Accident Compensation: A Cuckoo in the Sparrow's Nest of Social Welfare*

by

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I. INTRODUCTION

The Woodhouse Report condemned the unfairness of "providing entirely inconsistent awards for precisely similar incapacities".[1] The Accident Compensation Act 1972 removed the perceived inequity of treating accident victims differently but it created another between the accident victim and the Social Security beneficiary whose incapacity may be just as great or whose inability to earn may be just as little his or her fault. Social Security beneficiaries are seen to be getting a second class deal.[2]

One answer which has been offered is to merge the two systems of income maintenance. However, such a merger would present difficulties due to inherent and fundamental differences between the two statutes, in their evolutionary paths, their objectives, their level of benefits and their administration.

This paper attempts to compare these two pillars of welfare legislation, the Accident Compensation Act 1972 (A.C.A. hereafter) and the Social Security Act 1964 (S.S.A. hereafter), within the following areas:

I. Genealogy
II. Objectives and philosophy

[1] *Compensation for Personal Injury in New Zealand,* (Report of the Royal Commission of Inquiry, 1967, Chairman Mr Justice Woodhouse), 40. This Report will hereafter be referred to as the *Woodhouse Report.*

[2] National Superannuation, incorporated in the Social Security Act 1976, greatly altered the financial position of a significant section of the Act's beneficiaries. Hanson (note 3 post.) puts superannuation on top of the three-tier income maintenance structure in New Zealand. The impact of National Superannuation is beyond the scope of this paper; many of the comments made herein about social welfare benefits do not apply to it.

III. Funding
IV. Level of benefits
V. Administrative discretion
VI. Use of the Dispute Procedures.

I. GENEALOGY

The ancestor of the Social Security system of income maintenance is the Poor Law. Destitution in the nineteenth century was equated with moral depravity. The laissez-faire attitude of the government kept public assistance to a minimum; such aid as was available was offered to only the "deserving" poor and to those so desperate as to be prepared to accept the "discipline" (i.e. the surrender of civil rights, family unity and dignity) of the workhouse. Towards the end of last century European social reformers prompted both, as Hanson[3] points out, by humanitarian conscience at the suffering caused by industrialisation and by bourgeois trepidation at the prospect of socialist revolt, introduced social security legislative reforms. These embodied the idea that the poor were not to blame for their predicament, but the concept of "deserving" keeps appearing like a recessive gene throughout the successive generations of legislation.[4]

In New Zealand a series of income maintenance statutes was passed prior to 1935 (e.g. the Old Age Pension Act introduced by Seddon in 1898 which provided pensions for those of good moral character, but not for Maoris or Chinese; the National Provident Act 1910; the Unemployment Act 1930), but the first Labour government consolidated and greatly expanded welfare law by passing the Social Security Act 1938. It moved away from the contribution insurance-scheme approach towards universal benefits, based on need and funded from general revenue. The pattern set by the 1938 Act has been retained; the amendments since 1938 were consolidated in the Social Security Act 1964. The Report of the Royal Commission of Inquiry 1972[5] concluded that:[6]

> the present system has worked to the advantage of the nation since 1938, it has become part of the economic and social fabric of the nation. . . . no alternative which we examined is likely to do so better and without considerable disruption of the economic and social elements which make up our national pattern of life.

The genealogy of the Social Security Act does not then show a tradition of individuals claiming what they perceive to be rights. Rather it

[3] E. Hanson, *The Politics of Social Security,* (1980, Auckland University Press), Chapter 1.
[4] The "morals" clause which limited the grant of discretionary benefits to people of good moral character and sober habits, was not removed from the statute until 1972. Some might argue that its spirit if not its letter lives on.
[5] *Social Security in New Zealand,* (Report of the Royal Commission of Inquiry, 1972, Chairman Sir Thaddeus McCarthy).
[6] *Ibid.,* 32, para. 58.

shows a self-preserving but benevolent state doling out collective bounty to petitioners who comply with the statutory or departmental tests of eligibility.

In contrast the Accident Compensation Act 1972 sprang from a heritage of rights claimed by individuals through the adversarial process. The A.C.A. has two main forbears, the Workers' Compensation legislation and common law damages for personal injury. In 1882[7] legislative provision was made to compensate any "workman" (a term which was generously extended in 1891 to include female workers or workers born ex-nuptially) for injury from an accident at work. From a succession of Workers Compensation Acts,[8] a separate compensation court structure evolved and employers were compelled to take out liability insurance. At the same time, under the common law, people suffering personal injury had a right to sue for damages. If they were lucky enough to have the winning ticket,[9] they came away from court no worse off financially than they would have been had the injury not occurred. From these parents the descent of the present A.C.A. is well known: the revolutionary Woodhouse Report recommendations, significantly altered by the Gair Committee Report[10] before the Act was passed in 1972, the massive amendments since. The outstanding feature of the Act that evolved is that if an individual has a claim under the A.C.A. he or she no longer has the right to make someone else pay for an established wrongdoing. However, the tradition and attitude remain that the accident victim or person suffering injury has the right to claim compensation.

II. Objectives

Although the A.C.A. and the S.S.A. are both systems of income maintenance, the aims and philosophies of the two statutes were and remain distinct, a fact which should be remembered by those who recommend a complete integration of Accident Compensation within the Social Welfare structure.

As already suggested, the philosophy of the 1938 S.S.A. was one of state benevolence. Its objectives were lofty but sincere: to eliminate poverty and to promote human dignity. Savage referred to the legislation as "applied Christianity"[11] and Walter Nash foretold[12] that when the Act's benefits accrued "then once more this country will be 'God's own Country' ". These attitudes were echoed by the McCarthy Com-

[7] Employers' Liability Act 1882.
[8] They were enacted in 1900, 1908, 1927 and 1956.
[9] T.G. Ison, *The Forensic Lottery* (1967).
[10] The Select Committee was established in October 1969.
[11] E. Hanson, *op.cit.*, 96.
[12] *Ibid.*, 93.

mission which described the essential principles of a social welfare system in ringing tones:[13]

a) *Community responsibility* for giving dependent people a standard of living consistent with human dignity and approaching that enjoyed by the majority, irrespective of the cause of the dependency.
b) *Need* as the primary test and criterion of help given.
c) *Comprehensive coverage,* irrespective of cause.

(Italics original)

The report said there were four choices as to possible objectives of the Social Welfare system.[14] The first option was subsistence, to maintain life and health. The second was belonging, something greater than subsistence, and meaning that everyone should be able to participate fully as a member of the community. The third option was equality, for everyone to have the same standard of living as all other New Zealanders. The fourth was continuity, to be able to maintain the same individual standard of living as that enjoyed in the past. After considering these options the Commission concluded that the third option was not the aim to be sought nor was the Commission satisfied that "absolute economic equality is a value strongly sought in the community".[15] The fourth option, continuity, was also specifically rejected on the grounds that the community at large is not and should not be responsible for maintaining an individual's customary earnings and status. The objectives of social security were therefore declared by the Commission to be subsistence and belonging, the philosophy to be state responsibility, the criterion, need.

In contrast, the objective of the A.C.A. is compensation for loss of income. The guiding principles of the Woodhouse Scheme are community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.[16] The first two are "on all fours" with the S.S.A. objectives but the others are not so compatible—particularly real compensation.

Geoffrey Palmer has commented[17] that the survival rate of the 1967 Woodhouse policy recommendations has been about half. He says that the Woodhouse Report was anchored in fundamental social principle. Successive amendments have "cut it loose from its mooring". He stresses that the piecemeal approach, exhibited by past amendments and by the now shelved 1980 Amendment Bill (No. 2), overlooks the interdependence of every policy decision relating to accident compensation and in turn to its impact upon the general social welfare system.

[13] *Social Security in New Zealand,* 65.
[14] *Ibid.,* 63.
[15] *Ibid.,* 16.
[16] *Woodhouse Report, op. cit.,* 20.
[17] "What Happened to the Woodhouse Report?" [1981] N.Z.L.J. 561; a reprint of an address to the NZ Law Society Conference, 1981.

There does seem to be a marked confusion of objectives of the Accident Compensation Act, a fact commented on in a useful article by Colin James.[18] He points out that various individuals and groups hitch their wagons to the different philosophical strands running through the scheme. To expand on James' point, to some people the Act is an integral part of the social welfare system; Palmer[19] talks of its "definitely collectivist set of values". The Woodhouse Report put "community responsibility" at the top of the Scheme's list of objectives and stated[20] "a modern society should accept responsibility for those willing to work but prevented from doing so". However, there has been a reluctance on the part of accident compensation claimants to perceive themselves as being "on welfare". Also the two Amendment Bills of 1980 pay no respects to the welfare objective and it has been said during the Parliamentary debate on the Bills that:[21]

> The government have been at pains to try to draw a distinction between the Social Welfare System and the Accident Compensation Scheme. The distinction is a spurious one. . . . The compelling logic (of accident compensation) is that it is an integral part of income maintenance.

However, although there is a strong welfare strand running through the A.C.A., the Woodhouse Report itself made it clear that the scheme goes further than merely the welfare objective of meeting the subsistence needs of accident victims, and this has been confirmed in Accident Compensation decisions.[22] Its aim is to compensate in real terms by providing income-related benefits. This resembles the continuity objective which was rejected as unsuitable for social welfare by the McCarthy Commission. Real compensation reflects the restitutio in integrum measure of damages.

Then there is the insurance scheme strand of accident compensation which can clearly be seen running through the Quigley Report[23] and the two 1980 Amendment Bills. The thrust of the first Amendment, passed in 1980, was to change the administration so that the corporation would be run like a business with a board of up to six appointed and two ex-officio members. The objective was to "separate the functions of policy making and policy execution". During the Parliamentary debates on the first Amendment Bill, opposition members spoke against the change. The member for Christchurch Central said:[24]

> The changes in the style of administration is quite inappropriate for a social scheme of the character of accident compensation, which is not a business. Corporations are

[18] "National Business Review" June 8, 1981, p.9.
[19] *Compensation for Incapacity* (1979) 205.
[20] *Woodhouse Report,* 40.
[21] New Zealand Parliamentary Debates (Hansard) 1980, 5835, reporting the member for Hastings, Mr Butcher.
[22] E.g. in Appeal Decision 133, Judge Blair said that the scheme was not designed to provide assistance for the needy as such.
[23] Cabinet/Caucus Committee Report on Accident Compensation, October 1980.
[24] Geoffrey Palmer, New Zealand Parliamentary Debates (Hansard) 1980, 5911.

usually designed to run businesses. Accident compensation is not a business, it is a social service for which the community pays.

The second Amendment Bill, which has been held over until 1982, also shows signs of the insurance scheme philosophy with the government seeking to protect the fund, limit liability and restrict cover. For example, under clause 14 cover would be limited to doctors' fees greater than $5.00 per treatment for the first two visits; under clause 17 a self employed worker could opt out of the scheme (the Woodhouse Report[25] recommended that cover be universal, with no special arrangements for contracting out); under clause 20 lump sum compensation would be limited to permanent disabilities deemed greater than 15%; under clause 22 cover could be limited to accident victims who stay in New Zealand; under clause 24 compensation would not be paid to those injured whilst committing criminal offences.

A further philosophical strand evident in comment on the Act and submissions to the Select Committee Hearing on the Amendment (No. 2) can be summed up as the idea of "the social contract". This term is applied to what is seen as the process of the New Zealand citizen surrendering his right to sue for damages in exchange for a proferred bundle of statutory rights to compensation. The New Zealand Law Society's submissions to the Select Committee rejected the Quigley contention that the social contract was "simply to provide fair and just compensation on a compehensive basis". The Society would spell out the social contract in much more definite terms: realistic compensation levels geared to loss of earning capacity, adequate lump sums for non-economic loss, complete indemnity from medical expenses, etc. The submissions of the Federation of Labour also seemed to suggest that Bill (No. 2) was a breach of the social contract entered into by NZ workers in 1972.

While there was undoubtedly a certain amount of lobbying and political horsetrading before the Act was passed, it has been pointed out[26] that the term "social contract" is not an accurate metaphor. To use it is to liken the passing, by a 20th Century Parliament, of legislation abolishing certain common law actions to the 18th Century idea, most famously expounded by Rousseau, that man left a state of nature to enter organised society and in so doing lost his natural rights. The defects of the common law damages system are well documented.[27] Much as the pre-Act personal injury claim may have in part resembled Hobbes' vision[28] (poor, nasty, brutish, but seldom

[25] Report, 180.
[26] J. Hodder, (1980) 4 Capital Letter No. 9.
[27] E.g. G. Palmer, *Compensation for Incapacity,* (1979) Chapter 1; T.G. Ison, *The Forensic Lottery* (1967) Chapter 2.
[28] T. Hobbes, *Leviathan,* (first published 1651, 1975 Macmillan), 100. "The life of man [is] solitary, poor, nasty, brutish and short."

short), the term 'social contract', either in its 18th or 20th century context, implies informed consent, when it might be said that in 1972 few lawyers, fewer parliamentarians and even fewer trade unionists had a full understanding of the implications of section 5 of the Act. The profession or unions cannot cry "breach of contract" and clamour for the re-instatement of fossilised "rights" each time the political, social or economic wind blows change into the legislation.

Compensation for personal injury is now in the political arena; changes will be the result of party politics and pressure from interest groups.

III. FUNDING

The two systems of income maintenance under discussion are quite differently funded. Social Security payments, including National Superannuation, are funded from general taxation. Figures from the 1981 Report of the Department of Social Welfare[29] show the Department's expenditure for year ended 31 March 1981 on cash benefits, to have been $2,327.3 million. The number of applications received for cash benefits was 284,226; there were 995,075 benefits in force as at 31 March 1981.

The Accident Compensation Scheme is funded from three sources. The Earners' Compensation Fund, derived from levies from employers and self-employed workers, the Motor Vehicle Compensation Fund, derived from levies on motor vehicle owners, and the Supplementary Compensation Fund, which is met by reimbursement from the Consolidated Revenue Account. Accident Compensation figures, taken from the Report of the Corporation for the year ended 31 March 1981,[30] are as follows:

TABLE 1

	Earners' Fund	M.V. Fund	Suppl. Fund
Levies received	$124.1 mill.	$24.8 mill.	($16.7 mill. from Consol. Fund)
Expenditure on claims received during year	$ 48.5 mill.	$ 7.6 mill.	
Total compensation expenditure during year	$ 90.6 mill.	$20.8 mill.	$15.2 mill.
Number of claims received during year	96,652	11,771	20,324

From the foregoing table it is apparent that the Employers bear the brunt of the cost of the Scheme. The executive Director of the N.Z.

[29] App. J.H.R. (1981) E.12, 74 Table 30.
[30] App. J.H.R. (1981) E.19, 8.

Employers' Federation has described[31] it as "a monster, with a voracious appetite". Much of the Employers' submissions to the Select Committee considering the 1980 Amendment Bill (No. 2) concerns their alarm at the high cost of the scheme to them and possible suggestions for reducing it. During Parliamentary debates[32] the Minister of Housing demonstrated his sympathy for the Employers' point of view: "employers have a very real interest in the way in which their money is administered".

Although not expressly mentioned, cost-cutting informs the whole of the Quigley Report[33] and the resulting Amendment Bill (No. 2). Submission after submission to the Select Committee condemned this watering down of benefits. Palmer points out[34] that the Employers' Federation was the only major pressure group to welcome the changes proposed in the second Bill. He asserts, however, that the Employers are in fact getting a very good deal out of this scheme. He says that in inflationary times the average levy rate has increased by only .07 since 1974. Employers are relieved of paying insurance premiums which in parts of Australia run up to 30-40% of wages. What is more, employers can pass on the cost of levies to the consumer, in that sense, the community pays. Further, he remarks that industrialists are freed from actions for personal injury caused by dangerous products or premises, an unfortunate result of section 5 of the Act.

IV. Level of Benefits

The conflict of objectives and genealogy between the A.C.A. and the S.S.A. is reflected in the level and type of benefits offered by these parallel systems of monetary benefits. The S.S.A. provides flat rate benefits, generally means-tested; the National Superannuation Scheme stands in stark relief to this, being awarded as of right merely on the grounds of survival, regardless of means. Welfare benefits are aimed at the lower quartile income level (set by the builder's labourer's wage) regardless of the applicant's former commitments or earnings level. 'Need' is the criterion, not the maintenance of former living standards.

On the other hand, accident compensation payments are earnings related, not means-tested, and set at 80% of the claimant's former earnings level, regardless of need.

The essential injustice of differing levels of benefits being offered on the basis of how the incapacity arises, by accident or by sickness,

[31] "What Happened to the Woodhouse Report?" *op. cit.*, 562.
[32] New Zealand Parliamentary Debates (Hansard) 1980, 5838.
[33] Cabinet/Caucus Committee Report, *The New Zealand Accident Compensation Scheme, A Review* (October 1980).
[34] Note 17.

has been widely commented on.[35] The choice of benefits varies with the cause of misfortune, though the victim in each case may be equally blameless and equally in need of assistance.

V. Administrative Discretion

Linked to the fact of variation between the two systems in the basis of award of benefits is the considerable difference in the degree of discretion given to the administrators of the Acts.

It is not the function of this paper to analyse the arguments for and against discretion in a social welfare system., Richard Titmuss[36] argued for discretion, preferring flexibility to precision, innovation to precedence and adequacy for the many to equity for the few. In his attack on the "pathology of legalism" he said that as rules define benefit entitlements so they also restrict the benevolent state's ability to help people in exceptional need. Putting the argument against discretion, David Donnison[37] says that it loads the scales even further against those with exceptional needs and is inappropriate for the modern welfare state:[38]

> The administration procedures and philosophies of the 1960's—which relied on benign discretion and a lot of visiting, often among old ladies whom the staff got to know pretty well—will not do in the harsher world of the 1970's with the staff shortages, sharper class conflicts, a punitive scrounger-bashing press, and a range of customers . . . for benefits who are growing more like those of the 1930's than anyone thought possible.

It is submitted that these words apply equally to New Zealand in the 1980s. However, the purpose of this part of the paper is to compare the degree of discretion between the two systems of income maintenance and to suggest explanations for and consequences of this fact.

The Social Security system is a parcel held together by a string of discretionary decisions. The Ombudsman discovered over 100 discretions in the Act in 1964.[39] This is a direct consequence of need being the criterion by which the award and size of assistance are determined. The financial and social circumstances of each applicant must be assessed and a judgement made. The wide range of discretions give the advantage of flexibility; used positively they permit the Department to avoid refusal of help on the grounds of a straight-jacket precedent. In fact, however, policies and guidelines concerning the award of benefits are created and are enshrined in departmental manuals to which no applicant normally has access. The effect is that admin-

[35] E. Hanson, *op. cit.*, 139-152; Palmer in *The Welfare State Today* (1977) 4-19, and in "What Happened to the Woodhouse Report?" *op. cit.*
[36] R. Titmuss, "Welfare 'Right', Law and Discretion" (1977) 42 Political Quarterly.
[37] D. Donnison, "New Society", 15 September, 1977, 534.
[38] *Ibid.*, 536.
[39] A.F. von Tunzelman, "Administration of Social Welfare Benefits" in *Welfare State Today*, 269.

istrative decisions affecting benefits are made according to a secret law; the Department has the discretion to grant or refuse, but the applicant is left playing blind man's buff. If the reasons for decisions are not given at any stage, even at the review or appeal levels, the individual finds it hard to challenge it or predict with any certainty what the decision would be in any case in the future. Palmer forcibly described this state of affairs:[40]

> The Department of Social Welfare operates a law which for the most part does not give the citizen a legally enforceable right. It gives the administrator a discretion that creates a relationship between the Department and the recipient of the selective benefit something akin to a feudal relationship. The beneficiary is the supplicant. The benefit comes as an indulgence.

It must be remembered, too, when considering discretionary benefits under the Social Security Act that the secret matters to be taken into account may change from time to time. Tunzelman[41] points out that variation in the criteria to be considered in the exercise of a discretionary power may result from changes in political power, in the preoccupations of Ministers, in public opinion or media bombasting of certain groups of beneficiaries or changes in membership of the Social Security Commission over time. The result of these variations must be that an applicant has different chances of success at different times, although the merits of his case, (that means his need), have not changed.

On the other hand, the A.C.A. has far fewer administrative powers of discretion. It is submitted that this is in part due to the origin of the Act in a system of rights, as has been argued in part I ante. Accident Compensation benefits may not withstand a jurisprudential or Hohfeldian[42] definition of "rights", but they are much more "as of right", and much further from a charitable privilege than a highly discretionary Social Security Benefit such as say the Domestic Purposes Benefit. For example, if a woman is incapacitated by personal injury by accident or if her husband was killed in an accident, her compensation is hers by right, regardless of her personal or domestic arrangements. However, if a woman is in the same situation of incapacity or widowhood but is receiving the invalid's benefit or widow's benefit under the Social Security Act, she is subject to the humiliation, emotional distress and financial insecurity brought by the cohabitation rule.[43]

Palmer in the course of deploring the prolixity of the accident compensation legislation, has said that one of the sources of the statute's overwhelming obscurity was that it was decided in the early stages of

[40] *The Welfare State Today,* 16.
[41] *Ibid.,* 257, 273.
[42] W.N. Hohfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning* (1964) Chapter 1.
[43] Social Security Amendment Act 1978, s.17(1).

drafting that "since valuable rights were being taken away, everything that could be spelt out should be spelt out, with as few discretions as possible".[44] In other words the different status of the accident compensation claimant was acknowledged (significantly the annual report of the Accident Compensation Corporation talks of "claims", that of the Social Welfare Department speaks of "applications"). As a result of this detailed spelling out of rights, Palmer says the statute "evolves more like an instrument of private contract than a piece of social welfare legislation."[45] This remark of Palmer's of course assumes that the Act *is* only a piece of social welfare legislation, and ignores the other aspects of a social contract and insurance scheme which have been read into the Act's objectives as already discussed in Part II.

Palmer went on to state that he detected a trend in the amendments to the Act to give more and more powers of administrative discretion to the Commission (as it then was), a process which detracts from the certainty of entitlement. Palmer regrets this trend; however, it is submitted that this is an inevitable consequence of nailing the Accident Compensation Scheme to the Social Security mast.

If indeed the trend has been to move the accident victim from a position of assertion of certain rights closer to a supplicant for shifting privileges then it is submitted that the Accident Compensation Amendment Bill (No. 2) 1980 would have greatly accelerated the process. What follows in this part of the paper is a review of new administrative discretionary powers which the Bill (No. 2) sought to introduce.

(a) *Relevant Earnings*

Clause 12 would have repealed section 104(7) and (8). It removed the provision in section 104 whereby there was an automatic increase in relevant earnings following a general wage order. Future increases in the levels of relevant earnings would be at the discretion of the Governor General in Council, there is no assurance that orders would be regularly made.

(b) *Costs of conveyance to medical treatment*

Clause 13 would distinguish between accidents in N.Z. and those outside the country. The payment of costs of conveyance to medical treatment for the latter would become discretionary. The Corporation "may" reimburse them.

[44] "What Happened to the Woodhouse Report?" 570, and *Welfare State Today*, 171.
[45] Idem.

(c) *Compensation recipients who leave New Zealand for more than 12 months (Section 130 Act)*

Clause 22 gives the Corporation power to review individual cases and continue, commute, reduce, postpone or cancel payment of earnings related compensation while the person remains absent from New Zealand. In exercising this discretionary power, the Corporation *may* have regard to several factors including the nature of the injury, the injured person's work history in N.Z., his or her reasons for leaving the country.

(d) *Criminal Offences*

Clause 24[46] provides that where, in the course and as a result of committing an offence under section 58 of the Transport Act 1962 or any offence for which the maximum penalty is life or more than two years imprisonment, a person suffers personal injury by accident and is convicted and sentenced to a term of imprisonment, cover shall exist but no compensation shall be payable in respect of that injury. By Clause 24(2), where the Corporation has "reason to suspect" this is the situation, it *may* refuse to make any payment until 12 months after the date of the accident and the Corporation may in its discretion extend that period of 12 months "as it thinks fit".

This provision generated stinging objections[47] from the New Zealand Law Society, the Trades Unions and others, but was supported by the Employer's Federation and "strongly supported" by the new Corporation itself.

While it is accepted that the spectre of a masked burglar tripping

[46] The full text of Clause 24 is as follows:

24. Personal injury suffered in the course of criminal conduct—

(1) The principal Act is hereby amended by inserting, after section 138, the following section:

"138A. (1) Subject to this section, in any case where, in the course of and as a result of committing an offence, being—

"(a) Any offence under section 58 of the Transport Act 1962; or

"(b) Any offence for which the maximum penalty is life imprisonment of 2 years or more—

any person suffers personal injury by accident and is convicted of the offence concerned and sentenced to a term of imprisonment, cover shall exist but no compensation shall be payable in respect of that injury.

"(2) Where the Corporation has reason to suspect that any injury suffered during the course of and as a result of comitting any such offence to which this section relates, it may refuse to make any payment of compensation until the expiration of 12 months from the date of the accident:

"Provided that if the injured person has been charged but not tried for the offence by the expiration of the 12 months aforesaid, the Corporation may in its discretion extend that period of 12 months for such further period or periods as it thinks fit, having regard to any information it may obtain concerning the date of the trial."

(2) This section shall apply in relation to any accident occurring on or after the commencement of this Act.

[47] Submissions to the Labour and Education Select Committee on the Accident Compensation Amendment Bill (No. 2) 1980.

over his jemmy and claiming accident compensation is an affront to the sense of propriety of the hardworking and law abiding New Zealander, it is submitted that this provision is a particularly nasty one. As the comprehensive Law Society submission on this point states, Clause 24 is in conflict with the Woodhouse principles of no-fault and comprehensive entitlement, it introduces to the social welfare system penal sanctions which properly belong to the Criminal code, the range of offences with greater than two years imprisonment is wide and includes many non-violent offences,[48] etc. However the objection relevant to this paper is the vast discretionary power given to the Corporation by Clause 24(2). The Law Society's submissions point out[49] that this "puts upon the Corporation the unfitting mantle of policeman. It could easily cause serious injustice and involves a negation of the presumption of innocence."

The clause does not specify *who* in the Corporation must have reason to suspect, or whether the suspicions must be justified or sources revealed, or whether the injured person has a right to a hearing. It is horrific enough that the Corporation might have this power, but it must also be considered whether, in exercising its discretion in this regard, the Corporation would be likely to be influenced by public opinion or Ministerial directives. One need only consider the casualties caused by the civil disorder which occurred in New Zealand during the Springbok tour to see how this discretion could be exercised selectively against certain groups of whom the authorities disapproved, to deny them compensation.

(e) *Hospital Boards to supply accident Statistics to the Corporation*

Clause 25 requires Hospital Boards to supply "such information as the Corporation may require as to the nature and cause of the injury. . . ." This would give the Corpoation the discretionary power to force a breach of the relationship of confidentiality between doctor and patient. Again the prospect that this provision might be used to provide the information on which the Corporation might base the exercise of its power to withhold compensation under Clause 24(2) ("has reason to suspect") takes us into the realm of nightmare.

(f) *Power to recover compensation overpaid*

Clause 30 would give the Corporation a discretionary power to set off against compensation payable any other compensation or

[48] E.g. Wilfully doing an indecent act in a public place, s.125 Crimes Act 1961; improperly interfering with human remains, s.150 Crimes Act; theft of anything excluding $40 in value, s.227 Crimes Act.
[49] Pp.81-82.

rehabilitation assistance overpaid or levies due. The Law Society submissions to the Select Committee point out that this clause would enable the Corporation to be the judge in its own cause, would throw the onus on the claimant to prove the Corporation wrong, avoids section 94B of the Judicature Act 1908, and has the potential to become "an instrument of oppression".

From the above examples taken from the Accident Compensation Amendment Bill (No. 2) (the Bill is only in abeyance, all these provisions might re-appear in 1982) it is submitted that the trend to introduce discretion to the A.C.A. would have greatly increased with a consequential shift in the position of the injured person from that of claimant to supplicant.

VI. Use of the Dispute Procedures

As discussed in Part V, most Social Security cash benefits have a high degree of administrative discretion. Accident Compensation is generally as of right. In view of this, a comparison of the rates at which applications under the two Acts are declined does not produce surprising results:

TABLE 2

ACCIDENT COMPENSATION

(figures taken from the Accident Compensation Corporation Report for the year ended 31 March 1981, page 8)

Funds on which claims made	Claims received during year	Claims Declined	% Declined
EARNERS	96,652	1,897	1.96%
MOTOR VEHICLE	11,771	226	1.92%
SUPPLEMENTARY	20,324	585	2.88%
TOTAL	128,747	2,708	2.1%

TABLE 3

SOCIAL SECURITY CASH BENEFITS
(figures from the Report of the Department of Social Welfare for the year ended 31 March 1981, Table 30, page 74)

Cash Benefit	Applications Received During Year	Applications Declined	% Declined
*National Superann.	31,066	828	2.67%
Widows	2,566	276	10.76%
Orphans	167	43	25.75%
D.P.B.	20,601	3,138	15.23%
*Family	27,124	978	3.61%
Invalids	3,094	526	17.00%
*Miners	1	—	—
Sickness	35,628	4,395	12.34%
Unemployment	163,979	32,721	19.95%
TOTAL	284,226	42,905	15.10%

* payable as of right

As can be seen from Tables Two and Three, the rate of refusal of the discretionary Social Security benefits is much higher than that of Accident Compensation benefits. The cash benefits under the Social Security Act which are not discretionary, but payable as of right, that is National Superannuation and Family Benefit, are the only ones with refusal rates under 10% and are significatntly closer to the refusal rate under the Accident Compensation Scheme. After the Orphan's Benefit, (which is a small sample size) the benefit most frequently refused, and most frequently asked for, is the Unemployment Benefit.

Given the wide areas of discretion exercised by the Social Welfare Department in awarding cash benefits, one might expect a high rate of challenges through the Review and Appeal procedures by individuals who are refused a benefit. However, the review and appeal provisions in the Accident Compensation Act are used much more frequently, as shown in Table Four.

TABLE 4

	A.C.A. (1981 Report, pp.7-8)		S.S.A. (1981 Report, pp.26, 74, figures for Cash Benefits)	
a) Claims/applications received	128,747		284,226	
b) Claims/applications declined	2,708		42,905	
c) % declined		2.1%		15.1%
d) Number of applications for review	3,847		1,802	
No. of applications for review				
e) as % total claims		2.98%		0.63%
f) as % claims declined		142.0%		4.2%
g) Number of Appeals	330		96	
Number of Appeals				
h) as % total claims		0.26%		0.04%
i) as % claims declined		12.1%		0.22%

Again, all figures are extracted from the respective Parliamentary Reports for the year ended 31 March, 1981. In discussing the Table 4 it must first be pointed out that in lines (d-i), when comparing the number of applications for review under each system with the number of total claims or the number of claims declined, I am not in the strict sense comparing like with like. The review applications are not drawn from exactly the same population as the total number of claims; the reviews may relate to claims made in previous years (thus it was that there were more applications for review under the Accident Compensation Scheme in 1981 than there were claims denied). However, it is submitted that it is still a useful measure of the activism of applicants for the two systems of benefits and the extent to which adverse decisions are challenged.

It can be seen that only 2.1% of accident compensation claims were declined while 15.1% of applications for Social Welfare cash benefits were declined, i.e. the rate of refusals is over seven times greater under the S.S.A. However, in spite of its relatively low rate of refusal of claimants, under A.C.A. the rate of applications for review is much higher than that under the S.S.A.; 142% as compared to 4.2%. The rate of appeals made is also higher under A.C.A.—12.1% compared with 0.22%.

In terms of Administrative law, one might think that the Social Security Act decisions, being so often the exercises of a discretion, are wide open to challenge, e.g. under general vires issues, acting under

Ministerial direction, improper exercise of discretion, unfairness of procedure, taking irrelevant matters into account, etc. Why is it then that the Accident Compensation Scheme under which entitlements are spelt out in detail and with which there is so much less scope for argument, has a rate of review applications which is roughly five times greater than that of the Social Security system and a rate of appeals which is six times higher?

There may be many reasons for this astonishing and paradoxical gap between the rate of challenge of decisions on benefits between the two systems of income maintenance. I should like to propose and briefly examine just two possible explanations: the type of person who applies for the benefits and the role and activism of lawyers.

Beneficiaries under the Social Security Act are traditionally the casualties of society[50] dependent people, sick and disabled people, unemployed people. With the notable exception of National Superannuants, social security applicants are generally in the lower socio-economic groups, are not organised, articulate or represented by advocates.[51] In contrast it might be said that Accident Compensation has altogether a "better class of claimant". As Palmer has remarked,[52] Accident Compensation took welfare into the upper income groups. On quick perusal of the A.C.A. review and appeal cases, one learns of broadcasters with laryngitis, injured lawyers with tax-avoiding farm interests, skiers with fractures, surgeons with hepatitis. I would venture to suggest that few of those just mentioned have had the experience of waiting in line in the Department of Social Welfare. It is submitted that Accident Compenstion claimants tend to be less passive, more articulate, more expectant of the benefit as of right and more willing and able to enlist legal assistance in obtaining it.

Secondly, in suggesting that the role of lawyers is a possible reason for the different rates of challenge under the two Acts, I am not presuming that lawyers are the only or the best advocates a claimant or applicant can have.[53] As Titmuss[54] argued, an adversarial procedure controlled by lawyers may be inappropriate for social welfare tribunals and can take the whole issue out of the claimant's hands, increasing his or her sense of powerlessness in the face of a "City

[50] E. Hanson, *op. cit.*, 151.

[51] An exception to this generalisation which proves the rule is found in *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878 (C.A.). In this landmark case in New Zealand constitutional and administrative law, the claimant, challenging the D.S.W.'s discretionary power relating to the Family Benefit, was the wife of a university lecturer.

[52] *The Welfare State Today* (1977) 12.

[53] A special interest group such as the Combined Beneficiaries' Union, or a trade union official, may well be more appropriate and effective.

[54] R. Titmuss, *loc. cit.*

Hall". Woodhouse[55] recommended an informal and simple procedure for accident compensation proceedings and warned prophetically against "a drift to legalism".

But leaving aside that argument, it is submitted that a lawyer should be a source of information concerning a citizen's rights, into which welfare entitlements must surely fall. However, welfare law is not an area in which the traditional New Zealand lawyer feels at home. Even if one would not subscribe to Ian Muir's[56] description of New Zealand lawyers as "middle class power functionaries available for hire", it seems that welfare law work does not fit in comfortably with the computer-technology and high overheads of the modern down-town private legal practice. Putting it bluntly, although civil legal aid is available for tribunal work, welfare law does not pay.

In comparison, a personal injury claim is by tradition the lawyer's patch. The *Cox* case[57] highlighted the uncertainty surrounding the award of legal costs in accident compensation cases by the Corporation, with Davison C.J. suggesting a legislative amendment or negotiated settlement between the Corporation and the Law Society would be necessary to determine a schedule of "reasonable costs". However, it is submitted that even if an accident compensation case might not in itself be profitable, the middle class client will likely return for other services more lucrative to the firm.

VII. Conclusion

The epithet "visionary" has often been applied to the Accident Compensation scheme, and with justification. It is a unique system of compensation for personal injury, not bettered anywhere else. It *is* revolutionary. But it is also in one sense subversive. It is a cuckoo planted in the sparrow's nest of Social Welfare. As it has begun to grow and show its colours, its fellow-travellers have started to look dowdy, under-nourished and beleagured.

Returning to the Woodhouse quotation cited in the Introduction, this paper has attempted to show that the community still provides inconsistent awards for similar degrees of incapacity. It has been shown that the Accident Compensation Scheme, while being as much a system of income maintenance as the Social Security Act, differs from it in fundamental respects—it springs from a heritage of rights claimed rather than from privileges applied for. Any attempt to merge the two Schemes must take these distinctions into account.

[55] *Woodhouse Report*, 127.
[56] "Community Legal Services in New Zealand" (1981) Legal Services Bulletin, August 1981, 177.
[57] *Cox* v. *Accident Compensation Commission* (unrep. Supreme Ct. Administrative Division, Wellington 1980, M491/77).

Solutions have been put forward, and have been criticised. Hanson[58] considers that to transfer sickness benefit to the Accident Compensation Scheme would involve a major upheaval to the Social Security system, perhaps to the extent of threatening its whole existence. The New Zealand Planning Council[59] recommends a return to the basis of need as the common criterion for any income maintenance, with a standard "core" benefit, staked to the average wage. Palmer[60] suggests placing the entire income maintenance system on an earnings related basis free of all income tests and with few areas of discretion.

It is a complex and essentially political decision which in the 1980s must be governed by the constraint of the economy. Accident Compensation (like of course National Superannuation) was the legislative product of the affluent early 1970s; it is unlikely that there would have been the economic confidence to pass it now. The real question is whether to level up or down to achieve equity of income maintenance. It is submitted that the government has chosen the latter; to prune the Accident Compensation package right back and to increase administrative discretion to the point that the accident compensation claimant eventually will become just another supplicant for the State's Welfare largesse.

[8] *Op. cit.*, 142.
[9] *The Welfare State? Social Policy in the 1980's* (1979).
[3] *Welfare State Today*, 15.

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