costs. The more soft-headed approach might be described as don't worry too much, don't treat everybody as a crook, treat everyone as a good honest citizen unless there is cause for suspicion. Even then,

treat the claimant as an honest citizen while looking for any evidence of fraud. Treat people well and it probably works out cheaper in the long-run. That proposition may do much to explain the relatively low levels of cost in New Zealand.

To conclude, I might add a word about the comparison of the Plan with tort liability. One question that I was interested in, was : « Do people really miss tort liability in New Zealand? » Someone who is known to us all used to tell us that if we didn't have tort liability, people would miss it, and in particular there was a public urge for retribution. So I thought I would ask about this when I was interviewing injury victims in New Zealand. It was interesting that in open-ended discussions, nobody mentioned retribution. It never came up in discussion until I raised it. Even then, when I asked whether they would like to have sued any wrongdoer, it was generally regarded as an irrelevant question. A typical response was : « What good would that do, he couldn't have paid the money anyway, it would have had to come out of insurance. »

There was a general lack of sympathy for the idea except for one person. He had gone to a Christmas party, and since he wanted to include alcoholic refreshment in his evening he arranged for a non-drinker to drive him home. When going home as a passenger, his car was hit broadside by another car coming from another Christmas party. The other driver had not taken the same precaution. The claimant that I was interviewing became a quadraplegic. Under the accident compensation system, he received lump sums of, at that time \$ 17,000. (the equivalent of about \$ 35,000. today), plus all medical expenses, plus loss of earnings, plus some other rehabilitation costs. He was building a new house, and the ACC had also paid him a contribution to his new house equivalent to what they would have paid for adapting the old house.

He was unhappy about it, and I asked why. He explained that under the old system, he would have been able to sue, and he would have expected about \$ 200,000. in a lump sum. I thought that he was underestimating, and I told him that I thought he would probably have received more.

When he had finished complaining about the present system and referred with nostalgia to the old system, I said to him : « Does this mean that you would have preferred the old system to the new one? » He thought about that for a long time. Finally he said : « No. It would have taken years of hassle to get the money, and you see, I just wanted to get on with building my house. » There is a world of significance in that single phrase, I wanted to get on with building my house. Here was the one person that I found who really wanted retribution. He really would have liked to see the wrongdoer hauled into court. But even he could see that any desire for retribution through litigation would be inconsistent with his own paramount goal of speedy rehabilitation.