# LUMP SUM PROVISIONS FOR NON-ECONOMIC LOSS:

# A MATERIAL TERM

# IN THE

# 1972 SOCIAL CONTRACT

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CONTENTS

## I INTRODUCTION

Lump sum payments for non-economic loss - to be or not to be?

That, inter alia, was the question which faced the Royal Commission of Inquiry set up in 1967 to report upon the compensation for personal injury in New Zealand.

At this stage, injuries were compensated either through the common law or under the Workers' Compensation Act 1956. Both avenues were less than perfect. The former was based on proof of negligence, or invoked by the doctrine of res ipsa locquiter. It was categorised by cost and delay. The lump sum damages which were awarded were subject to reduction if the plaintiff was contributorily negligent. In the opinion of the Royal Commission, chaired by Woodhouse J (as he was then):

> "The remedy itself produces a complete indemnity for a relatively tiny group of injured persons; something less (often greatly less) for a small group of injured persons; for all the rest, it can do nothing."[1]

Workers' compensation was awarded where the worker's injury was one 'arising out of the employment' and suffered ' in the course of employment'. It provided the injured worker with eighty percent of his or her earnings, paid periodically. Two statutory limitations severly restricted the scheme. The maximum weekly payment (as of 1 December 1966) was $23.75. The period over which payments may continue was six years. A schedule to the Act measured the percentage of any permanent disability, entitling the injured worker to a proportionate amount of the maximum weekly compensation. Usually paid in a lump sum, the maximum award as at 1967 was $7,343.

The Woodhouse Commission almost totally rejected lump sum payments for non-economic loss, founding their recommendations upon a scheme of periodic payments based on loss of earnings. Despite this, the 1972 Accident Compensation Act contained two such provisions - section 119 provided for loss of bodily function (which shall be called physical loss ) and section 120 compensated for pain and suffering, loss of enjoyment of life and disfigurement (which shall be called intangible loss ). Their inclusion was largely due to the submissions which were presented to the Gair and McLachlan Select Committees.
Had this inclusion not been invoked, it is likely that the Act would not have received popular approval and support.

Eight years later, an attempt was made on the lives of the two sections. In 1980, the Government introduced legislation which sought to repeal lump sum payments for intangible loss, and to restrict compensation for physical loss to injuries of fifteen percent severity and greater according to the schedule to the Act. Predictably, this objective was fought with great vigor, with the Unions and the Law Society emerging as the main combatants protecting the lump sum cause. Victorious, the new 1982 Act retained both lump sum provisions for non-economic loss, despite the serious attempts made to terminate their existance.

This paper argues that the lump sum provisions for non-economic loss formed a material term in the social contract represented by the 1972 Accident Compensation Act. Those rights under the common law and workers' compensation legislation were exchanged for the benefits of that Act as it stood in 1972. Any material alteration to that contract would necessarily be accompanied by fresh consideration. This vital element was absent in the 1980 attempt to alter the contract.

Part II of this paper indentifies the major opponents and advocates of lump sum payments, while Part III considers just what was agreed to in the 1972 exchange Part IV discusses the Government's attempt to eradicate section 120 and seriously wound section 119, and the retaliation by the pressure groups and from within the A.C.C. itself. Part V reviews the outcome of that battle. The conclusion will briefly address possibilities for reform.

## II FRIEND OR FOE?

### 1. The Woodhouse Commission

Emphatically, the Woodhouse Commission rejected lump sum payments, recommending that except in the case of minor permanent partial disability, compensation was best administered under a periodic scheme. This was subject to commuting to lump sums only where "the interests or pressing needs of the person concerned clearly would warrant this"[2]
Compensation for loss of bodily function would be recognised and included in the period payment.

The Woodhouse ideal did not anticipate compensating intangible losses:

> "Beneath the Woodhouse Report's attitude to the common law method of assessing damages dwelt an antipathy to the award for intangible loss. The antipathy was based on the unarticulated view that there was no social justification for compensating pain and suffering in a no-fault system. There was also an underlying feeling that the availability of such compensation

deflected from recovery. For tactical reasons the point was never made explicit; rather the attempt was made to avoid arguments in favour of pain and suffering by comparing the recommended new benefits with awards at common law to show that the new benefits were superior."[3]

2. The Gair Committee

Unique in that it was established before the Government had formed any policy on compensation for personal injury, this Committee was bi-partisan to a large degree. Reflecting upon forty nine submissions, the Gair Comittee diverted from the Woodhouse blueprint and incorporated lump sum payments into their recommendations.

Including compensation for both physical and intangible loss, the Committee was swayed by submissions which while recognising the difficulty of calculating compensation for pain and suffering and loss of enjoyment of life, considered that "these heads of damage are however too deeply embedded in our legal system to abolish at the present time."[4]

The Committee, however, limited the scope of compensation for loss of enjoyment of life from loss of bodily function to cases of permanent disability. Intangible loss compensation was "important, but not so important that compensation should be available at the levels sometimes awarded in common law claims. In particular, very little weight, if any, should be given to temporary pain and suffering"[5]

It would seem that the Committee envisaged one provision in any enactment dealing with both physical and intangible non-economic loss, recommending that this loss be measured against a schedule rating the severity of disability.

3. The Law Society

In the preliminary negotiations of the social contract the Law Society found its ranks divided over the feasibility and indeed desirability of the Woodhouse proposals. Somewhat sceptical in its submission to the Woodhouse Commission, the Society indicated that "where a system had worked tolerably well in the past and is not subject to a demand for change by those most affected by it, then we would view with caution the introduction of a new system based upon different principles."[6]

One of the subjects of division was the omission of lump sum payments in the Woodhouse proposals. In its closing paragraph in this submission the society resolved that "the Commission be specifically advised that... there is a considerable body of opinion which supports a retention of a lump sum payment for physical

injury which does not result in a loss of earnings capacity."[7]

Before the Gair Committee, the Law Society argued inter alia that there should be a separate payment for pain, suffering and loss of enjoyment of life. Before the McLachlan Committee they contended that these payments should increase. It seems that over time the legal fraternity embraced the reform more heartily, even at the expense of loss of work. Palmer noted:

> "The legal profession in New Zealand proved to be public spirited. In the extensive forays into this part of law reform in various parts of the common law world I have not come across a legal profession with as much altruism."[8]

4. The Unions

Undoubtedly the most bitterly opposed of all to compulsory periodic payments, the Unions regarded the retention of lump sum awards as vital to the workers' welfare. The Federation of Labour (FOL) advocated that "in many cases a lump sum settlement is more beneficial to a worker, both from a practical and therapeutic point of view, than a periodic payment."[9]

The Railway Workers' Unions saw "no compelling evidence pointing to the need for the institution and administration of a scheme whereby compensation or damages ought to be paid to those entitled on a periodic payment basis."[10] They praised the advantages of lump sum payments as:

* able to support expenditure in a capital way (for example, the purchase of a house, business)
* conducive to the adoption of a new vocation
* aiding the purchase of items to help the claimant adjust to his or her new condition (for example, the purchase of a car, TV)
* giving the claimant a measure of independence
* avoiding 'pension complex', which is inflicted through periodic payments being a constant reminder to the claimant of his or her affliction.

Definitively, the Railway Unions concluded that they were "satisfied that the suggested institution of a scheme of periodic payments (whether in whole or in part) in the place of the present system would be resisted strongly by their members and a fortiori it would be resisted strongly by the Railway Unions." [11]

Spelt out in clear language was the view of the New Zealand Workers' Union. They stated"quite categorically and emphatically that they are bitterly opposed to the suggestion that their claim for damages should cease and that injured

workmen should go on a pension."[12]

The Unions were more concerned with upgrading the Workers Compensation legislation with which they felt comfortable, than with widespread social reform. They "wanted the best of both worlds: they liked the extended coverage offered by Woodhouse, but they wanted to retain common law unless every benefit under the scheme was at least as generous."[13]

They certainly were unequivocally opposed to the lack of non-economic intangible loss as proposed by Woodhouse.

## III THE SOCIAL CONTRACT ESTABLISHED IN 1972

> "The use of lump sum payments made lawyers and unionists happier than they had been, because it enabled some measure of compensation to be made explicitly for intangible loss."[14]

### 1. The Legislation

The Accident Compensation Act 1972 provided separate sections which allowed for lump sum payments for physical and intangible loss. After its second Select Committee examination chaired by Mr A.A.C McLachlan, the Accident Compensation Bill finally received the Royal Assent on 20 October 1972. Heralded as "an historical measure of far-reaching importance in its social, legal and political implications"[15] at its first reading by the then Deputy Prime Minister and Minister of Labour, Hon. J.R. Marshall, it was received with lukewarm resignation by the Opposition.

The Act's two provisions for lump sum compensation for non-economic loss departed from both the Woodhouse scheme, and to a far lesser degree from the Gair recommendations. Section 119 provided that loss or impairment of bodily function would be compensated by a lump sum. The maximum was $5,000 for 100 percent incapacity, calculated pursuant to a schedule to the Act. Section 120 gave the Accident Compensation Commission a discretion to pay up to $7,500 in compensation for pain, suffering, loss of enjoyment of life, and disfigurement. The Act stipulated that the maximum payable under the sections as combined was $12,500.[16]

### 2. Comment

While the successive Minister of Labour, Hon. D. Thompson, regarded that the Bill provided "real and indeed generous, compensation as advocated by the

Woodhouse Commission and the Gair Committee",[17] Opposition members were less convinced.

The member for Porirua, Dr. Wall, criticised the amounts available under sections 119 and 120 as "so small so as not to be rea lly financially significant from the point of view of rehabilitation."[18]

This doubt was reinforced by the member for Grey Lynn, Mr E Isbey, who had been a member of the Gair Committee.

> "I welcome the lump sum provision, but I share the view of my colleague, the member for Porirua, that the lump sum payment of $5,000, plus $7,500, making a maximum of $12,500, is insufficient for certain serious types of accidents."[19]

The Act extended the compromise reached in the Gair Report which balanced the Woodhouse determination to expel lump sums and the pressure groups' fight to retain them. The decision to pay lump sums for both physical and intangible loss was a direct consequence of the choice not to attribute a notional income to non-earners (upon which periodic payments would have been based). Had it been otherwise, non-earners would be entitled to very little, if anything, by way of compensation under the Act. This would have been a serious anomaly, considering the amounts attainable at common law for negligently injured non-earners.

> "Thus the decision not to have a minimum floor of earnings for everyone, whether earning or not, necessitated lump sums. Or looked at from the other way, the decision to pay lump sums meant that there was less demand for an earnings floor."[20]

Geoffrey Palmer was critical of the construction of the lump sum provisions, considering that their inter-relationship was confusing. In tandem, they seemed to enshrine common law benefits for intangible loss as well as the lump sum payments available under workers' compensation legislation. Palmer concluded that section 119 probably dealt with the objective elements of non-economic loss while section 120 turned to the subjective elements.

By objective he meant that section 119 compensation was based on objective factors such as the loss of a limb, which could be assessed medically according to the schedule to the Act. This objectivity rids the assessment of any individual reference to the claimant, and so leaves little room for argument. In complete contrast, section 120 was based on 'notoriously subjective' factors, by its very nature. As such it required the individual claimant to be taken into account,

and this lead to wide potential contention. Palmer regretted that the "elusiveness of the common law heads of damages becomes no clearer by reason of their inclusion in the statute."[21]

Particularly critical of section 120, Palmer concluded that "(e)ven though the number of appeals has been small compared with the number of awards, section 120 has been the biggest source of contention under the Act during the first four years. It has provided the commission with its most serious administrative headache. Now that lump sums are in the legislation, it will not be easy to displace them."[22]

## IV MANOUEVRES PRECEDING THE 1982 ACT

### 1. The Quigley Assault

Following grumblings that the scheme was too costly, a Cabinet/Caucus Committee sought to undertake a review of the Accident Compensation framework. It was chaired by Hon. D Quigley. In their report presented in 1980, this Committee asked inter alia whether the lump sums provided by sections 119 and 120 should be retained abolished, amalgamated or modified.

Recommendation 8 provided the answer: "That lump sum payments for minor injuries be abolished and that except for such injuries resulting in serious cosmetic disfigurement compensation payable pursuant to the provisions of section 120 be discontinued."[23]

The Quigley Report appeared to base its recommendation 8 on four grounds:

(a) The 1967 Royal Commission argued against lump sum payments.
The Report quoted Woodhouse J in a paper which he presented to the NZ Law Society. His Honour stated with respect to non-economic intangible loss compensation that "(s)uch monetary provisions are incongrous as an element within a social welfare system.... and there are consequential and adverse reactions upon rehabilitation."[24]

(b) The present system did not minimise the cost and delay of litigation as it was designed to do.
It had been tossed around that approximately forty percent of all applications for review were in respect of section 120 awards.

(c) "Most submissions" favoured the implementation of a threshold below which no lump sum would be payable.

The Committee approximated that a fifteen percent threshold would be appropriate, alleging that no loss below that figure would normally occur which would seriously effect the injured person's earning capacity. However, it was also recommended that the commission be given limited discretion to ensure the avoidance of serious anomalies in the application of this threshold.

(d) The administration of section 120 "requires subjective judgements by the Commission and is a fertile field for litigation and dispute."[25] Although recommending the repeal of section 120, the Quigley Report acknowledged that lump sum payments in respect of serious cosmetic disfigurement were apt. Accordingly, they suggested that section 119 be amended to incorporate compensation for disfigurement. The Report further envisaged increasing the maximum amount available under section 119 to $17,000.

2. The Jones Case

It would seem that the Supreme Court decision in Jones v Accident Compensation Corporation[26] delivered in February 1980 may have influenced the Quigley Committee's attitude to section 120 difficulties. This case involved an appeal against the decision of the Accident Compensation Appeal Authority, who confirmed a lump sum award of $6,500 pursuant to section 120.

The appellant Mrs Jones had suffered serious injuries in a motor accident in January 1976. Prior to the accident, she was a physically active woman whose life revolved around the care of her own and her husband's stables, where they bred and trained trotters. After the accident, Mrs Jones' life was drastically altered. To quote Casey J's judgment:

> "...both her knees are disfigured and deformed, with considerable scarring; her legs are bowed and she is in considerable continuous pain walking with an awkward and ungainly gait... She suffered from depression and at the time of the hearing in April 1978 was being treated with tranquillisers. She can look forward to continuous pain, probably worsening throughout the rest of her life and cannot walk at all on an uneven ground and requires help upstairs."[27]

Mrs Jones was originally awarded $2000 under section 120 by the Commission. This was increased on review by a Hearing Officer under section 154 (2) of the

Act, to $6,500. On appeal to the Appeal Authority, Blair J confirmed this decision, believing that his duty was to follow the general scheme of the Act to cushion the affects of the injury. Thus he dismissed the appeal.

In the Supreme Court, Casey J considered that the "maior issue before me was whether the limitation of $10,000 imposed by s 120 meant that the Commission was entitled to exercise its discretion by fixing its award in relation to a scale in which $10,000 represented an appropriate payment for the worse possible injury; alternatively... that this figure merely represented an upper limit or ceiling to an award." [28]

While agreeing that the Act's scheme was to cushion the effects of the injury by providing substantial but not total restitution, his Honour found the cushioning effect was achieved by the limit of $10,000. There was "no reason from the language of this section to assume that Parliament meant to impose a further limit by way of a scale of values within this figure."[29]

Casey J further enuniciated:

> "On a proper approach, the award of compensation should have been several times the limit of $10,000 imposed."

Thus, he increased the payment to Mrs Jones to the maximum amount. By way of post script, one may be puzzled as to the meaning of the word "proper" in his Honour's sentence immediately above. While it can be said that it refers to the proper method of assessment under the Act, an argument may validly be put that "proper" refers to the approach taken before the Act; that is, under the common law.

It is speculated that there was widespread concern that this decision in Jones v ACC may force open the floodgates of litigation with respect to section 120 loss. This concern may have been reflected in the Quigley Committee's findings. Indeed, as late as before the Labour and Education Select Committee, it was the Employer's Federation's view that "that High Courts' view of the principle (Jones v ACC) which should be applied in awarding lump sums makes it hard to distinguish between serious and less serious cases."[30]

3. The Fight Back.

The Quigley proposals formed the basis of the Accident Compensation Amendment (No. 2) Bill 1980. Their recommendations with respect to the lump sum provisions for non-economic loss were ensh rined in the infamous clause 20. Predictably,

this clause called for the repeal of section 120; the amendment of section 119 to include compensation for disfigurement; and the introduction of a fifteen percent threshold under which no lump sum payment would be paid.

The No. 2 Bill was sent to the Labour and Education Select Committee. Before this audience, the battle of the lump sum provisions was fought.

A. The Law Society

A tireless battalion, the Law Society included a synopsis of the history of lump sum payments for non-economic loss in its submission.

Describing some of the original Woodhouse proposals as "plainly unacceptable"[31], the Society retalliated that had these not been materially altered by the Gair Committee, they would never have achieved popular approval. The decision to provide lump sum payments was heralded as one such change, and as such these lump sums were a material term in the social contract represented by the Accident Compensation Act 1972.

The Society attributed positive benefits, both rehabilitative and therapeutic, to lump sums. They:

* conveyed finality of an unfortunate period in the claimant's life, signalling a new beginning
* offered security so that the claimant need not worry about money
* provided the means to purchase that which would give the claimant the prospect of developing a new interest
* gave the claimant the feeling that his or her case had been considered individually
* relieved neurosis, or prevented the onset of it.

The Society counter-attacked each of the Quigley grounds for the changes made in clause 20.

(a) That the Woodhouse Commission did not favour lump sums ignored the fact that these Woodhouse proposals were rejected by the Gair Committee; and that the inclusion of lump sum provisions for both non-economic loss categories was a part of the social contract accepted in 1972. The Society further advanced: "It is clear that Mr Justice Woodhouse would like to see lump sums totally abolished. The Cabinet/Caucus Committee's reliance on his views suggests that the present

proposals for curtailment are a first step towards abolition. If so the position should be made clear to the public."[32]

The Society believed the division between section 119's physical loss and the intangible loss of section 120 was both"sensible and satisfactory (except that the maximum amounts in each case are now so inadequate). "[33] While section 119's compensation was an acknowledgement of the claimant's actual objective disability, section 120 provided a discretion to compensate the individual according to his or her specific loss of enjoyment of life, playing an invaluable rehabilitative role.

(b) The argument that the present system did not minimize costly and time-consuming litigation as it was meant to, was seen by the Law Society as a gross exaggeration. Alleging that the section 120 assessments took at most a tiny fraction of the time and cost spent on litigation under the common law, the society retorted that "whatever the time and cost that is involved in this method of assessment, it is no more than necessary if a just and equitable system is to operate."[34]

(c) Finding no favour with the proposal to restrict lump sum payments to permanent injuries of fifteen percent and greater, the Society was surprised by the Quigley Committee's claim that 'most submissions' to that committee had supported a threshold. They took issue that all injuries below fifteen percent could be categorised as minor, and ones which would avail of no substantial earnings loss. The Society gave the example of a concert pianist who lost an index finger (fourteen percent disability) to illustrate their grievance. The Society reiterated "its opinion that the provision of the lump sums was an integral part of the social contract, and regrets having to submit that to deprive a section of the permanently disabled of any right to a lump sum is the plainest possible breach of that contract."[35]

(d) The Society was no more impressed with the claim that section 120 administration required subjective judgements by the Commission, and so were rent with the possibility of dispute. Submitting that much of this litigation could be attributed to the 'parsimonious attitude of the former Commission in relation to claims in general"[36], the Society concluded that it was necessary to"accept that we are all individuals and thus the same disability will affect two of us in different ways."[37] Thus, any dispute under section 120 was a necessary and reasonable price which must be paid for the administration of a just and equitable system.

In addition to these disputes, the Society criticised the Government's failure to maintain the value of the two lump sum provisions in real terms. They pointed out that the $17,000 maximum provided in the proposed section 119 was no more

than the aggregate in the Act as it stood[38]; notwithstanding that the number of potential claimants would decrease dramatically with the proposed fifteen percent threshold. In their submission, compensation levels should be indexed to ensure their accordance with reality.

The Law Society had few kind words for the proposals in clause 20. Their plan of attack was that the Bill" should be amended so as to restore the scheme of the concept which was accepted at the time of its introduction, when existing common law rights were exchanged for levels of compensation which were seen as realistic in terms of the then money values. The social contract involved in that exchange should be honoured and observed."[39]

B The Unions

Allied with the Law Society, the Unions showered a sustained attack on the proposals in clause 20.

Having always viewed lump sums for both physical and intangible loss as an integral part of the scheme, the Federation of Labour and Combined State Unions were predictably opposed to the Quigley proposals. They advocated that the "cutbacks provided by this clause strike at the very heart of the 1972 social contract."[40]

These Union's highlighted the grounds for the Quigley proposals in the same manner as the Law Society. They concluded that the Quigley Committee ignored the fact that the Gair Committee did not accept the Woodhouse proposals in this area. They felt unable to answer the allegation that most submissions favoured a threshold below which no lump sum compensation should be paid, because there was insufficient detail offered on this point. Further, they believed the cost of the scheme "pales into perspective when one recalls the huge cost both to the state and to the participants, of litigating common law claims in the High Court."[41]

The FOL and CSU ackowledged that section 120 assessments may have given rise to a disproportionate number of applications for review. Nevertheless, in their experience, the majority of these were successful, perhaps implying that the Commission should have looked more closely at the amounts being awarded at the outset.

Far from abolishing one section and eliminating a large percentage of potential claimants under the other, the FOL and CSU submitted that the Bill should provide an increase in the lump sum maxima to accord with reality. They further suggested

that the lump sums should be fixed to the consumers' price index to maintain adequate value in real terms.

The FOL and CSU threatened that if the proposed amendments were implemented, they would advocate a return to the common law heads of damages for those intangible losses, and physical losses of less than fifteen percent incapacity which would be denied compensation under the legislation.

The National Union of Railwaymen were unequivocally opposed to clause 20. In its submission to the Labour and Education Select Committee, the Railwaymen's Union advocated that "there is a substantial element of social contract in the scheme which evolved through the Select Committees and that many of the changes proposed in the Bill will, if implemented, be a serious breach of that social contract."[42]

In the opinion of this Union, clause 20 was contrary to the Gair Committee's recommendations and failed to recognise the very real assistance that lump sums provided in meeting the necessary adjustments which faced the injured worker. They were unable to accept that the volume and cost of the present review and appeal system could even be comparable to the old litigation system, and with respect to delay, they suggested that it was largely of the Commission's own making.

While acknowledging the fairly high proportion of section 120 applications for review, in the NUR's experience, "the great majority of these have been totally justified by the results. In more than 80 percent of cases the award has been increased; in one recent case by as much as $4,500. "[43] The Union conceded that section 120 was not easy to administer by its very nature, but believed that its abolition would sacrifice the real compensation concept to adminstrative convenience.

The Union also rejected the recommendation to abolish lump sum payments for permanent disabilities of less than fifteen percent:

> "It should be remembered that it is the manual worker who runs the real risk of the alleged minor disabilities to his hands, feet and back, rather than the sedentary worker whose major risk of injury at work lies in the field of falls in office premises."[44]

Again like the Law Society, this Union criticised the Government for failing to have the lump sum maxima increased to prevent erosion by inflation.

The New Zealand Engineering (etc) Industrial Union of Workers reflected the attitude of the other Unions. They were particularly concerned with the proposed fifteen percent threshold which they stated would deprive more than 7000 New Zealanders per year of compensation. They too threatened that if the threshold was implemented, a return must be made to the common law right to sue.

> "People who suffer permanent disabilities must be covered either by the Common Law or under the Act."[45]

The Engineering Union believed it was necessary to retain section 120 to take account of the claimant's special circumstances; the proposed depersonalised section 119 would have adverse effects on the rights of injured persons.

Repeating the familiar catch-cry of the major pressure groups, this Union scorned the lump sums as warranting an increase, not a cut-back. They cited Jones v ACC[46] where Casey J held that in the particular circumstances of that case, an award of several times the maximum under section 120 was appropriate.

Worthy of mention is the submission of the New Zealand University Student's Association. The students claimed that "(g)iven the nature of our membership, we have a special interest in non-earners, low earners and potential earners"[47]. They opposed the need for a threshold, but argued in the alternative that if there was a need for one, it should be no greater than five percent. Administrative ease should not be achieved at the expense of fair compensation.

In submitting that the amounts of the lump sum should be increased, the Students pointed out" the particular importance of lump sums to non-earners and potential earners in the absense of an adequate system of weekly comensation for those people."[48]

4. The Medico-Legal Working Party

Recommendation 11(d) of the Cabinet/Caucus Report proposed the establishment of a working party to consider the recommended changes to sections 119 and 120 of the 1972 Act.[49] This having been done, the Report of the Working Party hammered yet another nail in the coffin of clause 20.

The Working Party made no excuses for section 120's subjectivity. They emphasised that it would not be possible to award real compensation for non-economic loss unless subjective factors such as the claimant's age, sex, occupation, interests and general circumstances were considered in full. This would not be possible under section 119's schedule.

Further, the Working Party did not accord with the fifteen percent disability threshold, submitting that based on 1977 figures, seventy percent of all present permanent disability claims would be eliminated. This would result in a reduction of payments of $2,958,772 - that is, thirty six percent of all section 119 payments. The party found great difficulty in describing many of the disabilities scheduled at less than fifteen percent as minor.

The Medico-Legal group concluded that it was desirable to retain section 120 in the Act, together with increasing the maximum award under both non-economic loss provisions to a realistic level. To overcome the uncertain situation created by the Jones case[50], they recommended that Section 120 be awarded to include a scaling directive to achieve relativity. However, they included no example of what shape this directive should take. Moreover, when a claimant ran a concurrent claim under both sections, the payments should be awarded separately. This was to prevent the section 120 award from detaining the more easily ascertainable amount under section 119.

The Working Party's attitude towards the rehabilitative aspect of lump sum payments was crystal clear.

> "Rehabilitation is aided, not retarded, by the provision of s120 lump sums. It was the unanimous opinion of the Working Party that lump sums are helpful to rehabilitation, not only physically but mentally and socially, and should be available in addition to the more standard forms of assistance provided by the Corporation."[51]

5. The ACC Report

On 10 June 1981, the Labour and Education Select Committee recommended that the Accident Compensation Amendment (No. 2) Bill be held over to allow the ACC to reconsider and study it, and to permit the consideration and drafting by the Corporation of a new Bill which would avoid the complexity and technicality of the existing legislation.

The ACC Report which followed this recommendation summarised the submissions presented to the Labour and Education Select Committee. The Corporation devoted a small part of this summary to the theme of the Social Contract.

> "A wide range of submissions made references to 'the social contract' element in the establishment of the scheme whereby certain common law rights were exchanged for certain statutorily-defined entitlements. It is often argued that the present proposals, in that they involve a

reduction in such defined entitlements, constitute a significant breach of such social contract."[52]

The ACC Report recommended that the Accident Committee Amendment (No. 2) Bill 1980 should be discharged. Bowing under the weight of popular pressure, the Select Committee and then Parliament followed this recommendation. This signalled inter alia a victory to the advocates of the lump sum provisions for non-economic loss.

## V THE AFTERMATH - 1982

In 1981, the new Bill as rewritten by the ACC was introduced into the House. Retaining most of the No. 2 Amendment provisions, this Bill was again referred to Select Committee. The Bill which was reported back from the Committee was different in many respects to its former shape.

### 1. The Legislation

Promulgated in 1982, the new Accident Compensation Act responded to the battle chant of the major pressure groups and retained both lump sum provisions for non-economic loss.

In a more concise Act, section 78 provided a maximum of $17,000 for physical loss. Section 78 (6) imposed a threshold of five percent below which no lump sums were payable. Section 79 gave the Corporation a discretion to pay up to $10,000 for intangible loss. The sum payable under this section was to be paid either upon the sufficient stabilization of the claimant's condition, or upon the expiration of two years from the date of the accident. Section 79 (5) provided that in assessing compensation for intangible loss, regard was to be had "to the injured person's knowledge and awareness of his injury and loss."

However, a closer inspection illustrates a somewhat hollow victory for the lump sum advocates. Although retaining the two sections and increasing the lump sum maxima from $17,000 to $27,000, the new Act had lost two valuable powers.

First, it included no recommendatory power by the Corporation to any adjustment of lump sum provisions for non-economic, as there had been in section 15 of the old Act. Although this power had never been utilised by the Commission under the 1972 Act, its mere presence in that legislation implied potential for successful application.

Second, section 120 (d) of the 1972 Act gave the Commission extra power in special circumstances where it considered that the lump sums due under both sections 119 and 120 were inadequate. It was empowered to pay such lump sum as it thought fit, provided the figure awarded did not exceed the aggregate. This power was struck off the 1982 legislation, probably to combat cost and to discourage appeals.

2. Comment

It is notable that at its First Reading (16 September 1982), a significant part of the debate surrounded the absense of any index to which the provisions may be attached to keep pace with inflation.

Hon. J.B. Bolger, the Minister of Labour defended this omission; saying the concept before the House was closer to the Woodhouse Report than the 1972 legislation.

> "What would happen if the Government were to pick up the other concern of the Labour Opposition and have an inflated lump sum compensation of $50,000? I can tell the House what would happen. Litigation would increase. The bigger the sums of money the greater the litigation, and the more QCs involved. It would mean moving away from a no-fault automatic compensation scheme providing for a loss of earnings."[53]

The same rationale was presented in the defence of the threshold - that is, that earnings related compensation is the major source of compensation under the Act.

At its Second Reading, the Minister of Labour explained:

> "to understand the aim of this compensation measure, one must accept that Woodhouse envisaged and supported the concept of permanent compensation on a monetary basis, per week or per month, for those who were permanently injured, and the lump sum payment was an addendum attached thereto. It was not part of the original proposition".[54]

Even at the dying stages of the battle, the Government was still putting the Woodhouse proposals before the legislation that was enacted in 1972.

## VI CONCLUSION

Although the advocats of the lump sum provisions for non-economic loss prima facie won the battle, in the final analysis the outcome of the war is still undecided.

The lump sum provisions are still in the Act; however their roots do not delve very deep into the legislative soil. Sections 78 and 79 are neither protected nor entrenched. They are not annexed to the consumers' price index to maintain their value in real terms, nor does the Corporation have the power to recommend any increase in their maxima. This is left to Parliament.

Despite their substantial support, it seems that the retention of the two sections was a grudging compromise. It was not wholehearted acceptance that compensation for non-economic loss, both physical and intangible, was a material term in the social contract achieved in the 1972 exchange.

It is maintained however that sections 78 and 79 do form a material term in the social contract. Pushing to one side the debate over their relative merits compared to those achieved by periodic payments; it would seem that the major justification for the non-economic loss provisions flows from the fact that the Act provides no minimum earnings floor. If in addition to no earnings floor, there were no lump sums for non-economic loss, a grave injustice would be committed against non-earners. Indeed, such a scheme would never have been accepted at the outset, such were the suspicions about the proposals in 1967.

Should the Act ever be extended to sickness, the lump sums would prove an insurmountable difficulty. How is one compensated for cancer? Palmer suggests that it "may be possible to make the extension to sickness in consideration for the elimination of lump sums."[55]

Another alternative would be to establish a notional earnings floor, to provide earnings-related compensation for all people - real comprehensive entitlement. Perhaps this would lessen the need for the lump sum provisions, and provide the consideration necessary to strike them out of the contract.
However, the catch cry of the friends of lump sums was their rehabilitative qualities. This may still be provided as an addendum to comprehensive entitlement as alluded to above. Thus the lump sum payments would be viewed as a solatium - not to provide the major source of compensation, but to sympathise with the claimant's misfortune. Such payments would not be large enough to buy a house, but would provide the means to develop a new interest, for example.
If the Scheme is viewed as an insurance policy, it may be in order for every working adult - whether self-employed, employee or employer - to contribute a minimal amount to a fund to support a lump sum solatium payment. As little as $10 per annum would provide a sizeable fund.
Do the provisions for lump sum payments fare well in contrast to the common law? In the year ending 31/3/85, there were 11,105 claims under section 78,

and 13,260 claims under section 79.[56]

Under the physical loss section, 8,641 of the 11,105 claims were completed within a 2½ year period. Thus, 22 percent of these claims were not fulfilled in this time.
Under section 79, 10,557 of the 13,260 claims were registered in the 1983-85 period. Thus, 20 percent were registered prior to 1983, and not completed in the prescribed two year period in section 79 (5).

In the final analysis, lump sum provisions should not be repealed unless there is some other scheme to take their place. The 1980 attempt to remove them did not afford such consideration. Until this consideration is provided lump sum provisions for non-economic loss will remain a material term in the social contract established in 1972, and confirmed in 1982.

Appendix A: Chronological Scheme of the Reform

1967. Royal Commission of Inquiry set up.

1969. Report of the Royal commission tabled in the House of Representatives

1970. Gair Select Committee set up, before the Goverment had formed any policy on compensation for personal injury by accident Legislation based on this Report.

1972. McLachlan Select Committee set up -
Accident Compensation Act Passed

1980. Cabinet/Caucus Committee set up to review the scheme
Accident Compensation Amendment (No. 2) Bill based on this Report.

1981. Labour and Education Select Committee set up.

1982. Accident Compensation Amendment (No. 2) Bill

1982. Accident Compensation Bill introduced; received the Royal Assent same year, repealing the 1972 legislation.

Footnotes:

1. Compensation for personal injury in New Zealand. Report of the Royal Commission of Inquiry. December 1967 (Woodhouse Report) p77

2. Ibid p 124

3. Geoffrey Palmer Compensation for Incapacity Oxford University Press 1979 p 221

4. Report to the Gair Select Committee by the Department of Justice p 9

5. Report of the Gair Select Committee on compensation for personal injury in New Zealand, 4 Appendices to the Journals of the House of Representatives I.15, 1970 p48

6. Submission to the Royal Commission by the NZ Law Society p1

7. Ibid p7

8. Palmer op cit p127

9. Submission to the Royal Commission by the Federation of Labour p6

10. Submission to the Royal Commission by the Railway Workers' Unions p25

11. Ibid

12. Submission to the Royal Commission by the N.Z. Workers' Union p2

13. Palmer op cit p115

14. Ibid p223

15. Quoted by Hon. D. Thompson, 381 NZPD 2983

16. Section 120 (6) provided: In any case where the Commission considers that the lump sums which may be paid under this section and under section 119 of this Act are inadequate having regard to the special circumstances of the case, the Commission may pay under this section a lump sum of such amount as it thinks fit:

Provided that the lump sum payable under this section and section 119 of this Act shall not exceed in the aggregate $12,500.

17. 381 NZPD 2978

18. 381 NZPD 2996

19. 381 NZPD 3002

20. Palmer op cit 223

21. Ibid p 225

22. Ibid p 228

23. Government Cabinet/Caucus Committee (Quigley Report). Review of the Accident Compensation Scheme, October 1980 p 16

24. Ibid p17

25. Ibid p18

26. Jones v ACC [1980] 2 NZLR 379

27. Supra n26 p380

28. Supra n26 p382

29. Supra n26 p383

30. Submission to the Labour and Education Select Committee by the N.Z. Employer's Federation p19

31. Submission to the Labour and Education Select Committee by the NZ Law Society p46

32. Ibid p47

33. Ibid p55

34. Ibid p48

35. Ibid p50

36. Ibid p49

37. Ibid p54

38. This figure was the aggregate of sections 119 and 120 as amended by the Accident Compensation Amendment Act 1974, sections 9 (1) and 10 (2) (a).

39. Submission to the Labour & Education Select Committee by the NZ Law Society p1

40. Submission to the Labour and Education Select Committee by the FOL and CSU p5

41. Ibid p7

42. Submission to the Labour and Education Select Committee by the

National Union of Railwaymen p3

43. Ibid p10

44. Ibid p9

45. Submission to the Labour and Education Select Committee by the NZ Engineering (etc) Industrial Union of Workers p25

46. Supra n26

47. Submission to the Labour and Education Select Committee by the NZUSA p2

48. Ibid p4

49. Quigley Report p21

50. Supra n26

51. Report of the Medico-Legal Working Party p5

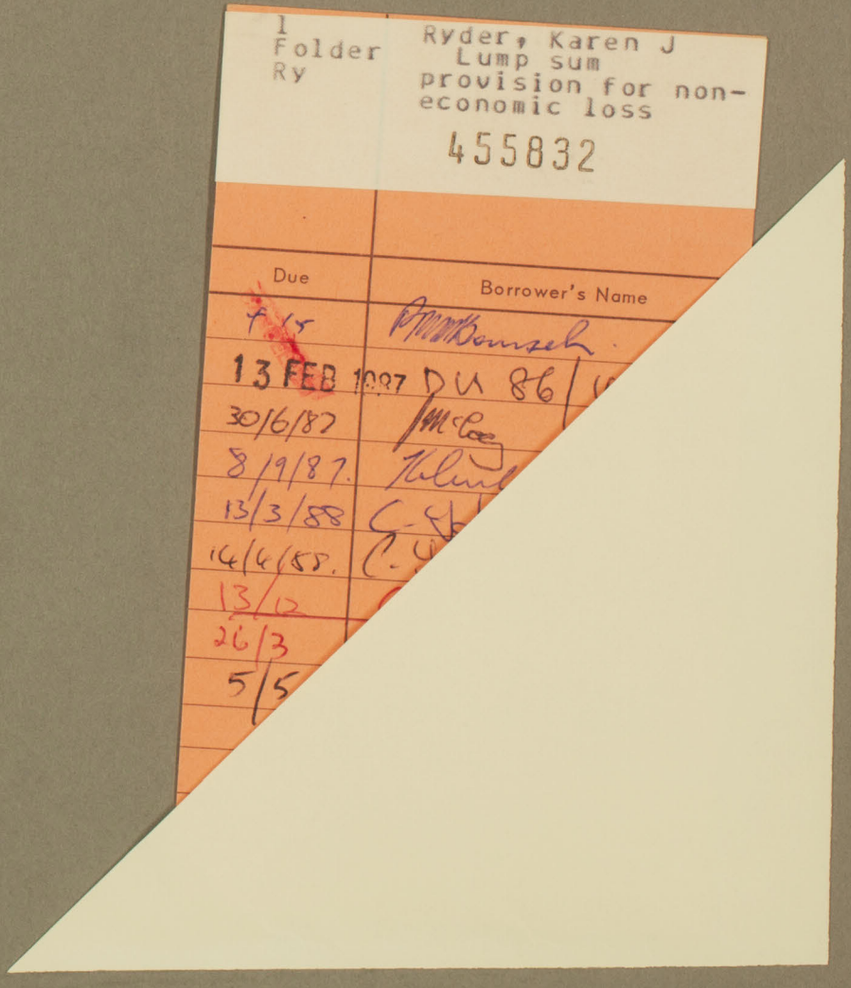
52. Report to the Labour and Education Select Committee by the ACC, Vol III Part C p134

53. 466 NZPD 3280

54. 448 NZPD 4905

55. Palmer p228

56. Figures received in interview with member of the ACC in August 1985.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