The Calculation of Periodic Payments for Permanent Disability

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Abstract
Methods of calculating benefits, particularly for permanent disability, remain a serious problem for both private and government plans of disability insurance. Professor Ison analyses some of the methods in use. His evaluation includes not only the financial implications to recipients of alternative methods of calculation, but also the social costs and the probable effects on the physical and mental health and the morale of claimants. His critique concludes by suggesting a combination of two methods to provide the optimum solution to the problems identified.
THE CALCULATION OF PERIODIC PAYMENTS FOR PERMANENT DISABILITY

BY TERENCE G. ISON*

Methods of calculating benefits, particularly for permanent disability, remain a serious problem for both private and government plans of disability insurance. Professor Ison analyses some of the methods in use. His evaluation includes not only the financial implications to recipients of alternative methods of calculation, but also the social costs and the probable effects on the physical and mental health and the morale of claimants. His critique concludes by suggesting a combination of two methods to provide the optimum solution to the problems identified.

INTRODUCTION

The measurement of permanent partial disability has probably been the most difficult topic in the area of compensation for disablement. Indeed, the problems involved are so formidable that many systems of disability insurance, including policies offered by insurance companies and the disability benefit under the Canada Pension Plan, confine their benefits to cases of total disability. This topic is probably also the most important one in contemporary discussions of system development.

While the measurement of permanent partial disability involves problems in the calculation of lump sums as well as periodic payments, the focus of this article is on the calculation of periodic payments. In contemporary debate, this is important in at least three contexts.

First, in relation to tort liability, there is increasing recognition of the difficulties of lump sum awards and of the potential advantages of switching to periodic payments, perhaps in the context of other structural changes. For example, Dickson J., speaking for the Supreme Court of Canada, has said:

The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump-sum system and a once-and-for-all award.

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The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest when there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in light of the continuing needs of the injured person and the cost of meeting those needs.¹

Secondly, in workers’ compensation in recent years, some provinces have abandoned the award of fixed pensions and reverted to periodic payments calculated by reference to the estimated actual loss of earnings of the worker as assessed from time to time (coupled with initial lump sums).

Thirdly, it has been argued that all etiologically-based systems, including tort liability and workers’ compensation, should be abolished in favour of a comprehensive plan of compensation for disablement.² In that context, too, problems of measurement arise in relation to periodic payments, particularly for permanent partial disability.³

Periodic payments have obvious advantages over lump sums as compensation for certain types of loss, particularly loss of future earnings and future expenses resulting from the disability. For example, periodic payments avoid the problem of calculating a lump sum by reference to an expectation of life which almost inevitably will differ, sometimes by many years, from the actual life of the claimant. The purpose of this article, however, is not to demonstrate the advantages of periodic payments over lump sums. Rather it is to discuss the alternative ways in which periodic payments might be measured when used as compensation for loss of future earnings or for loss of earning capacity.

Other types of loss do not usually involve the same problems. In our current system of workers’ compensation, for example, ongoing provision for medical and other future costs of disablement is necessary only in a minority of cases and is not usually a matter of great difficulty. Irregular and occasional costs can be met as required on an actual cost basis. Regular ongoing costs can be met by paying a regular allowance, either indexed for inflation or adjusted when actual costs change.

Traditionally, the greatest problem has been to design a satisfac-

³ *Id.* at 432.
Disability Payments

The primary choice is between
(a) the establishment of fixed pension, or
(b) the actual loss of earnings method; that is, attempting to make periodic payments, the amounts of which will vary from time to time, or at pre-determined intervals, according to changes in the estimated actual loss of earnings resulting from the residual disability.

Both methods have been used in workers’ compensation in Canada from its earliest years, though the actual loss of earnings method has generally been abandoned when its difficulties and injustices have been re-discovered. A fixed pension is the method that has generally been accepted in royal commission studies and that has traditionally been used by the workers’ compensation boards most of the time. In recent years, however, the actual loss of earnings method has been revived in Saskatchewan and New Brunswick. The difficulties of this method are explained under the headings that follow.

ADJUDICATIVE PROBLEMS

The actual loss of earnings method has a superficial attraction: it would appear to keep the compensation in line with actual economic loss. This is, however, an illusion.

All methods of measurement require a workers’ compensation board to determine whether the current disablement of a worker is a consequence of the compensable disability or a consequence of other causes, pre-existing, concurrent or subsequent. Under a pension system, this is determined only once, unless a worker applies subsequently for a re-opening on the ground that the condition has deteriorated. Under an actual loss of earnings method, however, the question of whether the current disablement is a consequence of the compensable disability is subject to constant or periodic review; and of course the decisions become increasingly difficult as the consequences of the compensable disability blend with subsequent events affecting the health of the claimant, including subsequent diseases, subsequent trauma and natural aging. Thus the problems involved in establishing etiology are not con-

4 The best of these was probably the B.C. Report of the Royal Commission on the Women's Compensation Act and Board, (1952).
fined to the decisions made in the early stages of a claim. They can beset a claim throughout the ensuing years.

Under an actual loss of earnings method, there is scope for continuing disputes not only about the significance of the compensable injury or disease as a cause of the current disablement, but also about the current disablement as a cause of absence from work. No disability exists as an isolated condition superimposed upon a state of normalcy. Every serious disability interacts with a range of physical, emotional, intellectual and social characteristics that combine, in ways that are never completely obvious, to determine fitness for work. Moreover, the current state of the economy, and of the labour market in particular, can be critical in the availability of work; but, again, its significance in a particular case at a particular time, compared with the personal characteristics of the worker, may well be obscure.

There would be no problem if each claim involved a discrete disability superimposed upon a state of normalcy and if the claimant would subsequently age at a standard rate with no other health problems, and if the labour market would remain static; but that is not the real world. Establishing etiology on a continuing or periodic basis can be extremely difficult and it can be even more difficult to establish the etiological significance of one past disability on the current labour market opportunities of a claimant. The evidentiary basis for the conclusions, and the roles of law, fact, medicine and logic would be so slight, compared with the range of intuitive judgments being made, that the decisions must have the appearance of whim, or open-ended discretion, or as resulting from prejudice or pressure.

In some cases it may be easy to determine that a current incapacity for work is due to multiple causes, perhaps several disabilities, the compensable disability being one. How much loss of earnings is to be attributed to that cause, however, can still be a contentious issue.

Another relevant factor is that the easiest claimants to place in employment are those whose disabilities are apparent, such as amputees. The most difficult ones to place are the bad back patients. Yet this is the category of claims that is also the most controversial, and it is in the bad back cases that the greatest pressure arises to close the files. Thus if an actual loss of earnings method was operating according to its own rules, compensation benefits would tend to terminate for claims that are not generally controversial, while continuing benefits would be claimed for the category of claims that is the most highly controversial.

Even if it could be done in any fair and accurate way, the continuing or periodic review of a disability, its labour market significance, and its etiology would still involve a high administrative cost to com-
Disability Payments

Some of the difficulties and complexities of adjudication under an actual loss of earnings method can be mitigated by a process of negotiation and bargaining to achieve a conclusion that the claimant can be persuaded to accept. If that happens, however, it puts a premium on an aggressive temperament and penalizes people of modest dispositions. It is particularly objectionable to engage in a process of that kind with someone whose self-confidence may have been shaken by disablement, and in any event, bargaining can be a negative influence on rehabilitation. Moreover, bargaining is a way of resolving differences between adversaries. For bargaining to take place between a claimant and an adjudicating tribunal is a serious impairment of the right to adjudication. Our system of workers' compensation was introduced in the first place to save disabled workers from the bargaining process, and any re-introduction of that by the adjudicating tribunal would undermine the perception of workers' compensation as a system of insured statutory rights.

CIVIL LIBERTIES

A major advantage of a fixed pension is its positive influence on rehabilitation. However much a claimant may be able to improve his future earnings, the pension remains unaffected. Conversely, to base compensation on actual loss of earnings creates a significant disincentive to work. There could be no benefit from work unless the anticipated earnings are substantially in excess of the compensation. In most cases, that would not be so. The traditional response to this, and the one adopted in the recent reversion to the actual loss of earnings method, is to calculate the current earnings of the claimant by including not only actual earnings, but also the earnings that could be obtained by the claimant in some suitable occupation. This use of "deemed earnings" has been one of the greatest causes of anger and complaint in the history of workers' compensation.

One consequence of the use of "deemed earnings" is that rehabilitation is no longer voluntary. The claimant is under considerable pressure to accept a job offer, particularly if it is one recommended by a board. Thus, to the adjudicative problems of this method, there is added a structure that will produce, in some cases, a form of directed labour. There are, moreover, other encroachments on civil liberties in the use of this method. One is that the position of a claimant, including his medical condition, work, work opportunities, place of residence and other aspects of the claimant's lifestyle, are subject to continuing or...
periodic investigations by the board. It is like a sentence of perpetual probation.

This method also requires continuing participation by a board in the doctor/patient relationship. Under other methods, once a pension is assessed, a board no longer requires continuing reports from the attending physician and the confidentiality of the doctor/patient relationship is restored. Under the actual loss of earnings method, however, there may be a continuing or periodic need for information from an attending physician to enable a board to determine whether any current loss of earnings is due to the compensable disability or to other causes.

The actual loss of earnings method is also inconsistent with contemporary demands of the civil rights movement among disabled people. They want more entrenched rights and less administrative discretion, more law and less medicine, more independence and fewer dependency relationships which subject their social and economic activities and their lifestyles to the continual judgments of other people.

Another civil liberties issue is the threat to the basic right of movement. A right which we claim distinguishes the “free world” from totalitarian regimes is the right to travel, including the right to leave the country of one's birth or domicile and settle or re-settle elsewhere. A fixed pension system enables disabled people to stay where they are or go to the places of their choice without fearing a loss of compensation payments. The actual loss of earnings method can generate a fear in claimants that if they are not present and available for continuing or periodic reviews of their entitlement, with local evidence of their efforts to work, their benefits will be reduced or terminated. Whatever the reality may be about the decisions likely to be made when someone has left the jurisdiction, the fear created of adverse consequences can be a serious restraint on the right to move. For this reason alone, this method is hardly consistent with the principles enunciated in the Canadian Charter of Rights and Freedoms.\footnote{Sections 6, 7 and 15.}

In Canada, this is not merely a theoretical problem. A large proportion of workers in high hazard industries are immigrants, and it is not unusual for a disabled immigrant to want to return to his country of origin, particularly if he will have family support there. This restraint upon civil liberties could, therefore, be substantial.

INFLUENCE ON REHABILITATION

A primary goal in the measurement of partial disability must
surely be to avoid any significant impediment to rehabilitation. Indeed, one of the reasons for compensating for partial disability at all is to avoid such an impediment. As mentioned above, some systems of social insurance and many insurance company policies of disability insurance compensate only for total disability. Thus any marginal improvement that a claimant can achieve in his condition may be a disqualification from all further benefits. Compensation for partial disability should be designed to remove that obstacle to rehabilitation as well as other impediments.

A fixed pension for permanent partial disability creates the maximum incentive to rehabilitation once a pension has been assessed. Claimants are told that pensions are payable for life, or at least until retirement age. They can do what they like, go where they like, earn as much as they can, embark on any career changes they wish, adopt any lifestyle of their choice, and nothing that they do will be called into question to impair the continuity of the pension. By contrast, the actual loss of earnings method negates the advantage to disabled people of re-establishing themselves in employment. It also constrains their liberty to make other decisions relating to their own rehabilitation according to their own choices.

This method can also create genuine fears of work. This was brought home to the writer in an interview with a paraplegic claimant in New Zealand who was receiving compensation on an actual loss of earnings basis. Apart from his paralysis, he seemed healthy. When asked why he had no plans for work he explained, after some reluctance, his fear. He was apprehensive that if he returned to work and then found after some period that he was unable to continue, his subsequent absence from work might be attributed to some cause other than his compensable disability, perhaps a debilitating disease, the aging process, et cetera. An attempt to work with temporary success may be construed as evidence of an ongoing capacity to work, and any subsequent discontinuance of work may therefore be attributed to causes other than the compensable disability. Thus his fear of work reflected his recognition that any subsequent resumption of compensation benefits would depend upon judgmental factors, and he would be cast in a role similar to that of a suppliant for the exercise of a discretion.

Fears of this kind can be aggravated by recognition that compensation systems are, and always have been, subject to political pressures. The treatment of disabled people has varied with the ebb and flows of the political process, and it would surprise no-one if the outcome of the various intuitive judgments involved in the actual loss of earnings method should vary with the political climate of the times. For that
reason too, any reversion to this method means that a disabled person loses the secured position of a pensioner only to obtain instead a position of vulnerability to the winds of political change.

Vested pension rights that are not dependent upon subsequent events not only maximize the incentive to rehabilitation but also promote the security and confidence that are likely to make rehabilitation successful. Conversely, uncertainty about future compensation benefits can maximize anxiety, which in turn can increase the severity of disablement. Moreover, uncertainty, coupled with the recognition that future benefits will depend upon a range of judgmental factors, may tend to divert some people from rehabilitation and create instead a perceived need to be more convincing about the nature and extent of their disabilities. Even among ordinary claimants, it can create an incentive to exaggerate their woes.

Another more serious aspect of the actual loss of earnings method is its incompatibility with the existence of a genuine and active rehabilitation service. Indeed, the actual loss of earnings method is incompatible with rehabilitation as a service that is offered to claimants. Where benefits are reduced if the employment efforts of a claimant are successful, and may also be reduced by reference to “deemed earnings”, rehabilitation consultants are bound to be perceived as benefit control officers, and rehabilitation is almost bound to become a euphemism for a system of imposed controls. This is another negative influence on the confidence of claimants that is so necessary for constructive and imaginative rehabilitation programmes.

Again, good rehabilitation can sometimes require personality and aptitude testing, often concurrently with treatment at a board clinic. On an actual loss of earnings system there would be suspicions that the results of such tests could become part of the evidence used for a termination of benefits. Moreover, confidence in the medical and rehabilitation staff would tend to be undermined by fears that they are not there to promote the patient’s interests, but rather to prepare a case against the patient by the provision of evidence relating to earning capacity in some “suitable employment”. Suspicions about the genuineness of a rehabilitation service are likely to be enhanced if it is board policy to follow clinical testing by requiring or monitoring routine job search efforts by claimants. That debilitating practice has already been used, and its use is surely likely to be extended under an actual loss of earnings method.

The provision of a real and genuine rehabilitation service is demanding. It requires a high level of intelligence and imagination among the staff, and it requires primarily field-work. People of the calibre re-
quired for a genuine, imaginative and constructive rehabilitation service are unlikely to remain in the job, or unlikely to be hired, if the job is perceived as essentially one of benefit control. The rehabilitation division of a board is almost bound to take on a paramilitary flavour, with supervision over claimants being the perceived role.

Again, when the role of a rehabilitation consultant at a board is so directly related to the reduction of claims costs, a claimant can have no confidence that the consultant is turning his mind objectively to the question of what career pattern would best suit the long term interests of the claimant, and hence no confidence that advice as to suitable employment is in the best interests of the claimant.

These problems are bound to aggravate the difficulties of quality control. The nature of a rehabilitation service makes it extremely difficult to measure success, to monitor performance and to maintain quality. There is no valid quantitative measure of success and no bottom line. There has, however, been one traditional mode of quality control; i.e., the market mechanism of free choice. Under a fixed pension system, a claimant can accept or decline the rehabilitation services of a compensation board according to his choice. This right of choice is the primary medium of quality control. In an actual loss of earnings system, including the provision for "deemed earnings" in some "suitable employment", this right of free choice is gone, and there is no other automatic control for professional quality. If any resulting deterioration in the quality of rehabilitation combines with other pressures operating on the system under an actual loss of earnings method, the temptations and the pressures will be there in any case where rehabilitation is difficult to identify a "suitable employment", deem the earnings, and close the file.

SIGNIFICANCE FOR EMPLOYERS

The negative impact of the actual loss of earnings method on disabled people and the problems that it creates for an adjudicating board are not counter-balanced by any clear advantages for employers. A reversion to the actual loss of earnings method might result in a net reduction in claims costs, and if it does, a consequential downward influence on assessment rates could seem attractive, at least at first impression. If this occurs, however, there are several reasons why it could turn out to be less attractive than it might first appear.

One is that any resulting reduction in the cost of workers' compensation claims could be offset to some extent by consequential increases in the costs to employers of sick pay and disability insurance, and in costs to taxpayers at large (including employers) through Unemploy-
ment Insurance, Canada or Quebec Pension plans, welfare, *et cetera*. Moreover, the anxieties and stress created for disabled people by the actual loss of earnings method might aggravate their disabilities, with resulting increases in costs. At the very least, any reduction in claims costs would be offset in part by the increase in administrative costs required to operate an actual loss of earnings system.

This last point is not a small one. The palliative that is offered to make an actual loss of earnings method acceptable in the political process is that it operates in conjunction with a lump sum payment. Thus the problems outlined above may begin at a time when a claimant has the funds to engage a lawyer. It would be no surprise if the combination of lump sums and the actual loss of earnings method results in a gradual increase in the use of lawyers, with a partial return to the costs and other problems of the adversary system.

Again, the actual loss of earnings method is difficult to reconcile with a funded system. If there is no fixed pension, there is no mathematical way of estimating the future costs of a claim for funding purposes. One solution would be to move from funding to current cost financing. That is something that should probably be done in any event, and as a practical matter, it has almost been done in Ontario. However, the combined effect of current cost financing together with an actual loss of earnings system could be unfortunate. The result would be that if workers really do receive the benefits to which they would be entitled under the system, then when the economy is down, costs would suddenly increase in respect of past claims. Hence assessments would have to be increased at a time when the increase would create the maximum difficulty for employers.

Another concern is the impact that this regime could have on the overall state of labour relations. The recent downturn in the economy and the consequential unemployment have created great strains for many people and for many companies. Constructive solutions to these problems may depend upon some measure of cooperation, and this is surely less likely to occur if hostile positions are adopted. The actual loss of earnings method may appear simply as an attempt to save money by a system change that is inimical to the interests of disabled people. This is all the more unfortunate if it is adopted when alternative methods of saving money* are available which would not adversely affect the interests of disabled people.

Another matter of possible concern to employers is that the actual

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* E.g. adopting current cost financing; and adopting a comprehensive plan of compensation for disablement instead of the present fragmented systems.
loss of earnings method is likely to result in more compensation to
those claimants who are generally considered by employers to be the
least deserving, particularly the bad back cases, with less going to those
categories of disabled workers who are generally regarded by employ-
ers as the most deserving, for example, the amputees.

Again, actual loss of earnings systems or proposals have sometimes
been associated with pressures and obligations upon employers to pro-
vide continued employment to workers who are disabled in their ser-
vices, even though such workers may not be wanted for what they can
now produce. The result could be that conscientious and law-abiding
employers comply with the obligation and provide continued employ-
ment, notwithstanding the economic disadvantage of doing so, while
more reckless or indifferent employers find ways of avoiding the obliga-
tion. Such obligations are notoriously difficult to police. The net result
may well be that conscientious employers are placed at a competitive
disadvantage.

A final concern for employers must surely be the long-term impact
on costs. If the short-term result of a reversion to the actual loss of
earnings method is a reduction in costs (and I am not sure that it is),
the long-term impact could well be a substantial cost increase. This is
because a reversion to the actual loss of earnings method is likely to
result in such a serious deterioration in the system from a worker's
perspective that within a relatively short time there could be demands
for a revival of tort liability in addition to workers' compensation.
Those demands would be hard to resist when it is seen that among
seriously disabled people, the compensation received by those disabled
as a result of employment compares so unfavourably with that received
by those disabled in some other ways. While these demands for a revi-
val of tort liability might originate in the labour movement, or with
labour lawyers, they could soon find powerful support from the insur-
ance industry and the litigation bar. The end result could be that em-
ployers are paying liability insurance premiums in addition to workers'
compensation assessments, and the overall impact on cost could be such
an escalation that employers look back with nostalgic envy to the as-
ssessment rates of 1985.

SIGNIFICANCE FOR TAXPAYERS

Our systems of workers' compensation were designed from the be-
ginning to protect taxpayers as well as to protect disabled workers and
employers. The principle adopted was that society should pay for indus-
trial disabilities but should not pay twice for the same disability. A
disabled worker should not receive a lump sum which he could then
spend and become a charge on public funds. It was partly for this rea-
son that the use of lump sums was discontinued (except for minor disa-
bilities) in favour of fixed pensions. In the recent revival of the actual
loss of earnings method, however, it has been combined with the re-
introduction of an initial lump sum. Because the actual loss of earnings
method does not guarantee further income (for the reasons explained
above), this revival could involve the kind of double burden on society
that the abolition of lump sums was originally intended to avoid.

THE PROCESS OF SYSTEM REVISION

The actual loss of earnings method was, of course, known to those
who conducted the royal commissions of earlier years and to board ad-
ministrators. It was rejected in preference for fixed pensions. This pref-
erence rested upon a sound analysis, and it included a conscious accept-
ance of the weaknesses of a pension system. Nothing of any real
relevance has changed since that judgment was made. What has
changed, and what appears to have led to the revival of the actual loss
of earnings method, is that the decision-making processes have become
less thorough, less analytical, less advertent to long-term consequences
and more responsive to the political pragmatism of the moment.

A royal commission has several advantages. The evidence and the
arguments are in the open, and nowadays, a royal commission can aug-
ment the submissions received by work of its own research staff. It is,
or at least might be, relatively immune from the pressures of the politi-
cal process. Those pressures can operate subsequently on the political
decisions made in response to the report, but they might not operate
from the beginning to detract from the fact finding and analytical
work. Again, royal commissions are generally conducted by people en-
gaged in the work on a full-time basis.

Conversely, legislative committees, task forces, consulting firms
and other types of enquiry often have their work conducted by people
who are subject to the concurrent distraction of other demands. This
problem is aggravated if the people concerned have no prior experience
of the system that they plan to change. Those types of enquiry can be
useful for a range of purposes, but for major revisions of system struc-
ture, a more penetrating analysis is essential.

Short-sighted answers are bound to follow from short-sighted methods of exami-
nation. It is even worse if the sweep and philosophy and the broad purposes of
such a project are ignored in favour of the sheer pragmatism of the moment.\(^7\)

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\(^7\) Woodhouse, *Aspects of the Accident Compensation Scheme*, (1979) Kennedy Elliott Me-
Unfortunately, that warning has been unheeded in the revision of workers' compensation in Canada during the last few years.

An example of this, which subsequently became typical, is that when the committee report in Saskatchewan recommended the actual loss of earnings method in 1978, they appeared to be acting in the honest belief that they had thought of something new and progressive. There was no recognition in the report that this method had been tried before in Canada, even in the neighbouring province of Manitoba a decade or so previously.

THE EXPERIENCE TO DATE

No doubt it would be of interest to know how the actual loss of earnings method has worked since it was revived in Saskatchewan and New Brunswick, but we probably never will, at least not in terms of a complete picture. Most of the relevant impacts of the system are not systematically recorded; there is no vantage point from which to see the full range of consequences and there has been no systematic empirical study.

For several reasons, however, one might expect this method to work better in Saskatchewan (which has had the longest experience with the recent revival) than it could work in the larger provinces. Saskatchewan was extremely fortunate in the ability and integrity of the person who was Chairman of the Board during the introductory years of the recent revival of this method, and one would expect him to make the system operate as well as possible. It would be unrealistic to expect that level of ability and authority among all primary adjudicators and at all levels of appeal in the larger provinces.

Secondly, the population of disabled workers in Saskatchewan is relatively small. The number of serious and permanent disabilities involving a significant issue is small enough for one person to be responsible for adjudication in relation to them all, and the chairman can also maintain a personal familiarity with what is happening in primary adjudication. This volume limitation can help to promote consistency, and it can also facilitate the use of judgmental factors without fixed rules. The volume is too great for that in the larger provinces. The continuing or periodic reviews required by the actual loss of earnings method in a larger province would have to be conducted, and the decisions would have to be made by a variety of staff, and it would be extremely diffi-
cult to achieve consistency in the application of the judgmental variables. One result would be further congestion of the appeal structures, some of which are already overloaded.

Another significance of volume is that in a smaller jurisdiction, the method could operate for a long time without adverse comparisons being made with tort liability. Consider the example of two clerical workers, both suffering accidents in which they became paraplegics. In one case it happened at work and in the other case it happened while travelling home. Both are able to return to the same or similar employment. In the first case, the worker in Saskatchewan would receive temporary workers’ compensation benefits and a relatively small lump sum. In the second case, the worker would receive periodic payments under automobile insurance, and if he sues on a tort claim may receive an award of about half a million dollars. Can anyone seriously expect organized labour to acquiesce in the actual loss of earnings method when comparisons of that type become headline news? In Saskatchewan, several years could go by before comparative accidents of that kind occur and the results become known. In Ontario, it could be only a matter of weeks. Any adoption of the actual loss of earnings method in the larger provinces could, therefore, create a serious risk of a demand for workers’ compensation to be supplemented by tort liability. That could have its advantages for the insurance industry and the litigation bar, but it would be unfortunate for disabled workers, for taxpayers and for employers.

PENSION CALCULATIONS

Part of the pressure for a revival of the actual loss of earnings method in recent years came from representatives of those who were dissatisfied with their pensions. This dissatisfaction resulted, however, not from the principle of a fixed pension but from the manner in which pensions have been calculated. For the reasons explained above, a fixed pension has substantial advantages over the payment of benefits by an actual loss of earnings method.

The method of pension calculation generally used in Canada has been the physical impairment method. This requires an injury to be rated as a percentage of total disability according to the estimated degree of functional impairment. To achieve consistency, the boards use schedules of physical impairment which ascribe percentage rates to particular disabilities. For example, in a typical schedule, total blindness is rated at 100%, loss of a kidney at 15%, immobility of the joint at the hip at 30%, complete denervation at the elbow of the median nerve at 40%, total immobility of the spine at 60%, shortening of leg by
two inches at 6%, and amputation of an upper extremity at the middle third of the humerus at 65%. In British Columbia, these percentage rates are then adjusted by an age variable. The percentage rate thus ascertained is then applied to the rate of compensation that the claimant would receive if totally disabled. Unscheduled disabilities are assessed according to the same principles, using the schedule as a guide.

This method has had its problems. One is that the schedules of physical impairment used by the compensation boards have been unduly orthopaedic. Thus the percentage rates for amputations seem unduly high when compared with physical impairment or likely economic loss while the percentage rates attributed to diseases or to bad backs seem unduly low. Thus while the theory has been that the percentage rates are intended to reflect the degree of physical impairment, the practice has been that they have tended to reflect anatomical loss. This problem is, however, not one that is inherent in the method. To a large extent, it could be solved by drastic revision of the schedules.

Another and probably the main problem with the physical impairment method is that it is difficult, almost to the point of being impossible, to incorporate any automatic occupational variable. In practice, an occupational variable is not used in Canada or in most other jurisdictions. Thus there is no necessary correlation between the degree of physical impairment and the consequential economic loss. Perhaps the example most favoured in academic discussion is that of a concert pianist losing a finger. Of course the real world of human disablement does not consist of concert pianists losing fingers, but it does include an enormous volume of bad backs, and in workers' compensation, these cases raise the majority of the problems in the measurement of periodic payments for permanent partial disability.

Traditionally, the percentage rates ascribed to bad backs have been low, typically in the range of 2 1/2 to 5%. In some of these cases, the ongoing loss of earnings resulting from the disability would be 50% or higher. More recent years have seen bad backs typically rated at 10%, sometimes 15% or 20%, and in some cases at higher percentages. If, however, the object is to bring the rate of pension more into line with actual economic loss, this cannot be achieved simply by raising the percentage rates. With bad backs in particular, there is no uniformity in the economic significance to different people of the same back condition. For example, a bad back may result in the transfer of a skilled manual worker to an unskilled sedentary occupation at half the rate of pay, while for a sedentary worker, the same back condition may permit continuation in his pre-injury occupation until retirement age with little or no economic loss.
An alternative, designed to cope with this problem, is the projected loss of earnings method. This was introduced in British Columbia in 1973 in relation to bad back cases, and was subsequently extended to some other cases of permanent disability. It is used concurrently with the physical impairment method and the pension is based on the higher of the two calculations. This method requires a forward projection of the likely impact of the disability on future earnings. By reference to that projection, a conclusion is reached about the impairment of earning capacity. Evidence is received about what the claimant is capable of earning in occupations that are likely to be available to him, and that level of earnings is compared (with adjustments for inflation) to the pre-injury level of earnings.

This method is similar to the measurement of damages for loss of future earnings on a tort claim except that there is no speculation about what the earnings of the claimant would have been in the future but for the disability. There is no speculation about what the future prospects of promotion would have been, nor is there (as there is on tort claims) any deduction for “contingencies”. The Workers' Compensation Board simply compares the likely future earnings of a claimant after the disability with his pre-injury earnings. The pre-injury earnings are, however, adjusted upward in certain cases, such as those involving learners and apprentices who, at the time of injury, had not reached what might be called the starting rate for their occupations.

This method avoids any attempt to vary the rate of benefit with fluctuations in the level of actual earnings, and hence avoids most of the problems of the actual loss of earnings method. While it is recognized that in the long run, the predicted loss of earnings might differ from the actual loss, this method regards that risk as a price worth paying to avoid the problems of the actual loss of earnings method. This risk of error is also mitigated in the Workers’ Compensation Act of British Columbia by a provision that permits the pension calculations to be re-opened on the application of the worker after ten years; and of course they can be re-opened at any time on the application of the worker in the event of a deterioration in the physical condition.

A possible objection to this method is that it does not provide compensation for non-monetary losses. While the theory of workers' compensation has been that benefits are payable for loss of earnings or of earning capacity, the physical impairment method commonly results in

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9 Decision No. 8 (1973) 1 Workers' Compensation Reporter 27.
10 Decision No. 297 (1979) 5 Workers' Compensation Reporter 11.
11 R.S.B.C. 1979, c. 437, s. 24.
Disability Payments

Pensions at a level exceeding these monetary losses, particularly in amputation cases. This excess might be regarded as compensation for non-monetary losses.

In the context of a comprehensive plan (covering all disabilities regardless of cause), this problem would take on added significance, and indeed, a solution must be found to provide adequate compensation for people, such as housewives, who may suffer significant disabilities without measurable monetary loss.

Perhaps the optimum solution is a blended formula that would arrive at a pension amount partly by reference to physical impairment and partly by reference to the projected loss of earnings. This would involve two calculations.

1. Physical Impairment Calculation

A revised physical impairment schedule could be used, showing dollar amounts rather than percentage rates, so that the amounts awarded would not vary with pre-injury earnings. For unlisted disabilities, the schedule would be used as a guideline. An award under this heading could be considered to cover:

(a) **non-monetary losses** — intangibles such as pain, suffering, limitations on social activities, *et cetera*, and

(b) **presumed loss of earning capacity** — the prospect that there may be some loss of earning capacity notwithstanding the absence of any immediate measurable loss. For example, a claimant may be able to return to his pre-morbid occupation with the same employer, but his prospects in the open labour market might be prejudiced by the disability if he should lose that position. Or the claimant might be a housewife who, in the ordinary course of events, might have returned to an earning position when the children left home.

2. Projected Loss of Earnings Calculation

This would provide the earnings-related portion of the pension, and it could be expressed as a percentage of the projected loss of earnings.

A politically sensitive question is whether these benefits should be cumulative or alternative. To make them alternative would mean that someone whose projected loss of earnings is substantial would receive no compensation for non-monetary losses. Conversely, to make them cumulative would evoke the objection that someone receiving substantial compensation for projected loss of earnings would be receiving too much in total. If that objection is met by reducing the amounts payable for non-monetary losses, the complaint would be raised that those with
no projected loss of earnings are receiving too little.

The optimum solution may well be to calculate the pension by reference to the larger of the two amounts, plus fifty per cent of the smaller. This suggestion reflects:

(a) a political hunch that the provision of substantial compensation for non-monetary losses is more acceptable for claimants who are receiving no other benefit than it would be for those who are receiving substantial compensation for projected loss of earnings; and

(b) recognition that the physical impairment calculation includes a component of presumed loss of earning capacity (non-measurable and non-demonstrable loss of future earnings), and losses of this type are likely to be greatest among those who are not receiving a benefit for projected loss of earnings.

In the context of a workers' compensation system, a viable alternative would be to make the two benefits cumulative, and to set the cash amounts of the first benefit, and the percentage rate of the second at levels that would make this result acceptable.\(^1\)

The detail of this proposal would involve a measure of elaboration that is beyond the scope of this article. There is no doubt, however, that the proposal is administratively feasible.

CONCLUSION

For the reasons explained, the recent reversions to the actual loss of earnings method are unfortunate. While the physical impairment method has its problems, these can be overcome by a fixed pension calculated through a blended formula that incorporates projected loss of earnings together with the degree of physical impairment. Under any method of calculation, the credibility of a fixed pension, including its value in the alleviation of anxiety, requires that it must be indexed for inflation.

The matters discussed in this article relate to questions of system structure that are, at least within a very broad range, independent of any judgment on the level of benefits. Under any system structure, the levels of benefits will remain partly a matter of intuitive and political judgment.

\(^1\) Neither of these formulae was adopted in British Columbia in 1973 because either would have required legislative change, and it was desirable to obtain experience with the projected loss of earnings method before undertaking any legislative change that would entrench its use.