SSRN tomorrow's research today

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

Vol. 5, No. 17: Jul 15, 2015

JOHN PREBBLE, EDITOR
Professor of Law, Victoria University of Wellington - Faculty of Law, Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien, Adjunct Professor of Law, University of Notre Dame Australia - School of Law
john.prebble@vuw.ac.nz

HANNEKE VAN OEVEREN, ASSISTANT EDITOR
Victoria University of Wellington - Faculty of Law

Announcements

Collected Papers by the Right Honourable Sir Geoffrey Palmer QC Part XVII Reforming Personal Injury Law: New Zealand's Accident Compensation Scheme

The Palmer Series collects the papers of the Right Honourable Sir Geoffrey Palmer QC, Distinguished Fellow of the Victoria University of Wellington Law Faculty. The Palmer series is sponsored by an anonymous donor whom the Faculty gratefully acknowledges.

Table of Contents

^top

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

"Compensation for Personal Injury: A Requiem for the Common Law in New Zealand"

American Journal of Comparative Law, Vol. 21, 1973
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 75/2015

SIR GEOFFREY PALMER QC, Victoria University of Wellington - Faculty of Law
Email: geoffrey.palmer@vuw.ac.nz

In October 1972 the New Zealand Parliament passed the Accident Compensation Act 1972 which establishes the most comprehensive accident compensation scheme ever enacted in the common law world and deals a mortal blow to the traditional tort system of compensating the victims of accidental injury. The stunning thing about the New Zealand experiment turns out to be that the common law has

something to teach social insurance, rather than the other way around. Despite the legislation being intended to replace and improve upon the deficiencies of common law and worker's compensation, it is apparent that the principles upon which the legislation is based threaten to swallow up the entire balance of New Zealand's comprehensive social welfare system.

The shape of the new accident legislation has been profoundly influenced by aspects of the common law of damages, especially damages for economic loss and dignitary harm. The policy makers have tried hard to keep the accident system separate from the social welfare system, but drawing boundaries between the two has proved to be very difficult. The idea of tailoring compensation payments to earnings up to a level which represents a large amount of the actual loss suffered by most people who are injured, coupled with a response to intangible losses, adds a richness of calibrated response to the compensating of losses that is altogether absent from flat rate schemes. Should this approach to compensating all losses come to pass in New Zealand it will be the legacy of the common law. In that sense this article is a respectful obituary to the common law as a method of compensating personal injury.

New Zealand's society is based upon strong threads of egalitarianism, pragmatism, state enterprise, humanitarianism and a comprehensive welfare state. This paper considers the changes made to New Zealand social welfare benefits following an extensive review by a Royal Commission. The Commissioners found that the system was sound in principle, and the amendments they recommended were not of a fundamental kind. The Commission also rejected a move toward earnings-related benefits, pointing out that the aims of the welfare scheme and accident compensation scheme are not the same. The aim of the accident compensation scheme was to maintain the standard of living enjoyed by the accident victim while the welfare system aimed to ensure that all members of the community have income sufficient to reach an adequate living standard. Nevertheless, earnings-related compensation for periods of incapacity caused by illness was recommended as an addition to the scheme for accident compensation.

The paper then turns to discussion of the accident compensation legal framework in New Zealand under common law and the damages available, and considers what the new legislation provides. It then turns to the process of reform, covering the process from the initial Royal Commission on Personal Injury to the introduction of accident compensation legislation into Parliament. As the most ambitious reform of tort law implemented in the common law world, the scheme will be worth watching. The question of first importance will be how far the accident compensation scheme becomes absorbed into the welfare system and what effect its pattern of compensation will have on that system.

"Compensating Criminals"

New Zealand Law Journal, pp. 608, 1975
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 76/2015

SIR GEOFFREY PALMER QC, Victoria University of Wellington - Faculty of Law
Email: geoffrey.palmer@vuw.ac.nz

The Accident Compensation Act 1972 is based on a principle of comprehensive entitlement. Eligibility for compensation of those injured in the course of carrying out activities proscribed by the law must be considered against that background. To deprive criminals of compensation is to bootleg fault back into the scheme in derogation of comprehensive entitlement. Such discrimination would be socially unacceptable for the same reasons that negligence was discarded. The effect of ACC provisions is to pay full benefits except in the case of murder and manslaughter and self-inflicted injuries, with a flexible approach where the claimant is actually in jail.

The paper considers policy alternatives available to deal with the problem of compensating criminals. The first alternative suggested is total exclusion of those injured in the course of carrying out an offence. While it is the most obvious approach, it is also the approach with the most glaring weaknesses. It is unacceptable because it would: filter out a potentially large number of worthy claims (as illustrated by a list of examples); reintroduce the doctrine of fault when a main purpose of the scheme is to eliminate it; add to the incidence of criminal disability; provide a fertile field for argument; indirectly deprive families of their interest in the claimant's compensation; and intertwine objectives of civil and criminal law.

The second option is to select more serious crimes for exclusion. One problem would be finding a consistent mode of selection. It would also be important to ensure that the dependents of those deprived of compensation were not adversely affected. A procedural choice by a prosecutor should not have flow-on dramatic consequences for the social welfare of the individual. Other alternatives would be to enumerate a range of specific offences where conviction would disentitle an ACC claim, or to vary

the selective approach by excluding those injured while committing certain types of crime against the police. But the mere fact of conviction as the disentitling event could clearly produce erratic and unfair results. And singling out crimes against the police may serve to add another element of tension to a relationship which by its very nature is not always relaxed.

The third option is to reduce benefits to those injured in the commission of a crime, either by removing the right to lump sum compensation in the case of serious crimes, by substituting a flat rate benefit in place of earnings related payment, or reducing the payment of compensation on some scale related to the term of imprisonment. This still leads to criticism: a severely disabled criminal must still support himself and his family; reducing benefits adds to the claimant's criminal disabilities in a way which ensures longer than the penalty imposed by criminal law; reduction of benefits takes no account of the position of the offender's dependents; and a fair method of selecting such offences is still required.

The author concludes that the policy currently implemented is the best policy. He argues that it is for the criminal law process to determine and apply the appropriate penalty; that adding to criminal disabilities is unsound; that even criminals are afforded basic social and economic rights; that provision of compensation does not lessen deterrence; that a criminal may have had a common law action available; that a loss for which compensation is paid is a loss regardless of whether it occurs to a criminal; to exclude some categories of convicted persons will place strains on the criminal process with incentives for plea bargaining; and there is no alternative policy available which is easily defensible in principle and administratively workable. The author concedes that automatic cancellation of an earnings related benefit during incarceration would be justified.

"Lump Sum Payments under Accident Compensation"

New Zealand Law Journal, pp. 368, 1976
Victoria University of Wellington Legal Research Paper Series Palmer Paper No.77/2015

SIR GEOFFREY PALMER QC, Victoria University of Wellington - Faculty of Law
Email: geoffrey.palmer@vuw.ac.nz

By the end of March 1976 New Zealand's Accident Compensation scheme had been working for two years. The scheme has run fairly smoothly and has done so since its inception with few signs of public dissatisfaction. It is surprising that the scheme has worked as well as it has considering the unfortunate prolixity of the legislation and the bewildering amount of amendment it has undergone. Fears expressed at the time the Act was passed have proved to be illusory so far. The scheme has as one of its fundamental goals the abolition of the adversary process in the context of compensation for personal injury. In that regard the scheme has enjoyed some success.

This paper discusses the process of accident compensation claims, identifying the pattern of practice which has developed in relation to the hearing of reviews. It recognises as unfortunate that many lawyers involved with accident compensation have yet to exhibit any great facility with the statute. The legislation is long and involved, but it behoves those giving advice pursuant to the statute to become familiar with its terms, including the amendments. The paper then turns to consider the development of the Accident Compensation Act from the Woodhouse Report through the amendments, and some of the difficulties in determining lump sum compensation which have arisen from the legislation.

"Accident Compensation in New Zealand: The First Two Years"

25 American Journal of Comparative Law 1, 1977
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 78/2015

SIR GEOFFREY PALMER QC, Victoria University of Wellington - Faculty of Law
Email: geoffrey.palmer@vuw.ac.nz

With the introduction of the Accident Compensation Scheme 1972, people injured in New Zealand after 1 April 1974 are entitlement to benefits and the right of accident victims to proceed in tort was taken away. Some conclusions can be made about the performance of the accident compensation scheme in New Zealand during the first two years of its life, although it is too soon to offer any final and comprehensive appraisal. The signal achievement of the first two years lies in the simple fact that the scheme is running fairly smoothly, and it has done so since its inception with few signs of public dissatisfaction. Many problems and challenges remain to be overcome, but the success in the first two years would indicate that the ultimate prognosis for the scheme must be favourable.

While the details of some of the review cases under ACC provide enlivening social interest, it is remarkable how wooden and devoid of legal interest are the issues the cases present. Gone are the great issues of fault. The overall impression from reading the decisions is how simple it all is. The

dominant feature of the scheme after two years seems to be an air of pragmatic experimentation.

In any scheme as comprehensive and novel as the accident compensation scheme problem areas will emerge. These problems so far are few in nature and none of them touches the fundamental principles of the scheme. Rather they are problems of second or third order of importance often involving complex technical issues. The following issues appear to constitute the main problem areas: 1) Assessing earnings-related compensation for periods of incapacity suffered by the self-employed; 2) Pain and suffering compensation under s 120; 3) Section 14 permanent partial incapacity; 4) The need to obtain authoritative medical assessments, especially for cases of permanent incapacity; 5) The proper limits of compensation available under s 121; 6) Occupational diseases; 7) The range of cover included by the words "medical, surgical, dental or first aid misadventure" in s 2; 8) How to obtain adequate accident statistics; 9) Classification of risks and variable levies for employers; 10) Increses in claim rates resulting from 100% compensation for first week of incapacity where the injury arises out of and in the course of the employment; 11) "Dependency" in death cases. This article touches upon these questions and upon others in the course of reviewing the performance of the scheme in the first two years of its operation.

The paper also discusses the inception of the ACC scheme from the Royal Commission's Report of 1967 to the appearance of the Accident Compensation Act in 1972, and discusses the alterations from the original Woodhouse Report. The cut and fill approach to legislative reform has now become so ingrained with the accident compensation legislation that the pattern will be difficult to alter. The trend of the amendments has been to give more and more discretion to the Commission. At present neither clarity nor predictability exist.

"New Zealand's Accident Compensation Scheme: Twenty Years On"

44 University of Toronto Law Journal 223, 1994
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 79/2015

SIR GEOFFREY PALMER QC, Victoria University of Wellington - Faculty of Law
Email: geoffrey.palmer@vuw.ac.nz

Since New Zealand's Accident Compensation Act took effect on 1 April 1974, despite many amendments, reorganizations, and statutory reconstruction, it has been impossible to bring a tort action in New Zealand for personal injuries. New Zealand's pioneering efforts in abolishing tort law for personal injury compensation has attracted a steady stream of overseas interest, the published results of which can be sorted into three categories. The first sees New Zealand's reform as a warning against the dangers of making such changes; the second finds the New Zealand experience a useful exemplar of how the world ought to be; and the third merely reflects an interest in the subject. In short, people cite the New Zealand scheme and extract the meaning from it which suits their policy preferences about reform of the tort system.

This article deals with the New Zealand developments on their own terms to attempt to explain the policy dynamics. Twenty years after the New Zealand revolution, no one else has copied it. Nowhere in the common-law world, not Australia, the United Kingdom, Canada, and certainly not the United States, has any consensus developed which has led to political action to abolish the personal-injury tort system root and branch. In the twenty years since reform, a great deal in the world has changed. New Zealand itself has been a leader in bringing about change through deregulation, corporatization, privatization, public-service restructuring, and reforms of public finance.

The author examines the New Zealand experience over the past twenty years with some particular questions in mind. What did the designers of the scheme fail to anticipate? With the advantages offered by hindsight, how could things have been done better? How can the overall performance of the scheme be assessed? The fresh statute passed in 1992 in New Zealand requires some analysis, not only because the changes made then were misguided from a policy point of view, but also because of their implications for the future of the New Zealand scheme. In terms of the net gain to human welfare over the years, the achievement of ACC must have been considerable compared with what went before. Even in its reduced form since 1992 legislation went into effect, accident compensation in New Zealand is better than what it replaced for the majority of injured people. The coverage is comprehensive, the cost relatively low, and the lessening of human suffering clear. These points must be remembered as we walk the winding paths of policy development.

The paper considers the development of New Zealand's scheme from its inception in the Woodhouse Report of 1967 onward. It discusses the financial decisions made regarding funding of the ACC scheme, including reductions and increases of levies over the years and the political nature of many of the funding changes. It considers the relationship between tort law and corrective justice, and asks

whether the continued unavailability of the right to sue under tort law is fair or just, given the reduction of the benefits of the scheme. Anyone who would advocate a return to corrective justice tort law has stronger arguments in the New Zealand context of 1993 than have existed at any other time since the scheme began. Corrective justice has been sacrificed for distributive justice, but not enough is now being distributed to make it fair.

"Accident Compensation in New Zealand: Looking Back and Looking Forward"

New Zealand Law Review, Vol. 81, 2008
Victoria University of Wellington Legal Research Paper Series Palmer Paper No. 80/2015

SIR GEOFFREY PALMER QC, Victoria University of Wellington - Faculty of Law
Email: geoffrey.palmer@vuw.ac.nz

This article reflects the author's personal experience with the development of accident compensation policy and his involvement with Sir Owen Woodhouse, chair of the Woodhouse Commission which recommended the New Zealand scheme. Reflections are made concerning the uniqueness of the New Zealand scheme in the common law world. Attention is drawn to the challenge that accident compensation posed at its inception and still poses for the "income maintenance" systems as a whole. It is argued that future policy requires the inequalities that now characterize "income maintenance" in New Zealand and that result from accident compensation be addressed. Some analysis is also offered to show that costs will increase should the administration of accident compensation return to private enterprise.

^top

About this eJournal

Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds

approximately to a North American associate professor in rank.

Submissions

To submit your research to SSRN, sign in to the **SSRN User HeadQuarters**, click the My Papers link on left menu and then the Start New Submission button at top of page.

Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: **RPS@SSRN.com**

Distributed by

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK
Northwestern University - School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)
Email: **bblack@northwestern.edu**

RONALD J. GILSON
Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)
Email: **rgilson@leland.stanford.edu**

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.

^top

Links: **Subscribe to Journal** | **Unsubscribe from Journal** | **Join Site Subscription** | **Financial Hardship**

Subscription Management

You can change your journal subscriptions by logging into **SSRN User HQ**. If you have questions or problems with this process, please email **Support@SSRN.com** or call 877-SSRNHelp (877.777.6435 or 585.442.8170). Outside of the United States, call 00+1+585+4428170.

Site Subscription Membership

Many university departments and other institutions have purchased site subscriptions covering all of the eJournals in a particular network. If you want to subscribe to any of the SSRN eJournals, you may be able to do so without charge by first checking to see if your institution currently has a site subscription.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

Accounting Research Network
Cognitive Science Network
Corporate Governance Network
Economics Research Network
Entrepreneurship Research & Policy Network
Financial Economics Network
Health Economics Network
Information Systems & eBusiness Network
Legal Scholarship Network

Management Research Network

Political Science Network

Social Insurance Research Network

Classics Research Network

English & American Literature Research Network

Philosophy Research Network

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact **site@ssrn.com** for more information.

Individual Membership **(for those not covered by a site subscription)**

Join a site subscription, request a trial subscription, or purchase a subscription within the SSRN User HeadQuarters: **http://www.ssrn.com/subscribe**

Financial Hardship

If you are undergoing financial hardship and believe you cannot pay for an eJournal, please send a detailed explanation to **Subscribe@SSRN.com**

^top

To ensure delivery of this eJournal, please add **LSN@publish.ssrn.com (Prebble/van Oeveren)** to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email Support@ssrn.com or call 877-SSRNHELP (877.777.6435 or 585.442.8170).

FORWARDING & REDISTRIBUTION

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of Social Science Electronic Publishing, Inc. For information about individual subscriptions and site subscriptions, please contact us at **Site@SSRN.com**

^top