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COMPREHENSIVE NO-FAULT IN NEW ZEALAND —
A MODEL FOR ONTARIO?

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Résumé
En 1972, la Nouvelle-Zélande a adopté un régime d’assurance sans égard à la faute qui a totalement remplacé le régime avec responsabilité de la common law de ce pays. L’auteure discute des forces et des faiblesses de ce régime et s’il pourrait être approprié à l’Ontario. L’auteure conclut que le régime néo-zélandais n’a pas été en mesure d’atteindre ses objectifs et qu’il ne solutionnera même pas les problèmes qui sont survenus en Ontario avec le régime d’indemnisation des accidents du travail.

“The visions that fuelled the reforms...was warm-hearted and humane. It took an optimistic view of human nature. The basic idea was that those in distress should be helped, that the well-being of each was of concern to all. Whether the vision and the efforts made to implement it represent significant social progress is a matter I leave to more detached observers to assess.”

Geoffrey Palmer from Compensation for Incapacity

The debate surrounding the merits of no fault universal insurance schemes has been an ongoing one for over twenty years. Proponents of the schemes claim they are efficient, cheaper, speedier and provide more universal justice. Critics maintain such schemes have hidden costs, lack flexibility, provide no incentives for deterrence and may be unfair in individual cases. Lawyers, academics,
politicians, worker compensation experts, employers and workers have argued endlessly about the implications of such schemes. Given the political and economic climate of the nineties when restructuring of many of our institutions is underway, it is perhaps appropriate to reintroduce the subject for a second look.

Ontario's adoption of a no fault auto insurance plan brings it a step closer to a universal no fault compensation scheme. An Ontario Task Force has recommended that the Province begin long term planning for the eventual introduction of a universal disability compensation program. As a medium term objective, the Slater Report recommended a universal accident compensation plan which would include compensation for all accidental injuries. More recently, rising costs, problems in the compensation of occupational disease and alleged widespread abuse in the Ontario worker compensation system have led to renewed calls for a complete revamping of the worker compensation regime in Ontario. Conveniently for Ontario, other jurisdictions have experimented with various forms of universal coverage. Already New Zealand, in particular, has pioneered for twenty two years with a comprehensive no fault accident insurance scheme which has provided a wealth of information and experience for other jurisdictions to examine. The successes and failures of the New Zealand experiment provide a useful starting place for an examination of universal comprehensive accident insurance coverage in Ontario.

There are a number of reasons why the drive to initiate comprehensive no fault insurance in Ontario exists. A major factor for some commentators is a humanitarian one. Why is it, commentators ask, that persons injured in the workplace or in traffic accidents should be compensated for their injuries, while victims of the ordinary mishaps of life are not? A fractured skull, whether incurred by a fall in the bathtub or by a blow to the head on a construction site is equally devastating to the victim. Cancers caused by exposures to toxic substances in the neighbourhoods of polluting workplaces are no less worthy of compensation than cancers caused by these same substances within the workplace. Financial compensation which depends solely on the place or circumstances of the injury is haphazard justice at best. Incapacitated persons, it is argued, are a community responsibility and in an affluent and civilized state, the government has both a moral and a legal responsibility towards all its injured and ill citizens.

A second factor fuelling calls for reform is the need to contain and control the costs of worker compensation while still fulfilling the mandate of a Worker Compensa-

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Comprehensive No-Fault in New Zealand Act to compensate workers when work or work factors make a significant contribution to the development of injury or illness. The spiralling monetary cost of worker compensation is a major concern to employers, while the human costs of uncompensated illness and injury is a grave concern of workers and their families. The adversarial tensions created by such disparate interests create conflicts which are governed by expensive and cumbersome adjudication and appeal mechanisms within worker compensation regimes.

Finally, the present system of worker compensation, in virtually all jurisdictions, has difficulty in dealing with the compensation of occupational disease. The problem of determining "work-relatedness," given the scientific uncertainty in proving a causal link to the workplace, has created controversy and conflict between the parties. This ongoing tension has led to a call for a new look at comprehensive insurance plans by way of a Public Inquiry/Royal Commission by various groups involved in worker compensation issues. There is here, at least, some consensus that something must be done.

What is to be done? Implicit in this view of state responsibility are a number of associated state obligations and functions towards ill and injured citizens. Firstly, the state has some obligation to assist such citizens in coping with misfortune due to injury or illness through some form of compensation such as, income replacement, medical care, and/or rehabilitation. Secondly, the state has an interest in preventing injury by regulation, and by providing incentives to discourage conduct which leads to injury. Finally, there is the belief that the state should express some sort of moral judgment about the behaviour causing an injury in order to satisfy the victim's and society's need for a just result, and to fix community standards of conduct. This is particularly true where the injury was caused by conduct other than merely negligent conduct. As New Zealand

3. During the consultation process for the Report of the Ontario Task Force on Occupational Disease, Ontario Provincial Government Publication, June 4, 1993, which the author chaired, the Task Force heard several groups and individuals recommend that a Royal Commission be struck to study the implications of universal comprehensive coverage as a solution to the problems around occupational disease. It should be noted, however, that many groups and individuals were opposed to such a Commission.


5. Ibid. 1003
has discovered, these associated obligations of the state are occasionally in conflict with pure forms of universal accident and illness coverage.

The mechanisms available for achieving these goals in Ontario have been a network of compensation schemes, civil actions, regulatory legislation and criminal sanctions. These various approaches are intended to compensate victims, deter dangerous conduct and punish the wrongdoers. The cost and efficacy of this patchwork approach has been called into question by critics of both worker compensation and the tort system. The idea of comprehensive no-fault insurance has been an attractive one to those who believe that the tort system is irremediably flawed, that the present system of multiple schemes is cumbersome, expensive and no longer workable and that the chief beneficiaries of private civil law actions are the lawyers.

This paper proposes to examine the New Zealand scheme in an effort to determine whether or not a comprehensive scheme, such as exists in New Zealand, would serve as a useful model in Ontario. To this end, a brief overview of the New Zealand scheme is given and the circumstances surrounding the passage and adoption of the New Zealand Accident Compensation Act of 1972 are described. This paper illustrates both the pitfalls and the possibilities that a New Zealand form of no-fault might bring to Ontario. In particular, it analyses how well the New Zealand system is able to fulfill the three tasks of compensation, accident and illness prevention and deterrence. Finally, some identification of pitfalls and possibilities is made for an Ontario response arising from the comparisons of the two jurisdictions.

AN OVERVIEW OF THE NEW ZEALAND SCHEME
New Zealand’s original no-fault compensation scheme was signed into law twenty two years ago, on October 10, 1972. It was hailed at first as “visionary” and has received both strong positive reviews and sharp criticisms. It has long served as a model for other jurisdictions which have studied its plan, commented on its weaknesses and modified its approach. These jurisdictions have basically backed off implementing so radical a plan, so that it remains virtually the only attempt at a full blown comprehensive no fault regime in existence. The original New Zealand plan has itself gone through a long reform process which has

resulted ultimately in its repeal and reenactment as *The Accident Rehabilitation and Compensation Act 1992*. The major provisions of the new Act came into force on July 1, 1992. Prior to this reenactment, the plan had been subjected to intensive scrutiny by a Royal Commission and by the New Zealand Law Reform Commission which produced a number of reports advocating major reforms of the system. One reform recommended major changes in the scheme, including provisions which would have covered and compensated sickness as well as accident by enlarging the range of physical and mental conditions covered. It is noteworthy that this provision was shelved and never enacted. Instead the new Act clearly reflects the views of the new Conservative Government that the old scheme had become unfair and subject to a significant level of abuse, and that the costs of the scheme were not shared equitably. The new Act focuses on restraining and reallocating costs and redefining and narrowing the broad definition of "personal injury by accident" that was contained in the old Act. These changes have made significant alterations to the original accident compensation scheme. The new definition of accident suggests that previous case law will no longer apply, new policy is in operation and considerable uncertainty exists as to judicial interpretation in the future.

**The New Zealand Scheme—An Historical Overview**

The circumstances surrounding the adoption of the original New Zealand scheme were quite unique. In 1966, a Royal Commission headed by the Honourable Owen Woodhouse (the Woodhouse Report) was struck to review the existing law on injury compensation and damages. It concluded that the common law and existing legislation were outmoded, expensive, slow and unfair. The findings in the report of the Woodhouse Commission went far beyond a mere adjustment of the existing system and, in its stead, proposed a radical new comprehensive accident scheme which included comprehensive coverage of both workers and non-workers. The new scheme was based on five principles which were identified as follows:

1. Community responsibility for all persons disabled by accident;
2. Comprehensive entitlement to benefits whatever the cause of the disablement;
3. Complete rehabilitation;

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7. The resignation in 1991 of the Prime Minister, Geoffrey Palmer, one of the architects of the original scheme, and the subsequent defeat of the Labour Party, killed this reform.

8. These views were clearly expressed by the Honourable Bill Birch in the Budget Supplement No. 6, *Accident Compensation—A Fairer Scheme* (Wellington: Min. of Labour, July 3, 1991).
4. Real compensation;
5. Administrative efficiency.

The Woodhouse Report conclusions, radical as they were, passed into law and were adopted in the New Zealand Accident Compensation Acts of 1972 and 1973. In order to understand the ease by which such far reaching and path-breaking legislation came into effect, and in order to contrast it with the present political and social climate in Ontario, it is helpful to examine the political and social climate in which it arose in New Zealand.

A major factor in the speedy acceptance of the Woodhouse Report was the widespread agreement in New Zealand that reform of the existing personal injury law was long overdue. Moreover, the view that responsibility for compensation lay with the community was already widely accepted and had historical antecedents in New Zealand's social history. Therefore, the call for a comprehensive review of the situation was very welcome.

Prior to 1972, New Zealand worker compensation legislation was in dire need of reform. An injured worker could either bring a private action for damages or make a claim for subsistence level benefits under the Act. Since benefit levels were very low there was considerable incentive to bring an action and if the suit failed, the worker could then subsequently resort to worker compensation benefits. This system, which was run by private insurers, was widely acknowledged to be inefficient, out of date, time-consuming and expensive. Coupled with discontent with the worker compensation system there was also great interest in devising a form of no-fault auto insurance coverage which would extend some benefits to victims of automobile injury. Given the consensus on the need for reform of worker compensation and the principle of community responsibility to relieve the burden of accidental injury, the stage was set for the possibility of a universal comprehensive form of insurance which would encompass and go beyond both.

The Woodhouse Commission, mandated to study and advise on the state of personal injury compensation in the worker compensation field, inherited and utilized a long and distinguished body of legal criticism outlining the weaknesses and inadequacies of the tort system. A most compelling portion of the Commission's Report was the devastating attack on the abysmal failure of the common law system to compensate victims fairly, quickly and reliably.

Given the Report's dramatic recommendation to abolish the tort system and replace it with a no-fault scheme, it was absolutely necessary and crucial to the acceptance of the proposals that the tort system be completely discredited. As Geoffrey Palmer points out in his analysis of how and why the reforms were adopted, this unrelenting
focus on the flaws of the tort system was strategically necessary as the success of the proposed comprehensive plan hinged on diverting money from the existing system to the comprehensive plan.\textsuperscript{9} Little empirical data existed to substantiate the attack on the tort system and Palmer himself admits that the Report's treatment of the common law system was "unbalanced" and "one-sided."\textsuperscript{10} No attempt was made to canvas or discuss the implications of doing away with private actions. A dual system of tort and some form of no-fault was simply assumed to be too expensive and the abolition of the tort system became inextricably linked to the advent of the no-fault system.

A second factor in the easy passage of so radical a scheme is New Zealand's proud tradition of being boldly experimental in the adoption of progressive social policy.\textsuperscript{11} Historically, New Zealanders were proud to have been in the forefront in adopting legislation for industrial reforms, for nationalization of banks and for early suffrage for men and then for women.\textsuperscript{12} When the Woodhouse Report recommendations were made public, they were praised by many in the press as continuing in the long tradition of social reform and advanced social legislation.\textsuperscript{13} Radical reform appealed to and enhanced the image New Zealanders had of themselves as possessing a strong social conscience.

In addition, this radical social insurance program was brought in by a Conservative government, thus preempting any significant opposition from the Labour Party, who were ideologically more identified with, and sympathetic to, radical reform. As a result, since the Government must always have a majority in the New Zealand House of Representatives, there was virtually no political opposition to the plan. Moreover, the passage of the legislation was eased by the fact that in the early 1970's New Zealand had a unicameral legislature and a strong

\textsuperscript{9} See G. Palmer, \textit{supra}, note 1. Palmer has stated: "Strategically it was essential to the Woodhouse style of reform that a compelling case be developed against the common law. If the common law system survived, a comprehensive system of compensation for injury was unattainable. If the common law remained, the financial logic of the reform was destroyed—new sources of revenue would be needed rather than making better use of the existing money."

The defects of the common law damages system were also well documented by the Ontario scholar T.G. Ison, \textit{supra}, note 1 in Chapter 2.

\textsuperscript{10} \textit{Ibid.} 35.


\textsuperscript{12} For a detailed account of these events see K. Sinclair, \textit{ibid.}

\textsuperscript{13} See Palmer, \textit{supra}, note 1 who cites the response to the report by the various newspapers.
central government patterned after the British Parliament. Party loyalty was expected, and once the Conservative government decided to adopt the new scheme they could expect even the most unenthusiastic party members to come into line in support of the plan.\textsuperscript{14} Even the New Zealand bar, which could have been expected to be apprehensive about losing its role in personal injury litigation, did not raise strong opposition. After some initial dissent, the bar supported and eventually approved the bill. Therefore, opposition to the scheme was minimal, and the opportunity for a comprehensive no-fault scheme was presented and seized without the benefit of any detailed cost-analysis and even without an informed and sustained debate of all the ramifications of dismantling the common law tort system and opting not to reform the existing worker compensation system.

**The Operation of the Scheme**

The New Zealand scheme is based on two major premises: it strives to establish some form of compensation for all earners, all persons who suffer motor vehicle injury, and all other injured persons not covered by these classifications.\textsuperscript{15} Secondly, it completely abolishes tort actions. Included in the tort actions abolished are occupier's liability, product liability, nuisance, medical malpractice and strict liability. Interestingly, private actions for punitive damages have survived, notwithstanding the bar.\textsuperscript{16} Claims for stress and mental injury are not covered by the Act unless physical injury is present.\textsuperscript{17} Occupational disease is compensated if it arises out of or in the course of employment and if it meets specific criteria. All other diseases are excluded under the present Act. Unlike the old Act which relied on a broad definition, the new Act has specifically defined "accident", "personal injury", and "medical misadventure".

The no-fault compensation scheme is administered by a semi-independent Accident Rehabilitation and Compensation Insurance Corporation (the ACC). It is funded by levies on four groups: earners, motor vehicle owners, employers and health professionals. While the previous regime emphasized that the Act was not an insurance scheme and that it was philosophically grounded in

\textsuperscript{14} See Palmer, *supra*, note 1 at 63.

\textsuperscript{15} Illness is not covered.

\textsuperscript{16} See *Donselaar v Donselaar* [1982] 1 NZLR 97, confirmed in *Auckland City Council v Blundell* [1986] 1 NZLR 732.

\textsuperscript{17} Previous to this reform, established case law made compensation available for mental trauma even where no physical injury was present and this included compensation for a spouse who witnessed the sudden death of a partner. The new definition of "personal injury" in section 4(1) restricts cover to death or physical injuries including mental injuries arising as an outcome of those physical injuries.
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conferring rights to the injured supported by taxes exacted by the authority of
law, the new Act establishes an insurance-based scheme to rehabilitate and
compensate in an equitable and financially affordable manner. In another
significant change, provision is made for experience rating for all four groups.
Assessments on these groups may be adjusted according to the actual cost of
the injuries. The system may include no-claims bonuses, increased premiums
or claim thresholds.

In summary, the history of the New Zealand scheme has been a unique lesson
in social policy. The experiment itself has been a courageous and innovative
one. However, the new reforms have been very controversial, and the original
intent of the Woodhouse Report has been radically altered. Geoffrey Palmer,
who guided the plan in its early stages states that the plan was initially anchored
in fundamental social principles but has now been “cut loose from its mooring.”
Sir Owen Woodhouse charges that the New Act has reverted back to what
New Zealand had originally and he is sharply critical of the move to experience
crating.

Pitfalls and Possibilities
The New Zealand scheme has run into its share of problems in meeting the goals
necessary to respond to the compensation of injuries and illness. The goals of
compensation, deterrence and the making of moral judgments are to some extent
contradictory. The problems faced by New Zealand are particularly instructive for
jurisdictions contemplating comprehensive plans. It is useful to analyse the perfor-
mance of the New Zealand scheme in meeting these goals, in order to illuminate
the problems which Ontario would have to resolve.

1. The Compensation Function
One of the ways to evaluate the success of the compensation function is to
determine whether or not the public is satisfied with the service provided.
Based on the New Zealand experience the compensation function appeared
to be widely accepted and approved by the general public, at least until
recently. Client satisfaction surveys conducted for the Accident Compen-
sation Corporation suggest that there is a high level of satisfaction among

22. See W. Hodge, supra, note 11 at 222.
injured persons who have had direct dealings with the Corporation.\textsuperscript{23} While other public opinion surveys have shown that the public is ill informed and confused about some aspects of the scheme there did not appear to be any serious opposition to the no-fault concept. However, since the passage of the new Act in 1992 there has been a new and vociferous wave of criticism from numerous New Zealanders. Sir Owen Woodhouse has stated that he regards the new reforms as a "backward step" and that only the employers would see the reforms as fairer.\textsuperscript{24} Many others have criticized the introduction of experience rating. Workers and unions complain that the Government has gone too far, even breaching the "social contract" made with New Zealanders when the compensation scheme was first introduced.\textsuperscript{25}

The compensation of occupational disease is just as difficult in New Zealand as is elsewhere. The same problems of causation and entitlement which plague the Ontario system are present in New Zealand. New Zealand's failure to extend the legislation to all cases of illness has made it less than the comprehensive scheme envisioned by Woodhouse and Palmer and by Ontario reform advocates. According to the new government the comprehensive entitlement concept set out in the Woodhouse Report is simply not affordable.\textsuperscript{26}

Moreover, the claim that cost efficiencies result from no-fault schemes has been put into serious doubt by the New Zealand experience.\textsuperscript{27} At the outset of the New Zealand scheme, funds which had supported the workers' compensation and third party insurance schemes were redirected to support the comprehensive plan. A levy of 1% of payroll was charged against employers while the self-employed contributed an amount equal to 1% of net relevant income. The balance of the fund was to come from a levy on owners of automobiles, general taxation and the interest on investment income. In 1991 it was determined that this model was no longer affordable or fair. The new government concluded that those who benefitted from the scheme were not necessarily contributing their proportionate share. Prior to the new reforms, approximately 70% of the fund


\textsuperscript{24} Sir Owen Woodhouse, in \textit{Western Leader}, Friday, February 26, 1993.

\textsuperscript{25} \textit{Ibid}.

\textsuperscript{26} Sir Owen Woodhouse, \textit{supra}, note 24 disputes this view. He states that the report on alternative reform options from the Law Commission president Sir Kenneth Keith has shot down the claim that cost blow-out is justification for abandoning the original scheme.

\textsuperscript{27} The Honourable W.F. Birch, \textit{supra}, note 8. The cost of the scheme has increased by 25% per year between 1985 and 1990.
came from the employer and self-employed levies and there was increasing frustration and concern arising from large increases charged against these groups. Accelerating medical costs and perceived abuses of the scheme were also seen as having contributed to the increased expenditures. A major focus of the 1991 white paper was on spreading the premiums more fairly. To achieve this the new reforms set out a series of separate accounts. As a result of this new accounting, the average Auckland family paid $424 annually in accident compensation levies in 1993.

Since 1975 there has been serious erosion of the reserve and a rapidly escalating rate of expenditure, far outstripping the cost of inflation. These escalating costs have been a matter of great concern and the subject of serious study. While it is true that the proportion of funds paid out to injured persons has remained at over 90%, administrative costs overall have been higher than expected.

Moreover, indirect costs, which do not appear in the financial reports but which make up a sizeable percentage of the true cost of no-fault plans, have been identified and acknowledged. These costs include the costs related to deterrence measures and the cost of accident prevention programs. There are also the costs incurred in monitoring the program and in augmenting the benefits of social security recipients whose entitlements were perceived as inadequate in light of the higher levels of the accident benefits. Hidden costs must be taken into account in determining the true costs of no-fault.

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28. Ibid.

29. In 1990, employers' contributions covered nearly 70% of all payments, though less than 40% of those payments were for accidents on the job.

30. An employer account – which is charged with the cost of all work-related injuries (other than work-related motor vehicle accidents).

An earners' account – to meet compensation costs, excluding public health care costs, for non-work accidents other than motor vehicle accidents.

A motor vehicle account – to meet the compensation costs of all motor vehicle accidents, including public health care costs.

A Supplementary account – to meet the costs of all accidents not otherwise covered. This account is reimbursed directly from government taxation.

31. This figure is based on a one-car household with one worker earning $30,000. A two-car, two-working adult household earning a combined $70,000 paid $848. These figures are from Western Leader, Friday February 26, 1993.

32. In a report of the Review by the officials Committee of the Accident Compensation Scheme (August, 1986) the scheme was said to be so strained by accelerating expenditures that its financial viability was open to question. In the Law Reform Commission Interim Report on Aspects of Funding 1987, the Commission reviewed the funding of the scheme and made recommendations.

33. Supra, note 8.

34. See Barbara Rea, "Accident Compensation: A Cuckoo in the Sparrow's Nest of Social
2. The Deterrence Function
The second obligation of the state is to prevent or deter conduct which leads to injury and illness. In theory, at least, one of the goals of the tort system is to deter careless and negligent behaviour by attributing liability to the person responsible for the harm done. The consequences which follow from drunken driving, workplaces maintained without regard for a workers health and safety, negligence in the production and/or delivery of goods and services, unprofessional and negligent behaviour of doctors, lawyers, engineers etc. are clearly spelled out. Theoretically, an employer should be discouraged from acting negligently towards workers by the knowledge that liability would ensue. The employer would therefore take steps to maintain and improve safety standards and prevent accidents. Other employers would learn by the example and would also be motivated to provide safe workplaces, thus establishing minimum standards of conduct for the community at large.

The success of the tort system as a means of deterrence did depend, however, on the ability to identify the defendant and on the defendant's ability to pay. With the advent of widespread liability insurance the assumption that tort actions deterred careless behaviour was weakened as insurance companies became liable for wrongdoing. The focus changed, then, to a theory of general deterrence which was based on the premise that the costs of compensation insurance schemes would offer some inherent checks on risky activities and unsafe practices. As well as industry classification differentials, various forms of experience rating have been created to build incentives into the various worker compensation regimes. Experience rating has been introduced into the New Zealand system in the new Act. A "no-claims bonus" rating system gives employers either a discount or a penalty based on compensation claims and the size of the business. The legislation provides for similar ratings on earners and vehicle owners or drivers.

The natural consequence of the no-fault approach is to greatly increase the role of government in all aspects of administration, accident prevention, education and retribution.

3. The Educative and Hortatory Function
The establishment of community and individual standards of conduct is a less recognized, but equally important, obligation of the state. A major criticism of the tort system is that it is an arbitrary and unreliable mechanism of compen-
sation. However, tort actions also served the traditional tort functions of retribution, deterrence and education, which establish individual rights through the recognition of tort claims and which monitor employer practices and standards of behaviour. These functions are absent or have been weakened in comprehensive no-fault insurance schemes as well as in the more traditional worker compensation schemes. Non-economic values embodied in the tort system have been lost or ignored, to the detriment of both the individual and of society. Many commentators within New Zealand itself believe that there is sufficient deterrent effect in the threat of tort action that they advocate an expanded role for tort actions in future reforms. The New Zealand courts recognized at an early stage the need for reintroducing some forms of deterrents when an unanimous Court of Appeal in Donselaar held that punitive or exemplary damages should be available.

Margaret Vennell, who was a Commissioner of the Corporation until 1991, has argued for a return to the common law in a number of areas. She advocates the introduction of a right of subrogation, enabling the Accident Compensation Corporation to sue tortfeasors, the reintroduction of product liability and the necessity of full medical disclosure to the patient. Other commentators have also called for the reintroduction of some private actions on the grounds that a tort action, however clumsy, serves as a policing mechanism which highlights and informs society of the responsibility of the individual citizen or corporation. They argue that when a tortfeasor is identified publicly, a rough justice results which, in many cases, satisfies the victim’s and the public’s need for a formal acknowledgement of wrongdoing, and provides incentives for the tortfeasor and for others in society to prevent and avoid the activity causing the harm. The New Zealand no-fault system having sacrificed the opportunity to adjudicate these issues, has lost the ability to analyse and comment on the behaviours which led up to the injury.

37. [1982] 1 NZLR 97 (CA)
41. Supra, note 36 at 55.
However, in New Zealand's new Act, the provision for lump sum payments for pain suffering and loss of enjoyment of life has been repealed. The acknowledgement that someone has suffered a serious loss and that an injury may have been caused by someone's negligent or wanton conduct is missing. The individual becomes a statistic. For the individual, this loss of recognition of their keen sense of injustice may have serious consequences.

Clearly, the New Zealand system is not yet a perfect model for the fulfilment of all the obligations of the state towards its sick and injured citizens. Moreover, there are still some philosophical and more practical problems which are currently being addressed in New Zealand. Some of these problems stem from differing visions of what no-fault insurance is. These diverse perspectives are also instructive for Ontario.

**Confusion of Purpose**

A number of contradictory philosophic approaches exist together in the New Zealand scheme and indeed, in probably any comprehensive scheme. The original Woodhouse Report envisioned an earnings-related income maintenance program which would cover everyone. Subsequently, many interpretations of the intent of the plan were made. Some took a social insurance view of the Act, others a social welfare view, while still others regarded the regime as a kind of social contract. Tensions exist as to whether the entitlement to a benefit under the Act is a privilege, an individual right or a collective right to a social service paid for by the community and implemented by the state. The goals of comprehensive compensation and community responsibility suggest the "collectivist set of values" referred to by Palmer, while the goals of real compensation and rehabilitation indicate a concern with the individual and the need for individual solutions.

Some approaches placed the Act within the broad spectrum of social welfare legislation in which the accident victim becomes a client of the state. No longer do the victims face the author of their misfortune but they must bring their complaint to officers of the state who determine entitlement. There have been bitter complaints that victims are treated similarly to welfare recipients. The inevitable bureaucratization of the process, which assists in creating a welfare

42. One extreme example of this are the Canadian suicide cases where individuals aggrieved by the compensation system have left suicide notes claiming the system drove them to kill themselves.


mentality, was recognized as early as 1982 in the Corporation’s annual report. This report acknowledged a “somewhat grudging attitude” toward claimants and a need to move away from a view of entitlement as a privilege rather than as a right. Barbara Rea described the confusion between social welfare legislation and accident compensation as a “cuckoo in the sparrow’s nest of social welfare.”45

The New Zealand Federation of Labour clearly regards the compensation scheme as a contractual right bargained and paid for by the surrender of common law rights. The scheme has taken on the nature of a social contract in which the quid pro quo is the certainty of entitlement in exchange for the abolition of the right to sue. This view has made it exceedingly difficult to explain to workers that their right to entitlement may be restricted by financial constraints. Labour was incensed when the new Act abolished lump sum payments for non-economic and non-physical loss as they considered such payments a right won by the initial bargain and not subject to unilateral change. Any erosion of the scheme which derogates from the 1972 “social contract” is regarded as a betrayal of labour and is accompanied by a demand for the restoration of private actions.

Accompanying the increased role of government in a comprehensive no-fault system are a number of associated problems. A huge bureaucracy cannot fine tune its procedures easily. The objectives of comprehensive no-fault are broad in scope, diverse, and sometimes contradictory. Trebilcock illustrates this problem when he argues that different objectives require separate policy instruments. He notes the tensions which arise when the tort system is charged with fulfilling social insurance objectives as well as the functions of deterrence and corrective justice.46 To an even greater degree, universal disability compensation schemes encompass a number of divergent goals and objectives which result in contradictions and a confusion of approaches.

Lessons for Ontario

If the Ontario government decides to proceed with a Royal Commission or Public Inquiry on the suitability of a universal disability insurance plan for Ontario, the following problem areas experienced by New Zealand should be flagged.

45. Supra, note 34 at 235.

1. **The Purpose of the Scheme**
In putting in place a comprehensive universal disability scheme the underlying purpose of the scheme should be clear. The present New Zealand scheme has a quite different philosophical approach and purpose than did the original Woodhouse Scheme. The Woodhouse scheme had as a central premise, a system of earnings-related benefits free of all means tests. These benefits were intended to provide real compensation by way of restitutio in integrum to reflect the legacy from the previous common law tort system. This was the initial bargain. The new scheme is much more restrictive and has set up a strict definition of accident. The goal of real compensation no longer appears to be achievable, and the right to a lump sum payment for non-economic and non-physical loss has been repealed. There is a shift to reflect a pure insurance focus, and the hope of the original Woodhouse Report to cover sickness as well as accident has also been put aside. The aspirations for the scheme held in the affluent 1970s has been deemed to be too expensive in the leaner 1980s and 1990s.

2. **Public Acceptance**
Universal disability insurance has some very strong advocates and some very persuasive arguments on its behalf. However, it is far from universally promoted and its introduction will face stiff opposition from a number of groups. Unlike the unique situation which existed in New Zealand, there is no consensus that universal comprehensive coverage is needed or that it will be an improvement over the present system.

In an interesting and revealing study done by Bogart and Vidmar on claiming behaviour, it was found that a majority of persons surveyed were satisfied with worker compensation. These people are likely among the approximately 95% of people who file the straightforward accident claims and who receive swift and efficient service. Is there sufficient dissatisfaction overall with the current system to make the transition to a universal disability system viable? Will workers be interested in a contributory scheme? Is the present discontent in New Zealand a warning sign?

Significantly, federal and provincial cooperation will be required to design a scheme which will be truly universal. Interprovincial worker compensation agreements will have to be modified or renegotiated. Presently, there is no evidence at all of a nation-wide desire for a comprehensive system. In fact, British Columbia has revamped its provincial worker compensation system and is

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encouraged by its results. Indeed, New Zealand officials have visited and have been impressed by the British Columbia model. Quebec also has a unique system, which is still being tried out. In Ontario, there are still a majority of labour and management groups which fiercely resist the notion of a universal regime. Ontario will not be starting out with the clean slate New Zealand had.

3. Cost

The funding of a universal disability scheme will require great innovation and a clear focus on what the plan is intended to do. New Zealand has pointed to the key questions: How is the scheme to be financed? Who will pay? What level of benefits is to be provided? Is there any room for private actions? The Woodhouse scheme and the plan envisioned for Ontario by Paul Weiler in his report, and by Terry Ison recommend an earnings related scheme providing the claimant with income replacement which would as nearly as possible maintain the claimant's original lifestyle. Ultimately, New Zealand has found this model to be very expensive and not affordable if sickness were to be covered. Other jurisdictions have proposed less expensive models which would provide flat-rate contributions and flat rate benefits which would maintain a minimum level of subsistence. Currently, workers in Ontario receive an earnings-related benefit level which is one of the highest benefit levels of any jurisdiction in the world. Will there be a willingness on the part of workers to pay into a fund or to see benefit levels drop to secure comprehensive coverage for all if this is deemed the most appropriate model? Will employers, previously protected from large assessments because of industrial classification, be willing to pay more if the more generous model is adopted? Will the new plan, in fact, be more efficient and cost effective?

In designing a plan, it will be necessary to let go of old notions of worker compensation rights held by both employers and workers, and move toward a new format where new agreements and cost arrangements are reached. Is there the political will to do this?

4. Deterrence

The deterrence function was found to be inadequately achieved in New Zealand under its original plan, and the new Act has provided for experience rating. Moreover, the New Zealand government also established a health and safety agency which has been given both an educative and preventive function. 48 This

48. The Corporation established an Internal Safety Rating System (ISRS) as a way of introducing systematized loss control, including injury prevention, into workplace methods and practices. As a result Corporate Auditors have been hired and trained to supervise the system and offer courses. In 1989, the corporation paid $16,932,000 to fund the Occupational Health and Safety programme of the Department of Labour, see Report of
step to further regulate workplace health and safety reinforces the view that separate legislation is required to achieve the goals of compensation and deterrence. Trebilcock argues convincingly that even strictly compensatory schemes must include incentives which promote and encourage safe and healthy practices and which take into account conduct variables. These incentives are very difficult to design into a comprehensive insurance plan, particularly a social insurance model.

Experience rating is partially effective in providing incentives to employers to take measures to maintain safe and healthy workplaces. In Ontario, the New Experimental Experience Rating (NEER) is designed to provide incentives to firms to improve workplace safety. Refunds or surcharges are issued to firms in participating rate groups, depending on the employer’s accident record. NEER, however, is very problematic with respect to the unique issues raised by occupational disease. Since diseases may have long latency periods and be partially caused by agents outside the workplace, experience rating becomes unfair and is unhelpful as an incentive to improve safety. Given that occupational disease is an area which triggers numerous complaints about worker compensation, this is very problematic. Allocation of costs in industrial disease cases presents major evidentiary difficulties. The debate as to how these costs should be allocated rages on, with little empirical evidence existing as to what method of cost allocation is most effective. Yet, incentives which require employers and workers to take individual responsibility for their activities are necessary to insure the integrity of the system.

5. The Educative Function in Ontario
A tort action allows the courts to review and comment on societal behaviour and to set public standards and guidelines of conduct. A comprehensive no-fault system changes the fundamental nature of the dispute between parties. A former plaintiff becomes a claimant/victim and the legal process changes from a dispute resolution function to an administrative function with the victim becoming a client of the state. A growing body of research literature about victims suggests

the Accident Compensation Corporation, March 31, 1989.

49. Supra, note 35 at 20-24.

50. Some new studies in the U.S. have shown that experience rated premiums have significantly lowered accident rates. For a review of these studies see D.Dewees and M.J. Trebilcock, “The Efficacy of the Tort System and its Alternatives: A Review of Empirical Evidence” [1991] Osgoode Hall Law Journal, at 128.

51. Worker Compensation Appeal Tribunal decisions express this concern. See WCAT decisions 398/89 and 482/91.

52. For a comprehensive discussion of their phenomena see L. Nader, “From Disputing to
that the victim of wrongdoing often has a real need to confront the author of his or her misfortune. The ability of tort plaintiffs to pursue the tortfeasor in court and to air their grievances in a public forum, reduces the feeling of powerlessness and enables injured parties to assert a right and to assume some control over their lives. For many aggrieved victims, the actual award of damages or compensation may be only of secondary importance to their need for justice.

Society as a whole may also suffer from the atrophied role of the plaintiff. A narrowing of the range of complaints brought before a court limits the role of the courts as an instrument for social change. Klar makes this point eloquently in his discussion of what is lost in a no-fault scheme such as New Zealand’s in respect of the flexibility and adaptability of tort law to accommodate new needs and to set new standards of conduct as society changes over time. As Klar points out, during the twenty one years where no-fault has existed in New Zealand, Canadian tort law has evolved and expanded to include many new protections for Canadians in various personal injury contexts. Where large groups of would-be plaintiffs are barred completely from the courts, the courts lose touch with the raw material which provides the social context of the complaints. The ability of the law to respond to human needs in a changing society is impaired, as is the ability of courts to monitor and establish standards of conduct for individuals and groups.

If Ontario were to expand the scope of the worker compensation system to encompass medical misadventure, product related injuries, environmental injuries and risky sporting and recreation endeavours as has been done in New Zealand, the ability to respond to changing activities would be impaired.

Even within our present worker compensation system, the inability of some injured workers to confront the egregious misconduct of some employers who have knowingly failed to inform workers of occupational hazards in the workplace has led to real strains on the worker compensation system. The availability of punitive damages in New Zealand courts for such cases highlights the need to design a comprehensive system which will allow recognition of intentional employer misconduct. The push for a return to some private actions suggest that in any Ontario regime, careful attention should be paid to the possibility of

53. See L. Klar, "New Zealand’s Accident Compensation Scheme: A Tort Lawyer’s Perspective" (1983) 33 Univ. of Toronto L.J. at 105-107; and see Nader, supra, note 52.

54. Klar, ibid. at 106-107. Klar cites several examples of the evolution of tort law in recognizing the rights of medical patients, athletic participants, penitentiary inmates etc.
retaining personal injury suits in certain areas. Trebilcock and Deewees have already done some empirical work which points to the areas most suitable for private actions.55

6. The Scope of the Reform
In a recent paper, Harry Beatty examines the reasons why so little progress has been made towards a comprehensive plan.56 He makes a case for moving beyond the intermediate step envisioned in the Slater Report, and argues that planning for total comprehensive disability compensation should begin. He sketches some strategies for reforming the entire compensation system which would require a harmonization and rationalization of numerous plans, which vary in their funding, coverage, eligibility rules, delivery mechanisms and other features.57 Given the broad based and radical revamping which would be required for such an undertaking, it is interesting to ponder whether the notion of a minimum guaranteed income should be revisited. The report of the MacDonald Royal Commission58 advocates the replacement of all compensation and welfare schemes with a universal income security program. While such an examination is far beyond the scope of this paper, it certainly is a logical inquiry for those who would compensate for all incapacity immediately, skipping Slater's intermediate step.

CONCLUSION
What can we learn from the New Zealand experience? Clearly, existing comprehensive insurance schemes are not a panacea for all the ills of the Ontario system. The goals of fair compensation, cost effectiveness, deterrence, accident prevention and standard setting have only been partially met. The thorny problems of occupational disease and abuse of the system that have been problematic in Ontario and which have been the impetus for the call for reform, have not been addressed at all. What New Zealand has provided is a map of the difficulties and obstacles that must be overcome in order to achieve an improved system. If Ontario is to proceed to a comprehensive entitlement scheme covering illness, howsoever caused, and at a benefit level that is both fair and affordable,

55. See D. Dewees and M. Trebilcock, supra, note 50 at 128.
57. Ibid. 100-101. The most important of these plans include: Family Benefits, Gains-D; Worker's Compensation; Long term disability insurance; Canada Pension Plan disability insurance; Ontario Motorist Protection Plan and personal injury tort awards.
it will be pioneering in new territory and will become the first truly comprehensive scheme in the world.

New Zealand, while a pioneer in universal comprehensive insurance coverage, is still in the process of fulfilling (or for some destroying) the vision of the original Woodhouse Report. The stimulus which existed in the 1970's creating the political will to experiment has slowed, bogged down in problems of cost and cost allocation. Even the basic philosophical approach has become blurred with different groups adopting different interpretations and understandings of the intent of the Act. Politics has entered the picture and complicated the issues. Nevertheless, Ontario has much to learn from the New Zealand experience. The pitfalls have been pointed out and the contradictions have been flagged. The problems to be examined if Ontario calls a Royal Commission have been exposed and Canadian legal scholars such as Ison, Trebilcock, Dewees etc. have already begun the debate. Empirical evidence of the efficacy of universal plans has begun to be compiled. What is needed is the political window of opportunity to make forward progress.

Universal comprehensive insurance coverage for both injury and illness has tremendous humanitarian appeal. It is attractive, in part, because it is a change from the present besieged and beleaguered regime which is increasing seen as unfair and unworkable by both workers and management. There is no question that the present system is imperfect—but is universal comprehensive coverage the proper alternative?

The implementation of a plan for Ontario which will ensure fair benefit levels, maintain some flexibility for exceptional cases, preserve incentives to deter negligent and reckless conduct, compensate occupational disease fairly, and will recognize individual civil rights and individual conduct is a challenge. Are we up to it?