Unemployed? Do not pass go . . . accident compensation and unemployment

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Unemployed accident victims receive no on-going weekly compensation payment under the Accident Compensation Act 1972 unless they fall within one of a few very restricted categories of earnings related compensation available under the present legislation. This paper explains and examines those limited categories and suggests that those few situations under the present law which allow earnings related compensation to unemployed accident victims need redefining to avoid the broad discretion at present vested in the Accident Compensation Corporation.

A new benefit is proposed which would compensate those unemployed accident victims who suffer potential loss of earnings and who do not receive any earnings related compensation under the present law.

I. INTRODUCTION

Whenever statutory accident compensation schemes have been discussed in the last twenty years, one great advantage over a Common Law award of damages has been the possibility of an on-going periodic payment which could be increased if the disability worsened and which compensates for lack of earning capacity. No scheme would be acceptable without such on-going payments. Any lump sum awards under such schemes are the icing on the cake.

And yet for a large section of the population the New Zealand Accident Compensation Act 1972 and all its amendments provides nothing but a lump sum payment. Apart from a few minor exceptions no person who is unemployed at the time of suffering an accident which results in a permanent disability, is entitled to any periodic compensation payments. The purpose of this paper is to question the justice of this situation.

This paper does not deal with the question of whether unemployment, like accidents or sickness should give rise to a benefit tailored to the claimant's previous earnings record rather than a flat rate benefit, but rather with whether an accident

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victim should receive any kind of earnings related compensation even though at the time of the accident the claimant was not in employment.

There are many reasons why a particular person may not be in employment at the time of an accident and yet none of these reasons need necessarily be permanent. At present there is a high rate of unemployment especially among unskilled people because of an economic recession. There is the possibility in the future, of unemployment in certain sectors of the population as a result of the introduction of new technology. On the other hand, those people who have readily marketable skills such as computer programmers and doctors are increasingly inclined to take time out of regular employment to travel, take a rest, or involve themselves in family responsibilities. Women who prior to the 1960's would have left the workforce with their first pregnancy and not returned, now do choose to return in the majority of cases.[1] Whatever the future holds it seems very likely that unless or until there are radical changes in the form of contracts of employment and entitlements to remuneration, all adults face periods of unemployment whether by choice or force of circumstances.

It is against this background that the present accident compensation scheme in New Zealand needs to be reviewed. This paper first describes the position of the unemployed claimant under the present New Zealand scheme, then discusses alternative schemes, and lastly attempts to suggest some feasible amendments to the present New Zealand legislation.

II. THE ACCIDENT COMPENSATION ACT 1972

Under the accident compensation scheme which came into operation on 1 April 1974 all persons injured in accidents are entitled to emergency and rehabilitative medical treatment.[2] All persons are also entitled to lump sum payments in respect of permanent loss or impairment of bodily function arising out of an accidental injury calculated on a schedule percentage system with a maximum not exceeding $7,000.[3] A further lump sum of up to $10,000 extended to an absolute maximum together with the section 119 sum of $17,000 is payable in respect of on-going pain, mental suffering, nervous shock, neuroses, disfigurement and loss of amenities or capacity for enjoying life.[4]

Another lump sum is payable for actual and reasonable expenses and proved losses necessarily and directly resulting from the death or injury not being damage to property, an expense in the administration of an estate, a future loss, loss of an opportunity to make a profit, or loss through inability to perform a business contract.[5] Under this section claims for household help while a person is incapacitated can be met.

In the case of the death of an accident victim, the surviving dependants are also entitled to small lump sums e.g. $1,000 for a totally dependent spouse, $500

1 46.3% of married women aged between 40 and 44 were employed at the time of the 1976 census.
2 Section 111.
3 Section 119.
4 Section 120.
5 Section 121.

for each totally dependent child with a maximum total of $1,500 for all dependent children of the victim.[6]

These then are the entitlements of all accident victims. Any further compensation is dependent on the injured person's employment status. Persons who are injured during the course of their employment receive compensation from their employers for the first week of incapacity.[7] After the first week, whether or not the accident happened at work the Corporation[8] pays 80% of the average earnings of employed persons, for so long as they are completely incapacitated, and 80% of the value of their earnings loss for so long as their earning capacity is temporarily reduced.[9] If there is a permanent disability which results in a reduced earning capacity then 80% of that loss is assessed as a permanent benefit.[10]

The general tenor of the Accident Compensation scheme is that only those who were in employment at the time of their accident and who can show a loss of earning are entitled to any on-going weekly payments. A person who was not in employment for whatever reason must be content with the entitlements to medical treatment and lump sums.

There are three provisions of the Act which create minor exceptions to this rule. These are sections 59, 104(6) and 118. There is some overlap between these sections.

A. Section 59

Section 59 provides that cover under the earners' scheme may be extended beyond cessation of employment for a period not exceeding 13 weeks. The period of the extension is calculated by allowing one week for each 30 days which that person was employed during the previous 12 months plus a further 7 days following the last day of his employment. So if Joe, who had been employed in the same job for the previous 12 months was made redundant with effect from 1 February his cover would extend under this section until 3 May. If Mary, who left school and found employment on 1 November, was also made redundant on 1 February her cover would extend only until 1 March. By the operation of section 104(10) the earnings related compensation of the accident victim whose period of cover has been extended by section 59 is calculated on the basis of the claimant's position before she became unemployed. The time limits set by section 59 are arbitrary. They may have had some validity when they were first drafted in a time of full employment but their operation in present circumstances may result in grave injustice.

The proviso to the section states that the Corporation may in its discretion determine that the cover shall be deemed to extend for such further period (if any) as the Corporation considers reasonable having regard to that person's employ-

6 Section 124.
7 Section 112.
8 I.e. Accident Compensation Corporation. Replaced the Accident Compensation Commission: Accident Compensation Amendment Act 1980. Referred to in this article as the Corporation.
9 Section 113.
10 Section 114.

ment history, state of health, and age, and to the circumstances under which he ceased to be an earner. The operation of this proviso is an unknown quantity. Can it be assumed that a healthy, 30 year old skilled worker, with a stable work record, who is made redundant on 1 February as the result of a change in government policy towards the industry in which she was employed, and who was injured on 14 May before she had found new employment would be favourably considered for an extension of cover? What does the reference to age in the proviso mean? If the same person in the example above is 55 years old is she less favoured or more favoured for an extension of cover because she has less chance of re-employment than the 30 year old? If the redundant worker had a patchy employment history is this to count against an extension of cover under the earner's scheme?

It is totally inappropriate to mention criteria to be considered by the Corporation in the exercise of its discretion without any indication of what consideration of such criteria should mean. Is it a plus or minus factor to be 55 or 18, or have a heart condition? If the accident victim was sacked from her last job for unpunctuality should this give the Corporation the ammunition to refuse an extension of cover? Is this a discretion which should be exercised in the claimant's favour often or very rarely? If it is to be exercised very rarely — on what grounds? Is it a sufficient reason that the Corporation wants to save money? During a period of widespread unemployment is the Corporation to assume that a claimant currently unemployed is unlikely to find work and therefore has not suffered a loss of wages?

The Corporation endeavours to reach a just result in the operation of this discretion so as to achieve the object stated in section 104(1) of compensating the accident victim in such a way as to "fairly and reasonably represent his normal average weekly earnings."

With increasing numbers of people who have been in regular employment becoming redundant and being unable to find new jobs section 59 must be used more and become more important. As it stands it is most unsatisfactory. The 13 week period is an arbitrary cut-off point which bears little relation to the time any unemployed person who was trying to find work might expect to be out of work.[11] The discretion of the Corporation to extend the period of cover is too broad and open to abuse. Decisions made under this section must appear arbitrary and unfair no matter what internal rules the Corporation might devise for itself.

B. Section 118

Section 59 deals with the person who has been in paid employment and allows the Corporation in limited circumstances to assess earnings related compensation on the basis of past performance. Section 118 on the other hand, deals with persons who are not currently employed but who would have been likely

11 For the calendar year 1980 the average duration of an unemployment benefit was 14.7 weeks (14.2 weeks for males and 15.7 weeks for females). Of all those receiving unemployment benefits on 31 March 1981 the median length of time was 16 weeks. Social Welfare Department statistics.

to be employed in the future, and who have therefore suffered a loss of potential earning capacity as a result of their accident.

The claimant under section 118 must be a person ordinarily resident in New Zealand at the time of the accident and the accident must have occurred in New Zealand. The persons included are set out as follows in subsection (1)c:

(i) Had not attained the age of 16 years; or

(ii) Was a pupil enrolled for secondary education or special education as those terms are defined in section 2 of the Education Act 1964; or

(iii) Was actively studying or training for an occupation, career, or profession which he intended to take up on completing his study or training, and satisfies the Corporation to this effect; or

(iv) Was not in regular work in paid employment in any occupation, career, or profession, and had completed a course of secondary education or special education within a period of 6 months before the date of the accident; or

(v) Had completed his study or training for an occupation, career, or profession, and satisfies the Corporation that he intended to enter upon that occupation, career, or profession within a reasonable time (not being more than 6 months) after so completing his study or training; or

(vi) Was not in regular work in paid employment, and had made positive arrangements and preparations to take up such work in New Zealand (either as an ployee or a self employed person) at a future time, being not more than 12 months after the date of the accident, and satisfies the Corporation to this effect; or

(vii) Having completed his study or training for an occupation, career, or profession, had entered upon that occupation, career, or profession, and the fixing of his relevant earnings under the provisions of subsection (5) of this section would result in a higher rate of compensation being payable to him for the time being, under section 113 of this Act, than would otherwise be so payable:

Provided that this subparagraph shall not apply in a case where the relevant earnings for the time being applicable (apart from this section) for the purposes of the said section 113 would be less than the amount prescribed for the purposes of this section, unless the Corporation is of the opinion that those relevant earnings would have reached that amount if the accident had occurred at a later time, not being more than 24 months after the date on which the person entered upon that occupation, career, or profession or 12 months after the date of the accident (whichever is the earlier).

Sub-paragraphs (i) to (v) include a homogenous group who are still studying or training or who are unemployed within six months of completing their study or training.

Sub-paragraph (vi) is an interesting provision which can be of help to some few people who are unemployed at the time of their accident but who have made positive arrangements to take up employment within 12 months of the time of the accident. A "positive arrangement" must be something less than "having engaged to work under a contract of service" under section 104(6).[12] It is difficult to imagine a 'positive arrangement' which will be sufficient to satisfy the Corporation but not to amount to a contract of service. A fairly common group who have made claims under this section are students who have made arrangements

12 Infra Part II.C. Section 104(6).

for holiday jobs but who are injured in an accident and are not sufficiently recovered to take up their holiday job. Some form of offer and acceptance between the student and the employer seems to be necessary. A student who has always found fruit-picking work with Company A in Nelson is unlikely to have a claim met merely on the expectation that this fourth summer she will also work for Company A. Neither will a communication from a holiday employer to "turn up and we'll see what we can do for you" be likely to be accepted by the Corporation.

Other persons who are likely to be affected are those who have chosen to withdraw from the workforce for a period of time but with the full expectation that they will return in the future. For example, the person who has taken 6 months to travel, or plans 2 years out of the workforce to attend to family responsibilities. If such a person is injured in New Zealand before going back into the workforce then she will have no claim for earnings related compensation unless "positive arrangements" have been made.

Just what amounts to a positive arrangement has been discussed in one Appeal Authority decision delivered on 20 September 1978. In discussing section 118(1)(c)(vi) Blair J. said:[13]

> I think it is quite plain that Parliament has deliberately imposed quite a strict test to enable a claimant to qualify. Although a plaintiff is not required to prove a binding contract of employment, he is obliged to show that the *arrangements* had got past the nebulous stage. The justification for this is obvious. If a claimant is asking the state to pay him for a potential loss of earnings, it is reasonable that he should establish that the earnings would almost certainly have been available to him, if the accident had not happened . . . I must find, as a matter of fact, that at the time of his accident, appellant had not made *positive arrangements and preparations* to work at the construction site. The use of the word *positive* indicates that the arrangements must have reached a stage where it can be assumed that, even though there may not be a formal contract, both sides to the arrangement regarded it as a settled one.

The appellant in that case fractured his ankle while serving a short prison sentence. Prior to the accident a probation officer had arranged for the appellant to have an interview for a job with a construction firm, but nothing further had been done.

In another earlier review decision in 1974[14] the claimant was unemployed at the time he was injured but had been asked to attend an interview for a job and said he had been confident of getting the job. The accident intervened and prevented him from attending the interview. He did not succeed in a claim under section 118(1)(c)(vi).

Sub-paragraph (vii) provides for the situation where a new entrant into an occupation although employed at the time of the accident, is earning less than the bare amount provided for potential earnings losses by section 118(5), but who would have expected in that occupation to be earning a higher income within the first two years of employment. The position of the law clerk who has completed the

13 *Appeal by G* (1979) 4 A.C.C. Rep. 29 (February).
14 (1976) 1 A.C.C. Rep. 34 (May).

degree but not the professional qualification would be an example. This sub-paragraph does not deal with potential earnings of an unemployed person but with special rules for assessment of the value of lost earnings for a certain category of employee.

Section 118(5) sets a notional figure currently of $145 for relevant earnings under section 118(1) and losses are then calculated as usual in terms of sections 113 and 114. This notional figure was first set at $50 in 1972 and has been raised fairly regularly since then in 1976, 1977, 1979 and 1981.[15]

For those claimants who are fortunate enough to fall in categories (iii), (v) or (vii) i.e. those who were engaged in or just completed studying or training for an occupation, career or profession, the amount may be increased by up to a further $72.50 commensurate with the potential earning level in that occupation.[16] The brilliant school student who planned a career as a surgeon until losing both hands in an accident at age 15 (sub-paragraph (i)), or the qualified accountant with 10 years practice who has taken maternity leave and who incurred brain damage in an accident (sub-paragraph (vi)) do not qualify for the extra $72.50.

Subsection (1)(c)(vi) which concerns the person who is not in paid employment at the time of the accident but who has made positive arrangements does not sit well in this section which otherwise deals with students and those recently qualifying for occupations. There may be justification for holding newly qualified people at a low rate of earnings related compensation but it seems unfair to lump all persons in sub-paragraph (vi) with school leavers and newly qualified people. As positive arrangements are required before eligibility is established, surely rates of pay for the job will be readily ascertainable. Why should that claimant be limited to a maximum of $145 per week?[17]

No earnings related compensation is payable under section 118 before the claimant's sixteenth birthday and then the assessment will be made at such date as the Corporation and the injured person or his guardian agree, or failing agreement on a date which the Corporation may fix having regard to all the circumstances of the case.[18]

Section 118 can also be used where a claimant comes within the categories set out in subsection (1)(c)(i) — (iv) and does not suffer any permanent disability but the period of temporary incapacity has delayed entry into the workforce and thus potential earnings have been lost. For example, a university law student who came within subsection (1)(c)(iii) was involved in a car accident in June and does not recover from injuries until the following January. She has missed one year of her studies and it will be one year longer before she is earning. She has suffered a potential loss of earnings and will be entitled to the flat rate of

15 The Accident Compensation (Prescribed Amounts) Order 1976/138 = $75; 1977/300 = $90; 1979/191 = $100; 1981/45 = $145.

16 Section 118(5) first proviso.

17 As at February 1981 the average gross weekly income (including overtime) was $259.30 for males and $185.06 for females.

18 Section 118(3) and (4).

compensation set out in section 118(5) for a period of one year. The claimant and the Corporation would presumably come to an agreement under section 118(3) that earnings related compensation would be paid during the final year of her full time studies, that being the year that otherwise she would have been employed.

C. Section 104(6)

Section 104(1) sets out how the Corporation is to calculate the amount of the accident victim's relevant earnings, i.e.:

> such amount as in the opinion of the Corporation, would, at the time of the accident fairly and reasonably represent his normal average weekly earnings having regard to such information as the Corporation may obtain regarding his earnings before the time of the accident and his earnings at the time of the accident, and to his work history and the period of his residence in New Zealand before the time of the accident.

Generally, the Corporation will begin by looking at the claimant's current weekly earnings but if these are not representative the Corporation may take into account average weekly earnings over the last 12 months.[19]

Section 104(6) states:

> Notwithstanding anything to the contrary in the foregoing provisions of this section, the Corporation may from time to time, in so far as it thinks fit to do so —
>
> (a) Fix a minimum amount of relevant earnings for any employee who, having engaged to work under a contract of service, has not commenced to work under that contract.

Section 104(1) is essentially backward looking in order to determine the relevant earnings of a claimant, whereas section 104(6) looks to the future. There is no requirement, however, that the relevant earnings of a claimant who falls within subsection (6) should be assessed at the rate for the new job. The Corporation is given a complete discretion to fix a minimum amount of relevant earnings as it thinks fit.

There are a number of situations where another provision of the statute seems to conflict with the discretion given by section 104(6).

1. Section 104(1)

In a situation where a claimant was already in employment but had given notice and was due to begin a new job the following week, there is a conflict between section 104(1) and section 104(6) if the claimant was injured while still in the first employment. The claimant's relevant earnings can be assessed under either provision. Is the Corporation to assess the relevant earnings always at the rate for the new job, on the supposition that this more truly reflects the actual loss of earnings? Or should the claimant be given the advantage of whichever assessment would produce the higher rate of earnings related compensation? The discretion in subsection (6) is so wide, that the Corporation is free to fix a rate which does not relate specifically to either job and could possibly be lower than an assessment made in respect of either job.

19 Section 104(2), (3), (4).

2. Section 104(10)

This subsection refers back to section 59 and provides that relevant earnings for a claimant with extended cover under section 59 may be assessed on the basis of the claimant's earnings at his last employment. A question arises in respect of a possible conflict of provisions where a claimant could have extended cover and has also contracted for a new job. But the wording of section 59 requires that the claimant's "cover would but for this section have ceased". An employee is defined in section 2 as "a person who has engaged to work or works in New Zealand . . .". Therefore, a claimant who fulfils the requirements of section 104(6) is an employee, has cover under the earner's scheme and is thereby excluded from the operation of section 59.

3. Section 118(1)(c)(vi)

The claimant under section 118(1))(c)(vi) is someone who "was not in regular work in paid employment, and had made positive arrangements and preparations to take up work in New Zealand . . . at a future time being not more than 12 months after the date of the accident." There could well be a question as to whether a particular claimant falls under this provision, having made "a positive arrangement" or whether the claimant has in fact "engaged to work under a contract of service" within the terms of section 104(6). There is a clear distinction in the way relevant earnings are to be assessed between those cases which fall under section 118(1)(c)(vi) and those under section 104(6). Under section 118 the amount of relevant earnings is assessed in respect of the flat notional rate provided for by section 118(5). Under section 104(6) the Corporation has a discretion to fix a minimum amount but presumably this amount will usually bear some relation to the actual rate of pay for the new job. The task for the legal representative of a claimant is to argue that the claimant's situation falls within the section which is most likely to generate the higher amount of earnings related compensation. If the claimant's future prospects include employment worth more than $145 per week, then he is likely to be better off with a "contract of service" rather than a "positive arrangement", although here again the broad discretion vested in the Corporation by section 104(6) could mean that the Corporation's solution to such a problem is to fix a minimum amount of relevant earnings at the notional rate provided by section 118(5).

4. Section 118(1)(c)(i) — (v)

The question in respect of these provisions is not to choose the section under which the claimant falls, but, in a situation where she falls squarely under both section 118(1)(c)(i) — (v) and section 104(6) to decide which rate of earnings related compensation should apply. This concerns, for example, the computer programmer who had just completed her qualification when she is injured in an accident. She has not yet started a job so she falls within section 118(1)(c)(v). She has however "engaged to work under a contract of service" beginning the month after the accident and therefore she also falls under section 104(6).

If she has a contract of service then she is an earner under section 104 and thus her case must be considered in the light of section 118(5) second proviso which reads:

> Provided also that in any case where the injured person is an earner whose relevant earnings ascertained in accordance with section 104 of this Act would be more than the amount so prescribed for the purposes of this section, the Corporation may fix the relevant earnings at such greater amount as it thinks fit (not exceeding the amount so ascertained) if, but only if, the Corporation is satisfied that, were it not for the injury the person had the capacity to continue to earn throughout a normal working life at a rate not less than that greater amount.

So the claimant is confronted with another discretion of the Corporation superimposed on the discretion it already exercises under section 104(6). The proviso requires the Corporation not to set a level of earnings related compensation that the claimant would not have had the capacity to earn but for the accident. If the amount arrived at by the Corporation under section 104(6) bears some relation to the wage actually contracted for, then the discretion in the proviso will rarely be useful. There may be isolated instances where a person had contracted for a special three month assignment which included danger money or whatever and which the claimant did not intend to repeat. In such a case the Corporation is free to set a rate of earning related compensation which would reflect her ordinary earnings rate.

The possibility of such high earning short term assignments is presumably one of the reasons why the Corporation is given a discretion to fix a minimum amount under section 104(6) rather than the rate for the job, but would it not have been better to specify the rate for the job, with a proviso that where the earnings were to be exceptional and short-term, the Corporation would have a discretion to reduce the long-term earnings related compensation?

D. Summary

Under the 1972 Act, unemployed accident victims are not generally eligible for any future earnings losses resulting from their injuries. There are three exceptions to this rule: (a) Section 59 which extends eligibility to persons who although not employed at the time of the accident, have been employed in the recent past; (b) Section 118 which extends eligibility to persons who are not employed at the time of the accident but who fit into one of the categories of person who would have been expected under the statute to have employment in the near future but for the accident; and (c)) Section 104(6) which extends eligibility to persons who may or may not be employed at the time of the accident but who have a definite contract of employment in the future.

Each of these provisions gives broad discretions to the Corporation to determine whether a claimant is entitled to any compensation for future earnings losses and at what rate such losses should be paid. There is no unifying concept behind these three provisions and conflicts can arise between them.

III. ALTERNATIVE SCHEMES

It is very easy to view the possibilities for compensation entirely in terms of the Accident Compensation Act 1972. Any amendments to improve the position of the unemployed claimant must be made in the context of the present New Zealand legislation if they are to be entertained as a feasible possibility. It is interesting however to discuss alternative accident compensation schemes and to ascertain how other such schemes have dealt with the question of the unemployed claimant. The scheme put forward by the New Zealand Royal Commission under the chairmanship of Sir Owen Woodhouse[20] is in fact totally different from the scheme adopted by Parliament under the current legislation. The draft Bill put up by the Australian Committee Report in 1974[21] is also an entirely different proposal and consequently contains different solutions for the unemployed claimant.

A. Common Law

Before these two statutory schemes are discussed it is appropriate to mention briefly the way the problem is treated at Common Law. At Common Law the chief difficulty as both Woodhouse Reports have indicated is for the plaintiff to be able to establish a claim at all. Once, however, the question of liability has been decided in favour of a plaintiff, the question of potential earnings losses is considered as part of the quantum of the claim.

Evidence is brought concerning the plaintiff's potential for employment and likely rate of earnings but for the accident. Built into this assessment are contingency factors such as likelihood of finding employment and length of time in the workforce. Obviously, in the case of a child any realistic assessment is impossible. The practice in the United Kingdom has been to award a global sum for a child including potential earnings loss without any attempt to quantify that particular loss.[22] There is a special difficulty in respect of children which is carried over into any statutory scheme especially where the incapacity is very serious. In the case of a person who had deliberately taken time out of the workforce to travel or raise a family and who could bring evidence of an intention and likelihood of return to employment before the accident intervened there is the basis for a calculation of a figure including a probability factor.[23] The potential losses of a person who was unemployed through lack of availability of work at the time of the accident are more difficult to assess but presumably some factor of likelihood of this particular plaintiff finding work within the foreseeable future must be in-

20 *Compensation for Personal Injury in New Zealand. Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967).

21 National Committee of Inquiry *Compensation and Rehabilitation in Australia. Report of the National Committee of Inquiry* (Government Publishing Service, Canberra, 1974).

22 *S.* v. *Distillers Co.* [1969] 3 All E.R. 1412.

23 See for example *Heath* v. *Flouty* (1970) reported in Kemp & Kemp *The Quantum of Damages* (Sweet & Maxwell, London, 1975) Vol. 2, para. 2.011. In that case the potential earnings losses of a badly incapacitated 16 year old girl were calculated on the basis of her likely entry into the workforce as a teacher, the probability of her taking time out from employment to raise a family and the probability of her returning to the workforce once her children had grown up sufficiently.

cluded.[24] The computation of such a potential earnings loss is difficult for a court even when the idiosyncracies of the particular person can be taken into account. A Common Law assessment can be tailored afresh for each plaintiff, whereas under a statutory scheme the rules must inevitably be more generalised and arbitrary. The advantage under a statutory scheme that losses can be re-assessed in the future will not be of assistance to a person unemployed at the time of the accident if she is thereby excluded from an earnings loss assessment.

B. The New Zealand Woodhouse Report

The Royal Commission to Inquire Into and Report Upon Workers' Compensation was appointed in September 1966 and finally reported in December 1967.[25] This was a time of full employment in New Zealand and that had been the case since the Second World War.

The question of the unemployed claimant as posed by this paper was not specifically addressed but the form of the scheme does allow some level of periodic payment to the person who was unemployed at the time she was injured.

Apart from small lump sums for minor injuries which did not result in any permanent incapacity,[26] all payments were to be periodic payments.[27] The periodic payment was to be calculated by attributing a percentage value of disability to it according to a schedule, and then setting this percentage against the claimant's current earnings. In this way the amount of the periodic payment was to be arrived at. Periods of total incapacity were to be compensated at only 80% of the claimant's earned income so that there would be an incentive for her to return to work.[28]

If loss of a foot for example is given a schedule value of 60%, then a man earning $200 per week who lost a foot would receive compensation payments of $120 per week. The conceptual difficulty with this system is that the claimant receives $120 per week compensation whether he is a labourer who can no longer perform his original work, or an accountant who can.

The person who was injured at a time when she was not in employment was to receive a periodic payment equivalent to the existing sickness benefit for a single person during the period of temporary total incapacity.[29] For permanent partial disability the minimum rate for total incapacity would be fixed at a notional minimum level. This notional minimum would also be the actual rate of compensation paid to those left totally and permanently incapacitated. The man who lost a foot, if unemployed at the time of the accident would receive 60% of the notional minimum rate.[30]

24 See for example *Rouse* v. *Port of London Authority* [1953] 2 Lloyd's Rep. 179 where the potential earnings losses of a dockworker were calculated with the probability in mind that he would have suffered periods of unemployment.
25 Supra n. 20.
26 Ibid. para. 305(e).
27 Ibid. para. 293.
28 Ibid. paras. 291, 292, 303.
29 In 1981 sickness benefit for a single person over 18 years old is $66.00.
30 Ibid. para. 300. In the Woodhouse Report this amoun was set at $20.

Long term incapacities, it was suggested, could be compensated on the basis of income averaged out over a period of 12 months.[31] If such a system were introduced a person who had been in employment for part of the last 12 months could possibly have a periodic payment assessment higher than the notional minimum. The Report also states that:[32]

> the controlling authority should be given some margin of discretion to deal with all cases at the time of assessment. And the applicable regulations should be used "as a guide not as a strait jacket".

The problem of the nature of this discretion and how it might be limited was not dealt with by the Report as this was a detail of drafting and unfortunately the New Zealand Royal Commission Report did not present a draft Bill.

Young people with potential rather than actual earning losses were not to begin to receive periodic payments for their injury until they reached the qualifying age which was suggested as the date at which full time employment commenced, or, a minimum level of weekly earnings was reached, or the claimant reached 18 years of age.[33]

The Woodhouse proposal was comprehensive in that all injured persons with a permanent disability would receive a benefit. The issue which was not addressed by the Woodhouse Report was whether it was just to restrict those who were unemployed at the time of their injury to a periodic payment at a minimum level without consideration of the circumstances or reason for the unemployment. This scheme would give the unemployed person more than the current New Zealand legislation but probably not a just amount.

C. The Australian Report

The Australian National Rehabilitation and Compensation Scheme Committee of Inquiry Report was completed in 1974. That Committee therefore had the benefit of the New Zealand Woodhouse proposal and the different scheme set out in the New Zealand statute. Their proposal was an entirely different one again and although the draft Bill attached to the Report puts the unemployed claimant in a better position than under either of the other two schemes, the question of unemployment was not specifically addressed. The discussion of loss of potential earnings was again limited to young people who were still studying or training. The question of the adult such as the married woman with child care responsibilities and potential earnings losses was not considered.

The draft Bill set up several different means of calculating weekly benefit according to the nature of the incapacity suffered and the claimant's employment status. The ceiling for those benefits based on weekly income was to be a notional weekly income of $500 and the notional minimum weekly income was to be $50.[34] For a temporary partial incapacity the claimant was to be paid one half

31 Ibid. para. 298(b).
32 Ibid. para. 298(d).
33 Ibid. para. 283.
34 Op. cit. n. 21, Pt. II — Draft National Compensation Bill, cl. 31.

of her pre-accident weekly income.[35] This benefit was based on actual weekly earnings and appropriately, because of its temporary nature, not available to the unemployed person. For total incapacity the employed person was to receive 85% of her weekly income after the first week, again an assessment based on actual earnings.[36] The unemployed person who suffered a total incapacity would prima facie be assessed on the basis of the minimum notional weekly income of $50, thus receiving 85% of $50 but not payable until 3 weeks after the incapacity first arose.[37] Clause 30 allowed the Director-General to determine a fair representation of a person's weekly income if the usual method of determining weekly income seemed to indicate an income which was non-representative for a particular period. And subclause (2) allowed the Director-General to set a certain earning period as representing the average earnings of a claimant as long as it was not a period more than five years before the incapacity commenced. This provision gave some flexibility to the determination of weekly income but seems more oriented towards a person such as an author whose earnings are liable to fluctuate over a period of time. It could be of assistance to an unemployed person but presumably only if she had not been out of work for long, or if she was employed at the time of the injury but had only recently become re-employed after a long period of unemployment. This clause is backward looking and does not leave room for any enhancement of the minimum rate for the adult who is currently unemployed but who planned future employment, for example, the person who has been involved in full-time child care but who intended to re-enter the workforce in the near future. Neither does it help the over 26 year old who has left earlier employment in order to re-train for a totally different career and who suffers an injury before being employed in that new career.

For permanent partial incapacity, the use of actual earnings in the calculation of the benefit was forsaken for a standardised figure based on average weekly earnings. The employed person's injury would be assessed as a percentage according to the Schedule, and her continuing weekly benefit would be the percentage value of this injury multiplied by 85% of the average weekly wage.[38] So, if loss of a foot was a 60% disability according to the schedule and the current average weekly wage was $250 per week, the claimant who lost a foot would receive $127.50 per week regardless of pre- or post-accident earnings.[39]

The unemployed person who suffered an injury was to be entitled to a permanent payment based on the percentage value of her injury multiplied by 60% of the average weekly wage.[40] So the unemployed person who lost a foot as in the above example would receive $90 per week. For assessment of permanent partial incapacity the claimant could be assessed at the 85% rate if she had been employed within the last 12 months, so there was a period of grace before the claimant dropped down to the level of an unemployed person.[41]

35 Ibid. cl. 38.
36 Ibid. cl. 31.
37 Ibid. cl. 40. We can assume that this notional minimum would have been raised in accordance with inflation.
38 Ibid. cl. 33(1).
39 (85% x $250) x 60% .
40 Ibid. cl. 33(2).
41 Ibid. cl. 33(2).

There was a further provision which may have been helpful to the unemployed person and this was clause 36 which provided that:

> If for any reason the Director-General determines that the rate of benefit that, but for this section, would be payable to a person under section 33 or 34 is less than it fairly should be, the weekly rate of benefit payable to that person is such higher rate as the Director-General determines.

This clause confers a very broad discretion and it is possible that it could be used to raise the benefit of the claimant who has been unemployed for more than twelve months. The Report envisaged this provision as being necessary to cope with the situation where the calculation suggested under clauses 33 and 34 would leave the claimant in a disadvantaged position because the particular disability for that claimant, as against her pre-accident earnings would be inadequate compensation.[42] So the highly remunerated violinist who lost the use of her fingers on one hand may need to receive extra compensation because the kind of employment she could obtain after the injury coupled with her schedule rate of compensation as against average weekly earnings would not make up adequate compensation.

The Report did not advert to the position of the skilled and formerly highly paid worker who was made redundant and has been out of work for over 12 months or the housewife whose plans to return to a particular type of work have been dashed by injury. Clause 36 could be used to help such people but if it were it would probably be being used in a far broader fashion than the Committee originally envisaged. There would be difficulties of uniformity in administration and injustices would be likely to result. There is also a problem here in that the way the discretion is provided for in clause 36 in respect of permanent partial disability, allows for a more flexible approach than the discretion conferred in clause 36 in relation to total incapacity. This could result in the unemployed person with a partial incapacity receiving a higher benefit than the unemployed person who was totally incapacitated. The question of unemployment and loss of earnings benefits needs to be addressed separately and dealt with by design rather than accident.

The Australian draft Bill provided for no benefit to be paid in respect of personal injury until the claimant attained the age of 18 years, or became engaged in full time employment, or was earning not less than $50 per week in employment/self employment.[43] For those persons over the age of 15 years who were or became entitled to a benefit the notional minimum of $50 for the weekly income applied, and further assessments could be made at the age of 21 and 26 years so that the weekly income factor as a determinant of the benefit level could be raised if the claimant's earnings would have been higher but for the incapacity. Those incapacitated between the ages of 21 and 26 could also have the amounts of their weekly benefit reassessed on this basis at age 26.[44] So the recognition of potential variation in earnings loss is only acknowledged in the draft Bill for younger entrants into the workforce. Those who change careers or enter the

42 Op. cit. n. 21, para. 536.
43 Op. cit. n. 34, cl. 18 and cl. 4.
44 Ibid. cl. 29.

workforce at a later age do not receive this consideration, and therefore run the risk of receiving a benefit based on the notional minimum weekly income.

D. Summary

It is helpful to contrast provision for the unemployed under the present New Zealand scheme with that suggested by the New Zealand Woodhouse Report and draft Bill attached to the Australian Report.

Suppose Tom lost his hand after being involved in a car accident two weeks after he returned to New Zealand having lived in England for the past three years. He had not found employment in New Zealand at the time of the accident.

Under the Accident Compensation Act 1972 Tom would receive $4,900 under section 119 and some further sum not exceeding $10,000 for loss of enjoyment of life and disfigurement under section 120. He would not be entitled to any other benefit.

Under the New Zealand Woodhouse proposal he would receive 70% of a notional minimum rate as a continuing periodic payment. In 1967 the suggested minimum rate was $20 per week which would presumably be at least $120 on current figures thus giving Tom a weekly benefit of $84.

Under the draft Bill attached to the Australian Report Tom would be paid a benefit calculated against 85% of the average weekly wage. The average weekly wage in New Zealand in February 1981 was $215 so his weekly payment would be of the order of $127 per week.

It can be clearly seen that a periodic payment, even when calculated against some kind of minimum or average rate gives a more realistic benefit to the injured person than the lump sum awarded under the present New Zealand scheme.

IV. POSSIBLE AMENDMENTS TO THE NEW ZEALAND LEGISLATION

There is a need to deal with the question of earnings related compensation for the person who is incapacitated by accidental injury at a time when she was unemployed. The following conservative proposals are made in the context of the present New Zealand legislation with the object of taking account of potential earnings losses for the unemployed but without totally re-vamping the approach to lump sum and periodic payments. So, though the scheme put forward by the Australian Committee may seem to have something more to offer for the unemployed claimant, it is unrealistic to make suggestions at present in New Zealand which would require the whole basis of the scheme to be re-thought.

A. A New Provision

In order to do away with the worst inequities of the present scheme a new provision is proposed which would give a benefit for loss of potential earnings to those injured at a time when they were unemployed. This benefit would be restricted to those who suffered a permanent incapacity which resulted in an earnings

loss. It seems reasonable that earnings related compensation should not be payable immediately to an unemployed accident victim unless she falls within one of the already existing provisions of the statute. The unemployed person would have been without earned income but for the accident and should not get an additional benefit just because of the accident. The unemployed teacher who breaks a leg in a ski-ing accident and who recovers completely will receive no earnings related compensation as the incapacity was temporary. The unemployed right-handed accountant who loses three fingers on her left hand will receive no earnings related compensation because although she has a permanent disability it will not affect her employment prospects.

There are two main problems in setting criteria for entitlement to compensation for potential earnings losses of the unemployed accident victim. These are the time at which such earnings related compensation will commence, and the rate at which it will be paid.

1. Time at which earnings related compensation commences

The time at which earnings related compensation should begin for the person who was unemployed at the time she had the accident and who suffers a permanent partial incapacity must be the date on which she becomes re-employed. This may appear unjust in that a person with an incapacity is likely to find it harder to find employment than an able-bodied person even in a time of fairly full employment. The difficulty is brought about by the New Zealand system of weekly compensation payments based on actual earnings loss rather than a percentage level of past earnings as in the Woodhouse proposals, regardless of actual losses. An alternative way of computing losses for the unemployed claimant which allowed compensation payments to commence at some arbitrarily fixed date before the claimant had actually found work would be likely to seem unfair in comparison with the assessment of earnings related compensation for employed persons.

The operation of this proposal can best be illustrated by an example. Suppose in 1978 Mary was injured in a car accident. At the time she was not employed as she was looking after her two young children but she did have the intention of returning to her work as a physical education teacher when the youngest child began school in 1980. Because of her leg injuries she is not able to work as a physical education teacher but she does obtain a clerical job in 1980 which is lower paid than work as a teacher with her qualifications. She would be entitled to earnings related compensation from the time she commenced her clerical job.

Where the unemployed person suffered a total permanent incapacity then there are difficulties with setting a starting date for earnings related compensation. The date could either be set as the one in respect of which the claimant is able to bring evidence of an intention to commence employment, or, it could be set at an arbitrary time of say, 12 months from the date of the accident. If the date were to be set by the claimant's evidence there may be some abuses of the provisions in this respect but as we are dealing only with those people who are (a) totally incapacitated by an accident and (b) were unemployed at the time of that accident, we are speaking of a very small number of people. The problem with

setting an arbitrary date for the commencement of earnings related compensation at a fixed distance from the time of the accident is that it is unlikely ever to be a realistic assessment of when the claimant would have found work but for the accident, and would always be operating either to the advantage, or disadvantage of the individual claimant.[45]

2. Rate for potential earnings related compensation

The next issue in relation to cases of potential earnings losses for unemployed people is the rate at which earnings related compensation is payable. The present solution under section 118 is to set relevant earnings at a notional flat rate of $145 per week increasing to a maximum of $217.50 per week only in the case of those who were engaged in job-oriented training at the time of their injury, which job would have netted a greater amount than $145 per week after a time. It is submitted that this flat rate is too low whether a flat rate without more is retained or whether alternative means of assessment are made available alongside the flat rate provision.[46] A flat rate may be the only appropriate means for calculating earnings related compensation for those injured when still at school, or those without currently marketable work skills.

In those cases where claimants have specific qualifications and possibly a history of employment in a certain field, why can earnings related compensation not be calculated on the rate for that job? In New Zealand where there are award rates or government scales for the majority of jobs it would be a relatively simple matter to ascertain the rate for the job. The trained carpenter, experienced shop assistant, qualified teacher, could receive compensation based on the award rate for their previous permanent employment. A figure for jobs without award rates could often be calculated fairly by reference to similarly employed people. Such a system is not without its difficulties. For example, the woman who was a senior air hostess before she left to have children and who states that she intended to re-enter the workforce but not as an air hostess and with no specific job in mind is not easily assessable. Maybe such a person must be content with an assessment related to the notional rate, which if it were set at somewhere approaching the average wage would be likely to be more acceptable to a claimant. It is submitted that a provision which required the claimant to produce evidence of the earnings rate for the job she would have been re-employed in, with the possibility of electing assessment on the basis of the notional rate as an alternative would be workable. If the claimant could not provide satisfactory evidence of a higher possible earnings rate then the assessment would be made in relation to the notional rate. It is important to remember that the cases of permanent partial incapacity and total incapacity

45 There are very few claimants under the scheme who are still receiving earnings related compensation after 18 months. In September 1979 there was a total of 17,446 claimants who were still receiving erc 6 months from the accident. But only 560 of that number had been receiving erc for a period of more than 18 months and less than 2 years. Accident Compensation Corporation statistics.

46 The average wage including overtime for all persons in February 1981 was $215.89 per week. For males it was $259.30 per week and for females $185.06 per week.

are relatively few and that most unemployed people once recovered would be employed using their original qualification and skills.[47]

B. Changes to the Existing Sections 59, 118 and 104(6)

These existing provisions are different from the suggested new provision in that they offer immediate earnings related compensation in appropriate cases and for temporary as well as permanent incapacity. The recommendation made in respect of these sections are minor alterations in accordance with criticisms made earlier.

1. Sections 59 and 104(10)

It is submitted that the discretions ought to be removed completely from section 59 and cover should be extended to all those who have had cover under the earners' scheme within the last 12 months. At present cover is extended to 3 months and for longer at the discretion of the Corporation. To extend this period for a further nine months is a radical proposal in that it would bring within the ambit of earnings related compensation a good many of those unemployed at the time of their accidents. It would mean that many of those who suffered an injury while temporarily out of the workforce whether voluntarily or involuntarily would not be prejudiced. The only persons who would gain an unfair advantage in the sense that they would be compensated for earnings they probably may not have lost would be those who had given up employment voluntarily for a period longer than one year and who were injured during that year. The only clearly identifiable group within the population who do this are parents, usually mothers who take time out of employment to raise families. It is time as a society we recognised the economic value of such work. After the period of temporary total incapacity, the claiming parent would not be able to show an actual earnings loss and would revert to a potential claim for earnings loss under the suggested new provision if she suffered a permanent incapacity. This proposal admits to earnings related compensation only the unemployed person who has been in employment within the last 12 months.

2. Section 118(1)(c)(vi) and section 104(6)

These are the two provisions which deal with earnings losses arising out of an employment commitment still in the future at the time of the accident, one requiring "a positive arrangement" and the other "an engagement to work under a contract of service". It is submitted that these provisions be combined into one section which incorporates the more liberal aspects of each. The new section would require a contract of service or something less such as a positive arrangement, but regardless of the exact status of the arrangement, the relevant assessable earnings would be the rate for the job in question, except that in the case of long term incapacity this might be adjusted if the job arranged had been for only a short period and was paid at an exceptionally high rate. Such an amendment would avoid the

47 Supra n. 45.

confusion between the two provisions as at present and would introduce a fairer way of assessing relevant earnings in each instance. It would also remove from section 118 this anomalous sub-paragraph (vi) from subsection (1)(c). If the new provision discussed earlier were introduced there is no injustice in restricting this particular provision to the limited class of persons who have actually arranged employment.

3. Section 118(5)

At present section 118(5) provides only one way of setting relevant earnings except where the claimant, as well as falling within one of the categories of subsection (1)(c), is an earner. It is acknowledged that a fixed notional rate is necessary in order to calculate earnings related compensation for claimants who were injured when still at school or had only recently left school without specific job qualifications. But in the case of those who are training for a particular occupation, career or profession at the time of injury, then it is submitted that a more appropriate way to set earnings related compensation for permanent incapacity is to take the rate of pay for that job as the claimant's relevant earnings, where such relevant earnings would be higher than the notional base rate.

C. Summary

By means of these proposed amendments to the Accident Compensation Act 1972 the person who was injured while unemployed would be more fairly treated than at present.

If a person had been employed within 12 months of the accident she would receive all benefits to which the employed person is entitled. If the claimant was not employed currently but could prove a positive arrangement she also would receive all benefits which an employed person would receive. Claimants who were not employed because they were still at school or training for a qualification would receive compensation for potential earnings losses either at a real rate if that was assessable or at the notional flat rate. Those claimants who were unemployed at the time they were injured and who did not fall into any of these categories already discussed would not receive any earnings related compensation until they were able to show by the fact of their re-employment that they had suffered an actual earnings loss. Those few claimants who were unemployed at the time of their accident and who suffered total permanent incapacity would receive earnings related compensation either from a date for which they can produce evidence that they would have become re-employed, or from an arbitrary date set by the legislation.

Such an approach does not perfectly cover the situation of the unemployed person who suffers an accident. Claimants who suffer permanent partial incapacities run the risk of having their chances of re-employment reduced while at the same time not being able to show earnings losses until they are in fact re-employed. It is difficult to overcome this problem under the present scheme in operation in New Zealand which works on the premise of only compensating actual earnings

losses, and not on relating any weekly compensation payments to the disability itself.

D. Costs

The costs of expanding the benefits of earnings related compensation to the ranks of the unemployed must be discussed. They are not nearly so great as may first be supposed. First of all, in a time of full employment the involuntarily unemployed would be in work and would be entitled to earnings related compensation. The difference is that under the present legislation while employed their compensation could come from the earners scheme whereas if they are unemployed the money must be found from the supplementary scheme. In other words the cost is shifted from that of the employers' levies to the general taxpayer. As the general taxpayer would already be likely to be paying an unemployment or sickness benefit for the unemployed claimant, the extra cost to the taxpayer via the supplementary scheme would not be all that great. Under section 59 which extends cover under the earners scheme beyond the actual period of employment in certain circumstances, it is provided in subsection (7) that if cover is extended beyond 6 months since the claimant was last in employment then the costs expenses and compensation for that claimant are to be charged to the Motor Vehicle Fund where appropriate or otherwise the Supplementary Compensation Fund, but not the Earners Compensation Fund. So, a precedent for transferring the burden is already present in the legislation.

Finally, most accidents do not result in long term incapacities and those who are unemployed and eligible for future earnings loss compensation will be an even smaller number.