PART 2 – INTRODUCTORY SURVEY

I – PROCEDURE

19. The terms of reference were first advertised in September 1966 in metropolitan newspapers, and organisations and persons wishing to make submissions were invited to do so. At a preliminary public sitting on 29 September 1966 consideration was given to the procedure to be adopted, and we were addressed by the Solicitor-General and by counsel and by others representing various organisations.

20. It was explained that the Commission would conduct its inquiries on a wide front, and proposed at public hearings to provide adequate opportunity for all those wishing to make submissions. It was announced that necessarily the Commission reserved the right to make investigations other than by means of public hearings, and that in particular the members of the Commission would travel overseas in order to make a further study in other countries of the various matters in issue. It was arranged to commence public hearings in Wellington on 1 November, and an announcement was made that the Commission would sit in other cities should it become clear that this was desirable; and that further hearings would be held following the overseas visit.

21. The first section of our public sittings lasted from 1 November to 7 December 1966. During this period we sat in public on 15 days of which two days were occupied at sittings in Auckland and one day at Christchurch. No request was received that we should sit in any other cities than these. Forty-seven organisations or persons accepted the invitation to present submissions before the Commission, in person or by a representative. Appendix 1, Part I, provides a list of the organisations and persons who made public submissions during the first section of our hearings.

22. On 17 February 1967 the Chairman and Mr G. A. Parsons left New Zealand in order to proceed with investigations in selected overseas countries. At this time it was not possible for the third member of the Commission, Mr H. L. Bockett, to leave New Zealand, but fortunately he was able to join the other two members in New York on 7 April. During this period the Commission visited Vancouver, Chicago, Toronto, Montreal, Rome, Geneva, Stockholm, London, New York, Washington, San Francisco, and Sydney. In

all of these cities we were given advice and assistance which has been most valuable to us, and we wish to express our sense of great indebtedness to all those concerned. Appendix 2 provides a list of those who assisted us so generously during this important and rewarding part of our investigations.

23. These inquiries overseas were completed by the beginning of May, and arrangements were then made to conduct the second part of the public hearings in New Zealand. At this stage all those who had expressed any interest in our inquiry were advised by letter (Appendix 3) that we would be glad to have some further assistance with regard to the matters therein mentioned. On 24 June advertisements were placed in the metropolitan newspapers advising that public hearings would be recommenced on 4 July at Wellington.

24. In the event this second part of the public hearings occupied three days, and during that time 19 persons or organisations appeared to make initial or further submissions. Appendix 1, Part II, contains a list of those who made public submissions on this occasion. In addition to submissions made during the public hearings a number of written communications were received from time to time. Wherever these appeared to amount to submissions they were treated by us accordingly. A list is contained in Appendix 1, Part III.

25. Copies of public submissions were received (usually in advance of the hearing) and were made available to those interested. In addition a verbatim record of the proceedings during all public hearings was kept. A copy of all this material will be deposited in the General Assembly Library at Wellington.

26. In addition to the submissions received by us we have supplemented our inquiries by recourse to a great deal of written material published both overseas and in this country. A bibliography is contained in Appendix 4.

27. We wish to express our thanks to all who presented submissions to us and also to many others who have provided us with information together with much constructive advice and useful criticism.

28. We have received the loyal assistance of our small staff throughout the period of this inquiry, and for this we are grateful. In particular we must record our high appreciation of the services of our Secretary, Mr J. L. Wright. His understanding of administrative problems and his conscientious attention to all aspects of the inquiry have been of great assistance to us.

II–PLAN OF THE REPORT

29. It seemed useful to prepare a short summary of the more important considerations which have guided us, and some of the broad conclusions we have reached. For easy reference this has been placed before the commencement of the Report itself and comprises the whole of Part 1.

30. There are eight parts to the Report proper. Part 2 contains a reference to the nature and scope of the inquiry, a short survey of the general position as it stands today, and an outline of the principles which we believe should direct the form of any modern scheme of compensation for personal injuries. Parts 3, 4, and 5 provide some analysis of the achievements of the common law action based on fault, the workers' compensation legislation, and the social security system. Part 6 of the Report contains our proposals for a new and comprehensive scheme together with an account of the reasons which have led to the various recommendations. Part 7 deals with accident prevention and the physical and vocational rehabilitation of injured persons. In Part 8 there is an outline of the financial implications of these proposals. Part 9 brings our general conclusions and recommendations together in a convenient form.

III—SCOPE OF INQUIRY

31. The opening words of the Warrant appointing this Royal Commission require us to survey and report upon "the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons in employment". But the evaluation of existing or proposed processes is not to depend upon these economic factors alone. The reference to them is followed immediately by specific mention of an issue of prime consequence which is repeated in the sixth paragraph of the Warrant. This anticipates that any balanced system of compensation must be organised to accelerate and promote in every way the physical well-being and the vocational rehabilitation of injured workers. And so we interpret our general responsibility.

32. The Commission is furthermore required to investigate and report upon "the relationship between money payable by way of compensation or allowances or damages" in respect of injured workers, and money payable to them "pursuant to legislation concerned with social security or welfare or pensions". The question involves problems which previously have been given only piecemeal attention under systems working independently; and usually with little reference to allied difficulties or the wider issues of principle which should control related processes. There are questions, for example, as to whether it will be possible by liaison alone to solve existing and avoid new anomalies; or whether it remains sensible to have several approaches thrusting off independently into this general field. Today any rational solution seems to demand a willingness to reconsider in a comprehensive way the current validity of several apparently established theories and ideas.

33. The Commission is directed also to investigate and report upon any associated matters deemed by it to be relevant. Some of the wide issues mentioned in the preceding paragraph are clearly relevant by reason of their close identity with or the pressure they bring to bear upon matters contained in the detailed terms of reference. And it is important to consider, so far as it can be done, the needs which may not yet have matured but which are evolving rapidly. The rate at which social institutions and ideas are being turned upside down is not merely dramatic—it is accelerating every year in a fashion which demands a great deal of mental energy to keep pace. It cannot be good enough, therefore, to adjust merely to contemporary needs. Some deliberate attention should be given to the foreseeable demands of the years immediately ahead. And if there may seem to be a weight of tradition against change, at least it

is worth remembering that the apparent heresies of one generation become the orthodoxies of the next. The ultimate validity of any social measure will depend not upon its antecedents but upon its current and future utility.

34. For the foregoing reasons we have found it essential to examine the social implications of all the hazards which face the work force, whether at work or during the remaining hours of the day. Only by doing this have we been able to make recommendations which we believe can be handled comfortably by the country in terms of cost, and which will provide a co-ordinated and sensible answer to a series of interrelated and complex problems. Our decision that it was impossible to resolve the problem of industrial injuries in isolation was reinforced by the findings and recommendations of the recent inquiry conducted by the Committee on Absolute Liability. These are referred to in paragraphs 137 to 141 of this Report. This inquiry supplements our own. We acknowledge the assistance which the Report of the Committee has been to us.

IV-THE PRESENT POSITION

35. Unlike the position in several other modern countries, the victims of industrial accidents in New Zealand are able to turn for relief to three distinct but overlapping processes. No consistent design or purpose has produced this situation. It has arisen over the years, without organisation, and as the result of differing social attitudes. We have become accustomed to it, and as it seems to work it is in a general way accepted.

36. The first of the processes to appear was the common law action of negligence. It is a judge-made remedy which has a history, as an independent civil wrong, going back over the last century or so. Increasing industrialisation produced social pressures which demanded some enlargement of the rather rigid forms of action available, and in the absence of any move by Parliament the Judges applied the simple concept that even inadvertent fault, if it could be proved, would enable an innocent victim to shift the burden of his loss by receiving an indemnity in the form of damages. By the end of the nineteenth century damages were also available to those who could show that their injury had resulted from a breach of a section of one of the industrial statutes, and whether or not the breach could be labelled as negligent.

37. However, there are three possible results of a damages action. First, if negligence is proved, or alternatively, a breach of the duty imposed by one of the industrial statutes, then the Court will award a complete indemnity. Second, if the injury resulted from the fault of both parties the losses will be apportioned between them. Third, if there was no fault at all the Court will do nothing. For example, it ignores the not illogical thought that a person who is the innocent cause of a loss might reasonably be asked to share with his equally innocent victim the loss he has caused.[1]

38. Then in 1900 came the Workers' Compensation Act. For vast numbers of persons the common law remedy had proved to be no remedy at all. Either they were unable to prove any negligence, or they were defeated by one of several overgenerous defences which had been allowed as a shield for those under attack. Accordingly this new Act enunciated the downright principle that, regardless of fault, employers must share some of the losses of employees who suffered injury from accident arising out of and in the course of employment. This remedy, which provides a rather limited form of

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[1]See para. 86 *infra*.

compensation, is regarded generally as the oldest form of social insurance to appear in modern societies. In New Zealand the enactment was modelled on similar legislation passed three years earlier by the United Kingdom Parliament, and this in turn had its origins in German legislation dating from 1884.

39. There are criticisms of the common law and compensation processes which stem from the limitations under which each must operate. Because the damages action equates responsibility with fault the damages are reduced for contributory negligence, and what is more important, the action provides no relief for large numbers of people who either lack the proof of fault or who are the victims of what lawyers pleasantly call "an act of God". On the other hand, although the compensation system fills a gap by assisting a whole general class, its benefits are averaged out at levels considered to be inadequate as true recompense; it also ignores the interests of that class for two-thirds of each day. The one process ensures overall economy by limiting the beneficiaries, and the other by restricting the benefits.

40. The third process is the general system of social security which received a great push forward in the years before the Second World War. On a flat rate basis it provides modest insurance against need for those able to qualify within the income-related means test. When earnings have been interrupted, for example, by physical incapacity, an application can be made for a sickness benefit, or in some circumstances for an invalidity benefit. But the social security system does not attempt to compensate for losses. It provides a basic income for subsistence.

41. In the case of work-connected injuries the first and second of these remedies are available as alternatives. The third, however, can often be found to have supplemented lump sum awards by providing subsequent periodic benefits. This fact, congenial enough to the recipients, invites criticism that the system as a whole permits anomalous double payments. Lord Beveridge noted the point in his famous report for the United Kingdom Government upon social insurance and allied services, written in 1942. In referring to a similar situation which then existed in the United Kingdom he said that—

> "an injured person should not have the same need met twice over. He should get benefit at once without prejudice to any alternative remedy, but if the alternative remedy proves in fact to be available, he should not in the end get more from the two sources together than he would have got from one alone."[2]

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[2]Cmd. 6404, para. 260.

But this anomaly is not the only or indeed the most serious difficulty which arises from a fragmented method of handling the whole problem of adjusting the losses which follow upon injury.

42. In contrast to the situation of those who suffer work-connected injuries, workers who have the misfortune to be injured outside the course of their employment must take their chance of proving negligence, or if they fail, depend upon qualifying for the much more slender assistance provided by the social security programme. And many fail in both respects. There will be confident assertions that this is an entirely suitable state of affairs and that if people fall victim to the hazards of modern living, then in general they should battle along unaided by community responses. We do not agree. We regard it as an entirely anomalous situation, and we think that the present discordant methods of handling it are now obsolete. Indeed it is the feature of this inquiry that, at the outset, we are faced by a problem that no longer can be swept easily to one side if any just and coherent solution is to be found to the reasonable claims of incapacitated workers upon the community which has been prepared to accept the benefit of their work.

43. Once it is accepted that it is in the national interest to provide for deserving groups of workers some form of comprehensive insurance which in the long run the public is to support, then any discrimination between people in the same general situation could hardly be justified. In the case of the Workers' Compensation Act it is true that in an immediate sense compensation is provided by compulsory levies upon all employers in the form of insurance premiums. Nevertheless, as the New Zealand Law Society has recognised in its general submissions, it is not difficult to demonstrate that in the end it is the community as a whole which pays. Clearly the premiums are built into the costs of industry and automatically become part of the price to be paid for the product. Since the insurance scheme is a compulsory one the premiums can be regarded as a sort of indirect tax borne finally by us all.

44. This compulsory insurance extends also to cover the negligence action which frequently is used by employees to recover damages from their employer. And because it does, the cost of all successful claims falls not upon individual employers but is similarly shared by industry as a whole, and finally by the community, in the fashion outlined in the preceding paragraph.

45. Social security benefits, too, are provided by all citizens, although by means of direct taxation. It is unnecessary at this point

to describe in detail the level of benefits but they do not pretend to be a substitute for common law damages or for the compensation provided by the Workers' Compensation Act.

46. It is obvious enough that a worker does not cease to be a worker as he leaves his factory at 5 o'clock. But existing processes refuse to accept his continuing status. If he slips and is disabled in the factory shower-room as he prepares to go home, he will be entitled to all the advantages of the Workers' Compensation legislation and may even succeed against his employer in a negligence action. Yet if he suffers the same accident upon his arrival at his home he will receive nothing at all, or at best the assistance provided by the Social Security Fund. From the point of view of the injured workman these inconsistent results develop from a diagnosis by causes and a disregard of their similar effects. When it is recognised that in each case it is the community which pays, the discrimination assumes an air of unreality.

47. If one can ignore tradition it would seem far better for the work force to be able to look forward to a uniformly generous treatment of all injuries regardless of cause; and far better for society to deal with the whole problem on a basis both comprehensive and consistent. In 1942 Beveridge discussed some of these matters in his report. In the course of doing so he accepted the need for a unified scheme, but then he provided three arguments which he considered would support the situation described in the last paragraph. We know of no other arguments which can be advanced in its favour, and today these are generally rejected; and rightly so, we think. These matters are mentioned in the following paragraphs 48 to 54.

V—THE BEVERIDGE REPORT

48. In paragraph 80 of the Beveridge Report[3] there is the blunt statement that the Workers' Compensation Act (upon which the New Zealand legislation is modelled) "was based on a wrong principle and has been dominated by a wrong outlook." The reasons for this statement follow and then it is said—

> "There should be no hesitation in making provision for the results of industrial accident and disease in future, not by a continuance of the present system of individual employer's liability, but as one branch of a unified Plan for Social Security. . . . If a workman loses his leg in an accident, his needs are the same whether the accident occurred in a factory or in the street; if he is killed the needs of the widow and other dependants are the same, however the death occurred. Acceptance of this argument and adoption of a flat rate of compensation for disability, however caused, would avoid the anomaly of treating equal needs differently and the administrative and legal difficulties of defining just what injuries were to be treated as arising out of and in the course of employment. . . . *A complete solution is to be found only in a completely unified scheme for disability without demarcation by the cause of disability.*" [The italics are ours.]

49. This is a strong statement by a man who was regarded at the time as the foremost expert in the field. And the conclusion he expressed a quarter of a century ago may be a surprise to many in this country who have become sufficiently accustomed to the system (which still is operating here) that they accept it even now as part of an unchanging order of things. Subject to the reference to a flat rate system of benefits (which we consider to be an inappropriate form of compensation for workers whose varied earnings have suddenly been cut off through injury) we accept the conclusion reached by Beveridge as the inevitable result of any detached analysis of the position today.

50. Yet it will be said that in an important respect Beveridge ignored his own opinions. He certainly proceeded to recommend a unified scheme of national insurance; but it was one which would retain all the demarcation problems of the old system because under it work-connected injuries would be compensated on a more favourable basis than incapacities arising from other causes. This recommendation, however, he explained, not on pragmatic grounds or

[3]Cmd. 6404.

for the likely economic reasons that at the time all pensions could not be raised together, but on the basis of three arguments which have since been much criticised.

51. In the words of the report[4] these arguments are—

(1) "Many industries vital to the community are also specially dangerous. It is essential that men should enter them and desirable, therefore, that they should be able to do so with the assurance of special provision against their risks."

(2) "A man disabled during the course of his employment has been disabled while working under orders."

(3) "Only if special provision is made for the results of industrial accident and disease, irrespective of negligence, would it appear possible . . . to limit the employer's liability at Common Law to the results of actions for which he is responsible morally and in fact, not simply by virtue of some principle of legal liability."

THE FIRST ARGUMENT

52. Although Beveridge described the first argument as a strong one, it cannot stand against three principal criticisms. First, the daily acceptance of greater risks may well justify additional earnings by way of danger money. Nevertheless, the degree of risk does nothing to aggravate the degree of subsequent injury should the risk materialise, nor can it fairly affect the level of compensation which should be paid for that injury. To adapt a classical dictum the argument attempts to equate the greater risks of injury with the actual fact of greater injuries. Then there is a second criticism. It concerns the use which was made of the argument. One might ask, if it is the case that workers in dangerous occupations deserve higher levels of compensation, then why did Beveridge not suggest that the lesser hazards of farm hands or chefs would oblige them to accept a lower level of compensation for their similar injuries than steel workers or steeplejacks. He used the argument to support preferential treatment for every work-connected injury, and yet it is applicable only to the claims of those in specially hazardous industries. Finally, there is the criticism that the claim for preference disregards the multiple and dangerous hazards which are increasingly affecting everyone during the hours outside the working day. It ignores the unchanged status of every productive workman during those extra hours, together with the unchanged responsibilities which remain with him if he is injured during that time.

[4]Para. 81.

53. Beveridge himself regarded the second and third arguments as weaker than the first.[5] The second, like the first, is open to the criticism that it concentrates upon the environment within which the injury might occur. Negligence aside, special recompense cannot be justified by the fact that some workers might suffer injuries while accepting normal directions. The third argument has no contemporary significance in New Zealand. If the common law action is to remain there would appear to be no good reason why the present responsibility of employers should be limited in any way, and no suggestion has been made during the course of our inquiry that this should be done. And if the common law action is to disappear the point has no relevance.

54. Accordingly we are left in no doubt that the original conclusion reached by Beveridge must be accepted because it was correct. The solution does in fact lie "in a completely unified scheme for disability without demarcation by the cause of disability"[6]; and if real effect is to be given to such a scheme then clearly no class within it could be marked out for preferential treatment.

[5]Para. 83.
[6]See para. 48 *infra*.

VI—THE OBJECTIVES FOR A COMPENSATION SYSTEM

55. In the final analysis any change in present methods must depend upon whether it can be afforded; and whether the need for it is clear. The first severely practical question is dealt with in Part 8 of this Report. The other involves an analysis of the system in operation. To make an effective analysis it is desirable at this point to decide what should be the role of any modern system of compensation for injured persons. Unless the target is identified it is unlikely that present achievements will be evaluated on any rational basis or the key be found to something better. It is possible to lay down five guiding principles for such a system.

First, in the national interest, and as a matter of national obligation, the community must protect all citizens (including the self employed) and the housewives who sustain them from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity;

Second, all injured persons should receive compensation from any community financed scheme on the same uniform method of assessment, regardless of the causes which gave rise to their injuries;

Third, the scheme must be deliberately organised to urge forward the physical and vocational recovery of these citizens while at the same time providing a real measure of money compensation for their losses;

Fourth, real compensation demands for the whole period of incapacity the provision of income-related benefits for lost income and recognition of the plain fact that any permanent bodily impairment is a loss in itself regardless of its effect on earning capacity;

Fifth, the achievement of the system will be eroded to the extent that its benefits are delayed, or are inconsistently assessed, or the system itself is administered by methods that are economically wasteful.

These principles can be summarised as—

Community responsibility
Comprehensive entitlement
Complete rehabilitation
Real compensation
Administrative efficiency.

We proceed to examine them in turn.

COMMUNITY RESPONSIBILITY

56. This first principle is fundamental. It rests on a double argument. Just as a modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity. And, since we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on a basis of equity by the community.

COMPREHENSIVE ENTITLEMENT

57. The second principle involves an acceptance of the argument advanced in paragraphs 42 to 46. It cannot be regarded as just that workmen sustaining equal losses should be treated unequally by society. The productive section of the community must sustain the elderly and the young, and the latter groups cannot reasonably expect to be provided with a form of social insurance on the same level. But subject to this consideration there can be no justification for providing from community funds for the same class of worker entirely inconsistent awards for precisely similar incapacities merely because fortuitously the causes which gave rise to them have at different stages of our social development been the subject of conflicting responses.

COMPLETE REHABILITATION

58. The third principle would seem to state the obvious. Nevertheless, although it is always remembered that injury losses must be quantified in money terms, it is often overlooked that the rehabilitation of incapacitated workers cannot be achieved by money payments except to the extent of money losses. The consideration of overriding importance must be to encourage every injured worker to recover the maximum degree of bodily health and vocational utility in a minimum of time. Any impediment to this should be regarded as a serious failure to safeguard the real interests of the man himself and the interest which the community has in his restored productive capacity.

REAL COMPENSATION

59. Clearly if compensation is to meet real losses it must provide adequate recompense, unrestricted by earlier philosophies which put forward tests related merely to need. Such an approach may have been appropriate when poverty was a widespread evil demanding considerable mobilisation of the country's financial resources. But

average modern households, geared to the regular injection of incomes undreamed of at the turn of the century, have corresponding commitments which do not disappear conveniently if one of the hazards of modern life suddenly produces physical misfortune. Increasing affluence has brought with it additional social hazards for every citizen; but fortunately, at the same time, it has left society better able to afford their real cost.

60. To the individual concerned, the cost will include any permanent physical deprivation which he might have to endure following an accident. Such disabilities can have damaging effects upon the ordinary activities of both young and old, regardless of their influence upon a capacity to work in any given occupation.

61. Accordingly, we are in no doubt that in modern conditions a compensation system of the type under discussion should rest upon a realistic assessment of actual loss, both physical and economic, followed by a shifting of that loss on a suitably generous basis. If there might seem to be an issue as to whether the compensation due to injured workers should be restricted to meet their current needs or be assessed on a uniform flat rate basis, then these are propositions which we reject as entirely unacceptable. These are the considerations which support the fourth principle.

ADMINISTRATIVE EFFICIENCY

62. This final principle needs no elaboration. It speaks for itself in terms which are clear enough. It looks to evenness and method in every aspect of assessment, adjudication, and administration. The collection of funds and their distribution as benefits should be handled speedily, consistently, economically, and without contention.

CONCLUSION

63. Against the background of these principles it is convenient to bring forward the general conclusion we have reached concerning the present processes. For all the reasons which follow we are satisfied that no useful, logical, or economic purpose remains in this categorised system; that it gives rise to injustice; that it perpetuates anomalies; and that the time has clearly arrived for its replacement. We consider the various arguments in the next parts of this Report.