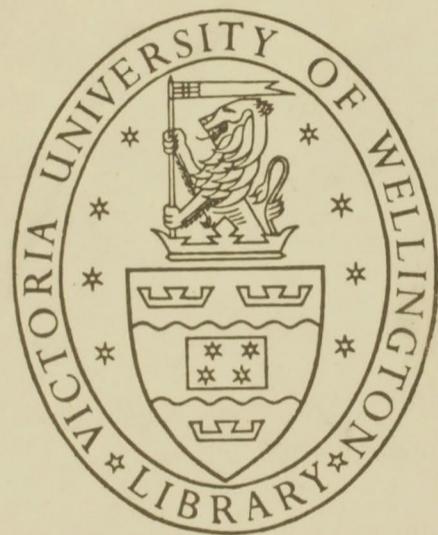


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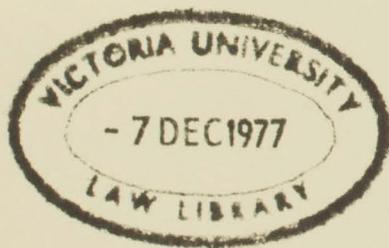
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## INTRODUCTION

The Accident Compensation Act 1972 provides various types of compensation to dependants of a person who dies as the result of an accident after 1 April 1974 and has cover under one of the three schemes in the Act.<sup>1</sup>

Assuming that the requirements of accidental death and cover are met, a dependency claim raises two immediate issues. The first is whether the person claiming was, at the relevant time, a dependant of the deceased. The second is the extent of this dependency.

Having resolved these issues, the final, and arguably the most important, question is faced; that is the quantum of entitlement under the Act's compensation provisions. The problems here are the assessment of the deceased's earnings for the purposes of the Act and the apportionment of the available compensation funds among the deceased's dependants.

The provision of the Act which are of practical importance<sup>2</sup> in dependency claims are:

- s.2 - The definition of dependency
- s.127 - Rules for determining dependency
- s.103 - Calculation of earnings
- s.104 - Relevant earnings
- s.123 - Earnings related compensation to dependants
- s.124 - Lump sum compensation to dependants
- s.121 - Compensation for loss of services
- s.130 - Compensation where dependants are overseas
- s.137 - Suicides
- s.126 - Payments of compensation to minors

- 
1. See sections 92 - 102D.
  2. This is not an exhaustive list. There are several other sections which may from time to time have some importance in this context, e.g. ss. 128, 133, 139, 145 and the provisions in Part VII relating to appeals.

The Accident Compensation legislation abolished common law rights founded on personal injury and replaced existing compensation schemes provided by Workers Compensation and Criminal Injuries Compensation legislation.<sup>3</sup>

The range of pecuniary benefits available to dependants under the new scheme is thus of great importance. One of the cornerstones of the Woodhouse Commission's recommendations was "real compensation".<sup>4</sup> In practice the difficulties which have arisen in the area of compensation to dependants relate not so much to establishing the fact and extent of dependency, but to the provision of "real compensation" under the terms of the Act.

This paper is concerned with the three issues outlined at the beginning as they relate to infant dependants. What follows is thus an outline of the application of the scheme to dependant children, and, to a much lesser extent, an evaluation of the policy behind the scheme and a comparison of this scheme with other schemes both past and contemporary.

As we shall see, the Accident Compensation scheme is administered by a large and still growing organisation which has been left to interpret complex and often badly written legislation. As a result of this there are areas of the scheme where policy interpretations and administrative guidelines have replaced the Act as a first reference for dealing with claims. The paper therefore includes a brief

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3. See, for example, s.5, s.105B.

4. Compensation for Personal Injury in New Zealand, Report of the Royal Commission of Inquiry, para. 55, 59 pages 39-40. See also Compensation and Rehabilitation in Australia, report of the National Committee of Inquiry, para 257, p.105, where this term is used.

outline of the administrative procedures which are followed in processing claims by dependants.

The claimant must establish that the person for whom the claim is being made was dependent on the deceased.

The Commission then has to determine the extent of the dependency of any one person.

The provisions constitute the statutory basis for ascertaining dependency. These provisions are section 2, which defines the term "dependant", and section 3 which lists a series of rebuttable presumptions as to the extent of dependency.

The relationship between these two sections has been described as "conflicting". Considering his examination of the Commission's approach to dependency, Mr Miller wrote:

"An examination of the implications of the definition of 'dependant' in s.2 and s.3 reveals irreconcilable conflicts. These have been circumvented by the Commission so far by a pragmatic approach of only using part of each section and ignoring others. The Commission should not have to do this, the legislation and procedures should and must be clarified before they become a source of conflicting and inconsistent rules."

Professor Palmer<sup>2</sup> also saw a conflict between the two sections:

"The provisions of the statute for ascertaining dependency in death claims contain serious ambiguities. There are a number of situations where sections 2 and 3 will not fit together."

1. J. Miller, Survey of Fatal Claims and Dependency (1977). The extracts in this paper are taken from a draft of Mr Miller's Thesis which was made available to the Commission.  
2. Ibid. at Ch. 7 p.49.  
3. Palmer - Accident Compensation, 25 ASCL (1977) p.41.  
4. Ibid. p.41-4.

## I. THE QUESTION OF DEPENDENCY

Once it is established that the deceased person had cover under the Act and died as a result of an accident, the claimant must establish that the persons for whom the claim is being made were dependants of the deceased.

The Commission then has to determine the extent of the dependency of any one person.

Two provisions constitute the statutory basis for determining dependency. These provisions are section 2, which defines the term "dependant", and section 127 which lists a series of rebuttable presumptions as to the extent of dependency.

The relationship between these two sections has been described as "conflicting". Concluding his examination of the Commission's approach to dependency, Mr Miller<sup>5</sup> wrote:

"An examination of the implications of the definition of 'dependant' in s.2 and s.127 reveals unreconcilable conflicts. These have been circumvented by the Commission so far by a pragmatic approach of only using part of each section and ignoring others. The Commission should not have to do this, the legislation and procedures should and must be clarified before they become a morass of conflicting and inconsistent rules".<sup>6</sup>

Professor Palmer<sup>7</sup> also saw a conflict between the two sections:<sup>8</sup>

"The provisions of the statute for ascertaining dependency in death claims contain serious ambiguities (...). There are a number of situations where sections 2 and 127 will not live together.

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5. J. Miller: Survey of Fatal Claims and Dependency (1977) The extracts in this paper are taken from a draft of Mr Miller's Thesis which was made available to the Commission.
  6. Ibid. at Ch. 7 p.49
  7. Palmer - Accident Compensation, 25 AJCL (1977) p.43-4
  8. Ibid. p.43-4.

"A proper analysis of the problem would require a survey of the New Zealand law upon the obligation to support. The family law tests and those made applicable to accident compensation are to some extent at variance (...). My view is that the policy was wrong in the beginning. 'Dependency' even where clearly defined requires the assembly of evidence of considerable detail in each case. These tailor-made determinations are to be avoided if at all possible".

These criticisms are, with respect, perfectly valid, but one must keep in mind the basic conceptual and practical relationship between the two sections. Section 2 defines "dependant" and is always the basis of any particular person's legal status as "dependant". Section 127 is not an element of the definition of dependency but rather a guideline as to the extent of dependency once dependency is established.

This is not to say that the application of the sections do not raise problems or conflicts, but simply that the relationship between section 2 and section 127 should not be misunderstood. Again, in evaluating the sources of any conflict one must recognise that the differences in purpose of the various compensation benefits require that a different aspect of the question of dependency be resolved.<sup>9</sup>

We turn now to an examination of the scope and application of these provisions.

#### A. The Statutory Provisions

##### 1. The definition of "dependant":

"Dependant", in relation to any person, means any other person whom he had a legal duty to support in whole or in part at the time when the dependency has to be determined; and includes any other person whom he might then reasonably regard or have regarded himself as having a moral duty to support in whole or in part, and whom he was then supporting in whole or in part; and includes a child of his born after his death; and "dependent", "totally dependent", and "partially dependent" have corresponding meanings.

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9. See discussion of the various benefits in Chap. III below.

There are five important elements of this definition:

- (a) "the time when the dependency has to be determined".
- (b) The existence of a legal duty to support.
- (c) The existence of a moral duty to support and actual support.
- (d) The nature of "support".
- (e) A posthumous child.

All these elements have raised practical difficulties and it should be noted that the definition itself does not stipulate "the time when dependency has to be determined". However, the compensation provisions themselves stipulate this time:

1. section 121(2)(a) specifies the "date of the accident" as the relevant time.
2. section 123(1)(b) seems to specify the time of the accident as the relevant time and this is in accord with section 123(1)(c) and (c) which both look at the time "immediately before the accident".
3. section 124(b) directs the Commission to look at dependency "immediately before death".

Of course in most cases the actual point in time for all these sections will be much the same as the deceased dies soon after the accident. The distinction is, however, significant where some time elapses between the accident and death - sections 121 and 123 both compensate for economic loss flowing from the accident or in other words the cause of incapacity or death. Furthermore, section 104 provides that for the purposes of earnings related compensation, it is earnings at the time of the accident which are relevant.<sup>10</sup>

The other elements of the definition will be considered in detail below.

In the broad context of "social policy" or income maintenance schemes it should be noted that several other

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10. Section 104(1)

statutes have provided definitions of "dependant" but none of the New Zealand statutes appear to have defined it at such length. Thus prior to the Accident Compensation Act 1972 the following statutes had defined "dependant":

s. 2 Workers Compensation Act 1954: "Dependant" means a person who is wholly or partially dependent.

s. 2 Criminal Injuries Compensation Act 1963: "Dependants ... means such of the relatives of the victim as were wholly or partially dependent upon his income at the time of his death".

s.48 Superannuation Act 1956: "Approved dependant means a person who is wholly or partially dependent".

ss. 61A, B and D of the Social Security Act 1975 provide for benefits to dependent children or widows and widowers (where there is no entitlement under the ACA), but the Act does not define "dependant".

The extensive definition of dependant given in the Accident Compensation Act 1972 included most of the elements which had been developed by the Courts in considering the concept in the context of Workers' Compensation.<sup>11</sup>

2. s. 127 - Rules for determining dependency:

As mentioned, section 127 of the Act provides a series of rules or presumptions to be applied in considering the extent of dependency where the claimant is the deceased's spouse or child.

(1) For the purposes of this Act it shall be presumed, in the absence of proof to the contrary that, -

- (a) Where a husband and wife are living together, the wife is totally dependent on the husband:
- (b) Where a husband and wife are living apart, the wife is dependent on the husband to the extent of any money ordered to be paid under a maintenance order or agreed to be paid under an agreement between the parties:

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11. For a discussion of these cases see McDonald - Workers' Compensation, 4ed. para 158, and Campbell and Neazor Workers' Compensation law in New Zealand, 2ed. p.89-91.

Provided that, if the husband is regularly paying to the wife more than the amount ordered or agreed, it shall be presumed, in the absence of proof to the contrary, that the wife is dependent on the husband to the extent of the amount being paid:

(c) A child under the age of 16 years is totally dependent on each of its parents.

(2) Subject to subsection (1) of this section, dependency shall be a matter of fact.

Now the crucial element of this provision is the application of the words "in the absence of proof to the contrary".

It will be recalled that the Woodhouse Commission recommended that

"There should be an irrebuttable presumption of total dependency (...) in favour of each child of the deceased (including step children) until 18 years of age, or until 21 years of age if engaged upon a full time course of education or training without regular salary or wages, and regardless of age if an invalid."<sup>12</sup>

Take the not uncommon situation where a marriage is ended by divorce. Both spouses remarry. Custody of the children of the first marriage has been given to the wife. The husband suffers death by accident. At the time of his death he was supporting the family of his second marriage. Now the effect of an irrebuttable presumption, as suggested by the Woodhouse Commission, would be to treat the deceased's children under 18 as totally dependent on him, notwithstanding the fact that their circumstances are not at all the same. There would also clearly be a conflict between the s.2 definition of dependant and the s.127 presumption of dependency.

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12. Report of the Royal Commission, para.285(e), p.111

There is also an extent to which the situation described above reveals a conflict between the two provisions of section 2 and section 127, but if the relationship between those provisions, outlined on page 4, is kept in mind the resolution of this conflict is clear. However, as stated previously, the effect of section 127 depends largely on the application of the words "proof to the contrary" and this aspect will be discussed in further details below.

B. The Elements of the Definition

1. "Legal Duty to Support:."

In Review 74/0267<sup>13</sup>, the Commission attempted to define the limits of the "legal duty" element of the definition of "dependant"

"In the Commission's opinion, a "legal duty to support" can apply only to a situation where the law itself imposes that duty, the failure to observe which can have legal consequences or result in legal enforcement".

At common law the duty of support as between parent and child is the duty of the parent to support the child according to his or her means. In a statute law context the duty of support would be that required by a financial maintenance provision.

The Commission's view is that the possibility of a legal duty to support coming into existence at a future date does not bring the possible recipient thereof within this class: dependency is taken as at the date of death or the date of the accident and it is at this time that the legal duty must be in existence. Where the persons claiming

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13. Decided 26/2/75. Reported in ACC Report No. 2 at p.17.

dependency are infant children of the deceased the question will therefore be answered favourably in the great majority of cases without the necessity of further inquiry, because of s.127(1)(c).

## 2. "Moral Duty"

The problem of defining "moral duty" has not arisen with any frequency in relation to children of the deceased. It will arise more frequently in the case of foster children or step children, although there can be a legal duty to support a step child or a foster child.<sup>14</sup> This category is distinct from the first in that actual support must be proved and this in turn will usually imply the presence of a moral duty. In a situation where the dependency comes under this class, the measure of the dependency will be the extent of the support given by the deceased.

In Review 75/R0882,<sup>15</sup> the claimants were a mother and her two children. They were claiming dependency on the mother's eldest son. The deceased was aged twenty-one, was unmarried and had no children. The deceased was the manager of the family farm. It was argued that the deceased supplied his labour at a rate which could only be described as a subsistence level because the farming operations would not support anything further, and that the rate at which the deceased supplied his labour was not the ruling rates of pay so that the extra value of his labour, on which his mother in particular claimed to be dependent, was lost. It was contended that these factors

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14. A legal duty to support a step child or a foster child may exist where a maintenance order has been made under s.35(3) of the Domestic Proceedings Act 1968.

In Letica v. Letica (1976) NZLR 667, 671, Chilwell J. states that there may be a legal duty to support the children of a de facto spouse.

15. Decided 9/4/76.

displayed, on the part of the deceased, a moral duty to support the claimants and the actual discharge of that duty was through the low level of wages which the deceased was receiving from his mother at the time of his death. It was admitted by the claimants that no legal duty to support existed.

Following her son's death, the mother was forced to employ a farm manager at \$6,000 per annum, \$4,000 per annum more than she was paying her son. The Commission had declined to pay the claimants any compensation related to earnings or any lump sum compensation.

In upholding the Commission's decision the Hearing Officer gave the following reasons:

1. The younger children were dependent on their mother, not the elder brother. To the extent that there was any actual support, it came through the children's mother.
2. To the extent that there was support and that this had been lost, it was not through earnings but through services rendered. The loss could therefore be properly compensable under section 121(2)(a) and not s.123 or s.124. There was no moral duty of support towards the mother from the son's earnings and therefore the mother was not a dependant for the purposes of section 123 of the Act.

The claimant appealed to the Accident Compensation Appeal Authority. The Authority, Judge A.P. Blair, confirmed the Commission's decision:<sup>16</sup>

"The Act does not use the words dependant and dependency in broad sense. It does not embrace social or personal dependency but is restricted to actual monetary dependency. Where the person claiming to be a dependant is the wife of the accident victim or a child under the age of 16 years,

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16. Appeal Decision No. 31, Douling, p. 4

there is a rebuttable presumption of dependency, but in other cases such as the present one dependency must be proved as a matter of fact. (s.127). The basis of any such claim must be proof that the claimant had relief for financial support on contributions by the accident victim".

The decisions illustrate the point made above, that the answer to the issue of dependency may be resolved by reference to the range of compensation benefits provided by the Act. In a wider context it may be arguable that the deceased's younger brothers were dependent on his labour, but in looking at the extent of any "support" provided, the Commission and the Appeal Authority had no alternative but to restrict its view to the type of compensation for this loss of support provided under the Act.

### 3. "Support"

As we have seen, the nature of the support, whether it is related to a legal or a moral duty, must be in the nature of financial maintenance and provision of the necessities of life.

In some cases there may be evidence of support over and above that required by a legal duty to support. Thus in Review 76/R2482<sup>17</sup>, the deceased was separated from his wife. She had custody of the two children of their marriage. Under the terms of a maintenance order he was paying \$5 a week in respect of each of his children. This amount was therefore the extent of his legal duty to support these children at the time of his accident. However, in addition to the \$5 a week maintenance, he regularly bought for his children clothes and toys and contributed to the cost of their holidays.

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17. Decided 8/9/77.

The Commission decided that these extra provisions were "support", but the difficulties in such cases arise from attempting to quantify in yearly or weekly terms the value of this type of support. Not surprisingly, there will usually be considerable delays in resolving claims where this type of issue arises.

Again, it must be emphasized that for the purposes of compensation the value of the "support" provided by the deceased must be quantifiable.

#### 4. Posthumous Children

By section 2, the term "dependant" includes a child of the deceased born after his death. Where the deceased and the child's mother were not living together at the time of likely conception some proof of paternity will be required.

#### C. The Presumptions and the Guidelines

The 1967 Royal Commission had recommended that the presumption of total dependency in the case of a child of the deceased (until the age of 18) should be irrebuttable. The recommendation was not accepted, nor was it repeated in the later Australian Commission's recommendations.<sup>18</sup>

Section 127(1)(c) raises two interesting issues: the first is what constitutes proof to the contrary; and the second is the presumptions which accompany the application of section 127(2). The presumption contained in section 127(1)(c) is restricted to natural children or adopted children of the deceased.<sup>19</sup> (For the purposes of sections

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18. See the report of the National Committee of Inquiry at p.156 and clause 41 of the draft National Compensation Bill.

19. There is no definition of "child" under the Act. The Commission has limited the term to natural children of the deceased and adopted children. Guidelines page 7.

123 and 124 of the Act, step children or foster children are "other dependants").

The Commission has given itself a set of guidelines<sup>20</sup> for applying section 127(1)(c) and (2) in relation to earnings related compensation and lump sum benefits. Briefly, the effects of these are as summarised below.

Firstly, where the child was living with the deceased as part of his/her family, the child will be treated as totally dependent under sections 123 and 124 alike, when:

1. The child is under 16 years at parent's death and has no separate income; or
2. The child is over 16 years at parent's death and a Family Benefit is being paid in respect of the child, and the child has no separate income; or
3. The child has a separate income of \$3,000 per annum or less, but would otherwise have come within (1) and (2) above.
4. The child has a separate income in excess of \$3,000 per annum but otherwise would have come within (1) and (2) above AND if that income is not being used by the child for his/her own maintenance and support in whole or in part.

Secondly, where the child was not living with the deceased parent as part of his/her family, the child is treated as totally dependent under sections 123 and 124:

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20. The guidelines were introduced in April 1976. The summary given here has no official status whatever and represents only the writer's interpretation of the Commission's approach, and neither do the guidelines themselves have the status of official Commission policy.

(i) If no maintenance agreement or order exists against the deceased parent in respect of the child but the child had formerly lived with the parent as part of the family and otherwise would have come within categories (i) to (iv) of paragraph (a) of this section; or

(ii) If a maintenance agreement or order exists against the deceased parent in respect of the child, but the child had formerly lived with the parent as part of the family and otherwise would have come within categories (i) to (iv) of paragraph (a) of this Section UNLESS

(a) the child is in the care and custody of its surviving parent, and

(b) that surviving parent has remarried or has entered into a de facto relationship, and

(c) the surviving parent's spouse or de facto has undertaken responsibility for the child's maintenance and support;

in which case treat as partially dependent to the extent of maintenance deceased parent obliged to pay, or if regularly paying to a higher amount to that higher amount. But in no case is the amount of earnings related compensation paid to exceed the maximum earnings related compensation payable to a totally dependent child. The lump sum payment under section 124 is calculated as a pro rata amount of the maximum sum in the manner set out in paragraph (a)(ii) of Section II.

The guidelines were designed principally in an attempt to allow an administrative decision as to the degree or extent of dependency to be made on the minimum of essential factors. This in turn would permit payments of compensation

(earnings related compensation or lump sums) to be made promptly in those cases where dependency will be total, and in stated limited cases where dependency will be partial. A claimant will, however, always have the right to adduce further evidence as to dependency (or as to being a dependant) either in answer to a pre-decision letter or by applying for review under section 153. Accordingly, it was considered that the adoption of the guidelines would not disadvantage persons claiming to be dependants, or seeking to establish a greater degree or extent of dependency.

There will be cases where the degree or extent of dependency is clearly established in relation to some of a deceased's dependants, but is uncertain in relation to others. Where this situation arises the administrative procedure seems to be to reserve an aliquot part(s) pending clarification. This, also, would permit payments of compensation to be made promptly to those dependants whose degree or extent of dependency has been clearly established.

The guidelines have not been revised since they were introduced 18 months ago. In practice the income ceilings in the guidelines are rarely adhered to strictly, but the higher the personal income of the child claiming to be totally dependent, the less likely will it be that a finding of total dependency can be justified.

The practical effects of these guidelines are demonstrated fairly frequently on claim files. Thus in the first instance, point 1 is the common child dependency situation. Points 2 and 3 apply where the child, although over 16 is still at school or is a full-time student, or where the child is a

beneficiary under a trust and receives income of around \$3,000 a year or less. Under point 4 the type of situation envisaged is where the child's earnings are saved or banked or invested and not used for maintenance and support.

The application of the guidelines in the second category (i.e. where the child was not living with its deceased parent) has presented greater difficulties. A complicated example of the problems encountered in this type of case is given by Review No. 76/R2565.<sup>21</sup>

In that case the deceased was a construction worker in Wellington who met with a fatal accident at work. He was married to a woman from the Auckland area. He had deserted this wife and family several years previously. There were 3 children of this marriage, 2 of whom would be treated as totally dependent in a normal situation.

For several years the deceased had also lived in a de facto relationship with a woman in Auckland. There were two young children from this de facto marriage. It is important that this woman did not know the deceased's real name, but believed him to be a Portuguese, this belief being supported by a set of fake documents which the deceased had procured from somewhere.

The deceased deserted this family in 1970 and moved to Wellington. On moving to Wellington he had an intermittent relationship with a woman in Porirua. He arranged to marry her (under his Portuguese alias) and had made a booking at the Registrar's office. He did not show up on the day of the

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21. Decided 16 September 1977.

wedding and the woman saw no more of him. At this time, however, the woman was pregnant (by the deceased she claimed) and she gave birth to a daughter three months after the deceased's fatal accident.

Now the deceased's legal wife had obtained maintenance orders against the deceased as follows: \$15 for herself and \$5 for each of three children (made in 1969). The deceased had never paid any money under these orders. His wife did not know of his whereabouts and had not been able to trace him.

This maintenance order was varied in 1973 at Wellington to \$2 for the mother and \$1 for each of two children. The wife claims she did not receive notice of this, but was in any case still not paid anything.

In assessing the amount payable to the children of this marriage, the Commission applied its guidelines and decided that the presumption in s.127(1)(c) was rebutted by the legal duty of the deceased to pay only \$1 a week for each child. Accordingly, section 127(2) applied and the Commission held this to be the extent of their dependency.

With respect to the second family, there were maintenance orders as follows: \$1 per week for the wife and \$6.42 per week for each of the two young boys. The Commission's assessment of dependency followed the same lines as above.

In regard to the last case, it was decided that the woman was not dependent on the deceased, but if she could establish the paternity of her child, the child would be totally dependent in terms of section 2, and s. 127(1)(c), and would receive quite high weekly earnings related compensation.

There is no doubt that the words "proof to the contrary" have caused a great many difficulties for the Commission. The guidelines were an attempt to make section 127 administratively workable, but they do not answer the problems conclusively. There is still a question as to the nature of the enquiry necessary to rebut the presumptions. The word "proof" is arguably rather more demanding than a mere administrative enquiry and evaluation. It may not be sufficient to say "the claimant still has a right of appeal" if the administrative enquiry is inadequate, but neither is it feasible to arrange a semi-judicial enquiry in every borderline dependency claim.

The criticisms of section 127 by Mr Miller and Professor Palmer, quoted at the beginning of this chapter, are completely justified, but the right solutions to these problems have yet to be offered.

Mr Miller<sup>23</sup> suggests that the present legislation be amended by removing the words "in the absence of proof to the contrary" and creating an irrebuttable presumption of dependency for children under 16 who were living with the deceased at his death. This particular suggestion, however, goes little beyond the present Commission guideline and does not by itself solve the problem. Mr Miller goes on to propose an amended definition of dependency:

"A better definition would be that a dependant is the wife, husband or child of the deceased living with the deceased at the time of the accident, and any other person who has suffered or is likely to suffer a loss of support by the death of the deceased".<sup>24</sup>

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22. See p. 4

23. See note 5 : at Ch. 8 p.17

24. Ibid, p. 18.

The only new element which seems to be offered by this suggestion is that the future level of support which could have been expected should be considered. This aspect has at least as much merit in theory as basing the dependency on a factor with as many vagaries and vicissitudes as maintenance orders, but does not obviate the need for enquiry which is the source of the problem.

Professor Palmer<sup>25</sup> suggested that the "series of statutory qualifications for benefit" provided by clause 55 of the National Compensation Bill (Australia) would go some way towards avoiding this problem, but this clause deals only with widows, and the scheme is not repeated in the context of other dependants. The disadvantages of the Woodhouse Commission's proposals have already been discussed above.

On this note, we turn now to a brief discussion of the operation and the dependency provisions of three other income maintenance schemes.

#### D. Other Schemes

It has already been noted that several other income maintenance and compensation statutes in New Zealand use the term 'dependant' or 'dependent' without defining it thoroughly.<sup>26</sup> In general the administering bodies are required to direct themselves both in regard to policy and administration of the scheme. The Commission has done this through its dependency guidelines.

The Social Security Act 1974 used s.124 of the Accident Compensation Act 1972 as a model for its section 61D. The sections are in fact identical with the proviso in s.61D that

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25. See note 1 at p.44

26. See the list on p.

it will not apply where the Accident Compensation Scheme does. In practice, the Commission and the Social Welfare Department use much the same guidelines for establishing dependency. This is necessary not only in wider policy interest but also because many claimants who cannot obtain the full range for any accident compensation benefits will become the responsibility of the Department. A typical example is shown where a person who is incapacitated for work by accidental injury gains accident compensation whereas if he is incapacitated for a longer period by illness he may receive the sickness benefit.

Usually the Department will pay benefits readily and rapidly to dependants of a deceased person, and if a claim is accepted by the Commission in respect of the deceased, the Commission must reimburse the Department the amounts paid as benefits to the dependants.<sup>27</sup> The amounts will, of course, be deducted from the arrears of compensation owing to the dependants.

The weekly benefit to dependants under accident compensation will be discussed below and, as will be seen, they relate to the extent of the support provided by the husband. However, the Social Security benefits to dependant children are, besides the lump sums mentioned above, a flat rate weekly amount in respect of each child paid to the deceased's spouse.<sup>28</sup>

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27. This is done under section 134(3) of the Act.

28. See Appendix B.

Leaving this area aside, it may be useful to look at two schemes replaced by the Accident Compensation Scheme inasmuch as they affected the area of dependency up to 18 years of age.

It may be recalled that the Worker's Compensation Act 1956 contained in s.2(2) and (3) presumptions as to dependency:

"(2) For the purposes of this Act the wife of a deceased male worker and his children under the age of sixteen years shall be conclusively presumed to have been dependent on the earnings of that workers at the time of his death, and, if they are ordinarily resident in New Zealand, their dependency shall be deemed to be total unless it is proved in fact to be partial only: Provided that nothing in this subsection shall apply to a wife who at the time of her husband's death has deserted him without just cause.

(3) If any child is born to a worker after his death, that child shall be deemed for the purposes of this Act to be a dependant of the worker in the same manner as if born in his father's lifetime."

The definition of child included step-children and illegitimate children.

The application of the presumption in section 2 of the Worker's Compensation Act appears to have been much the same as the application of s.127, although s.2 is arguably worded in stronger terms. Where the child was over 16 years of age, the position again seems to have been similar:

"(199). Children who have attained the age of 16 years are not conclusively presumed to have been dependent upon the earnings of the deceased worker. In such case the onus is upon the children to prove that they were dependent upon their parent, and to show the extent of the dependency. Where the parent is entirely supporting such children, or has been making material contributions to their support, little difficulty is experienced."<sup>29</sup>

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29. McDonald: Worker's Compensation, 4 ed. at p. 115

The Section 2 interpretation of "dependant" in the Worker's Compensation Act 1956 makes it clear that the claimants must have been "wholly or partially dependent on the deceased's earnings", yet the Courts were prepared to look at the circumstances in wide terms and recognise dependency where there was a future probability of support.<sup>30</sup> A similar approach was taken under the Death of Dependant by the Accident Compensation Act 1952<sup>31</sup> - the definition in section 2 of this Act was restricted to a spouse, parent or child of the deceased but it was not necessary to show actual dependency on the deceased before his death, merely that there was a likelihood of future pecuniary benefit which had been removed by the death.

The approach to compensation of infant dependants taken by the Australian Committee would not in practical terms appear to be greatly different from the New Zealand scheme:

1. Child is defined as any person under 20 years of age, but excluding a person who has completed full time education.
2. The term includes adopted children and, if dependency on the deceased at the time of his death is shown, it also includes an illegitimate child of the deceased. There appears to be no provision for compensation of foster children or children of a de facto spouse.

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30. See for instance *In re McEnirney (Deceased)* (1955) NZLR 1151, referred to in *Karini v. C-A Mussel Co* (1969) NZLR 758-761.

31. See *Winiata v Etheridge* (1935) GLR 599 and *Cole v Jones* (1954) NZLR 699. These cases were both claims by parents in respect of the death of a child.

3. "Dependent" is defined as "dependent for economic support".

4. The presumptions of dependency are related to the type of benefit. There is a presumption that if deceased was the father the child was totally dependent on his earnings, but if the deceased was the mother there is no presumption of dependency.

Enough has been said already in this chapter to indicate the demerits of the Australian proposals. The range of possible infant dependants is restricted in comparison with the New Zealand scheme, and while it is possible that the scheme outlined in Clause 41 might result in greater overall administrative speed, the difference in cases of clear dependency (which are the great majority) would not appear to be significant.

It is submitted that the statutory presumption in s.127(1)(c) fulfils the objective of enabling compensation payments to be made to dependent children as quickly as possible. However, where there is also a limited fund, the presumptions must be rebuttable in fairness to any other dependants who may have been equally or more dependent than the objects of the presumption. It is felt within the Commission that only when the scheme is well established and a thorough statistical evaluation of claims can be made, can effective improvements be made in the basic dependency provisions. The problems with the present provisions are identifiable quickly enough - the answers to these problems are rather less clear.

## BENEFITS

In practice it would be fair to say that the concept of dependency has been applied to include any person who was in fact dependent on the deceased, whether the basis of the relationship was family, contractual, statutory or the mere acceptance of such form of obligation.

Earnings Related Compensation

Section 123 of the Act directs the Commission to pay earnings related compensation to each dependent child of the deceased person, while the child is a minor and would, in the Commission's opinion, have been dependent on the deceased person if the injury had not occurred.

This provision raised three major difficulties for the Commission. The first is the division of the available fund where this is necessary. The second is determining when dependency would have ceased had it not been for the accident. The third, and frequently most contentious problem, is establishing the deceased's earnings for the purposes of the Act.

Payment of a child's entitlement under this section is made to the parent or a person in loco parentis.<sup>32</sup>

The Available Fund

Section 123(3)(b) begins by stating a totally dependent child (or "other beneficiary" (1)(c) - includes foster and step-children) is entitled to one-sixth of the amount that

32. In practice the payments are made to the surviving parent as he or she will still be supporting the family. However section 126 does enable the Commission to appoint someone to receive the money for the child's benefit. See s.126(4). Discussed in Chap. 111 D.

## II. BENEFITS

Child dependants of a deceased person are entitled to three types of benefits. First, and usually most important, compensation is based on the earnings of the deceased parent. Secondly, all dependent children are entitled to a small lump sum. Thirdly, they may be entitled to compensation under section 121(2)(a) of the Act.

### A. Earnings Related Compensation

Section 123 of the Act directs the Commission to pay earnings related compensation to each dependent child of the deceased person, while the child is a minor and would, in the Commission's opinion, have been dependent on the deceased person if the injury had not occurred.

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#### 1. The Available Fund

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would have been paid to the deceased parent had he or she survived the accident but suffered a total loss of earning capacity. This means that the child would receive one-sixth of 80% of the parent's earnings at the time of death. This amount is increased automatically by cost of living adjustments and general wage orders. It is also subject to PAYE tax.<sup>33</sup>

Payments are made and calculated on a weekly basis. As stated above payments are made to the child's surviving parent or guardian.

Assuming a typical situation in which the deceased is a married man with a family and at the time of his death earns \$150 per week, the practical effect of section 123 is fairly clear.

Under s.123(1) a totally dependent widow (or widower) is entitled to 50% of the amount that would have been paid to the deceased as earnings related compensation, i.e. an amount equal of  $\frac{1}{2} \times \frac{4}{5}$  x earnings at the date of the accident.

For each of up to three totally dependent children his widow will receive an additional one-sixth of the notional earnings related compensation the husband would have received had he not been killed. In this example the widow would receive an additional \$20 per week, for one dependent child, \$40 a week for two dependent children and \$60 a week if she had three or more dependent children, bringing the maximum earnings based payments to \$120 per week. In no case can total earnings related payments exceed 80% of the husband's pre-accident earnings regardless of how many dependants there are.<sup>34</sup>

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33. See section 65(2)(c) Income Tax Act 1976.

34. A similar provision was included in the Draft National Compensation Bill, Clause 57.

As we have seen, the position is not so straightforward where the deceased person had responsibilities towards two families. If, for example, he was required to pay maintenance of \$5 per week in respect of two children of a previous marriage, the earnings related compensation in respect of those children would be \$5 per week plus any further benefits which could be quantified in yearly or weekly terms. This latter benefit might be expressed as \$1 per week for each child, making the total weekly payments \$6 each.<sup>35</sup> If there were also one or two children of another marriage or relationship who were totally dependent on his earnings, the weekly earnings related compensation in respect of them would not be affected. Taking the above example again, they would still receive \$20 a week each. But if there were three or more totally dependent children, the total amount paid to the partially dependent children would be subtracted from the class fund (in this case \$60 per week) and the remainder would be divided equally among those who were totally dependent.<sup>36</sup> This is done under section 123(4) of the Act.

Where as a result of the deceased's death his or her dependent children become orphans, earnings related compensation is paid at a different rate. Section 123(3) provides that in such cases each dependent child may receive up to a third of

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35. In practice this type of exercise is difficult. Estimates cannot be made precisely in most circumstances, and the figure taken will usually be in round terms - e.g. an extra \$1 per week.

36. For instance, if the extent of partial dependency was \$6 for each of two children, the fund for the other dependants would be \$48.

the notional earnings. The shares abate in the same way as the situations outlined in the examples above. In these circumstances weekly payments of the child's entitlement are made to the child's guardian.

We should also note the effect of section 123(5) of the Act. This sub-section seems to envisage claims where there are many or competing claims for dependency on the deceased's earnings, and provides that the Commission may take into account circumstances that arise after death. The relevant factors are the individual needs of the claimants, successions and inheritances on the deceased's death, proceeds from insurance policies and other circumstances of pecuniary benefit resulting from the death.

## 2. The term of dependency

Under section 123, earnings related compensation continues only for so long as the dependant, in the Commission's opinion, remains dependent, and, in the case of a child, during minority.

In the case of children, inquiries are not made until the child's 16th birthday<sup>37</sup>. At this date the presumption contained in s.127(1)(c) ceases. The dependency guidelines are then applied by the Commission and when the child goes outside the guidelines payments of compensation will cease or be reduced.

The action of cessation or reduction of earnings related compensation in respect of one child may affect the entitlement of other dependent children. If the child is, for example, the oldest of four totally dependent children, there will be no

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37. This appears to be so even where it is known that the child's surviving parent has remarried and that there is actual support by the step-parent.

change in the amount received by the widow; but in the other example mentioned above if one child ceased to be dependent there may be a pro rata increase in compensation for other children.

In practice, a child will be treated as fully dependent as long as he or she remains at school. Presumption of full dependency will remain if the child is a full time student in a tertiary education institution and remains at home. Where a child leaves school and commences employment the amount will be reduced, if not ceased, depending on the level of income and its application.<sup>38</sup>

When a child reaches the age of majority, the Commission has a discretion to continue paying compensation under section 127(7). The sort of situation envisaged is where the child is dependent by reason of a physical or intellectual handicap, or where the child is completing full time education.

### 3. The deceased's earnings

The provisions of the Act by which the Commission must establish the level of earnings of deceased persons are extremely complex and vest the Commission with a wide variety of discretions. Basically, however, the chain of enquiry is a rather simple one.

The first question to be answered is whether the deceased person was an "earner". The term is defined in section 2 as meaning "an employee or a self-employed person". In certain situations a person will not be earning anything at the time of his accident but is deemed to be an earner by virtue of section 59, section 118 or section 104(6). The application

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38. See the discussion on p. 16 above.

of these sections raises difficult questions of policy and statutory interpretation which are really outside the scope of this paper.<sup>39</sup>

Having established that the deceased person was an earner, the next step is to calculate his/her earnings. This is done by section 103 of the Act. There is a basic distinction between calculation of earnings of an employee and calculation of a self-employed person's earnings.

Section 103(2) lists a number of items which are included in the expression "earnings as an employee" and then a number of items which are excluded. A good example of the importance of section 103 was provided in Review No. 76/R2432.<sup>40</sup>

In that case the deceased was a married man with three totally dependent children. He was killed in a boating accident in New Zealand. His earnings which were in excess of \$300 per week were, however derived in Australia from his employment with an Australian firm which had vital trading connections with New Zealand. His work, therefore, took him to both countries, but he was paid and taxed in Australia, although the family he supported lived in Auckland which was his home. His employers did not of course pay an ACC levy. His dependants were held to be excluded from earnings related compensation by reason of section 103(2)(i).<sup>41</sup>

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39. Section 118 is briefly discussed in Appeal Decision 24, Fyfe at p. 5.

40. Decided 26 August 1977.

41. Note, however, that they would be entitled to all the other benefits provided by the Act.

Section 103(3) defines "earnings as a self-employed person" as

"So much of the assessable income (as determined under and for the purposes of the Land and Income Tax Act 1954) of that person as is beneficially derived by him from carrying on a business".

The subsection then goes on to exclude a number of items. The effect of section 103(3) is that the Commission bases earnings related compensation for a self-employed person on the amount taxed as income by the Inland Revenue Department. Although this invariably causes protest from injured self-employed persons, there is strong justification for the statutory approach as a self-employed person's business will often keep earning during the period of incapacity.

In practice the strict application of section 103(3) is often ignored in favour of a more equitable method of measuring loss of earning capacity such as replacement labour costs.<sup>42</sup> Even so, there are likely to be considerable delays before a figure is established.

The effect of this section on dependants is, however, extremely severe. In the majority of cases the self-employed person's business will fold up on his death, and his dependant widow and children are compensated on the basis of a figure which did not represent their standard of living. An example of this occurred in Review No. 76/R2349.<sup>43</sup>

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42. This, again, is an extremely difficult area. There is no specific provision in the Act which allows the Commission to use the cost of replacement labour as a measure of loss of earning capacity. However, this Commission practice has been noted by the Appeal Authority without adverse comment. The area of compensation to the self-employed is being treated as a priority in the redrafting of the legislation.

43. This application was withdrawn insofar as it related to this aspect of the decision.

The deceased was a young farmer who was married with two young children. The family's total yearly income was \$7,000 which for tax purposes was derived in equal parts by the husband and wife. On his death the widow and children received compensation based on the deceased's earnings of \$3,500 per annum, but his death meant that his family had to leave the farm and move into town because the widow could not operate on her own. The real loss of "family" income was therefore \$7,000 per annum, and in addition there were economic advantages in living on a farm which the dependants also lost.

Having completed the exercise of calculating the deceased's earnings, the Commission must then make a decision on which earnings are relevant for compensation purposes. Section 104 of the Act directs the Commission to use a figure that would represent normal average weekly earnings at the time of the accident.

In the case of employees, the Commission has a discretion to take relevant earnings based on the period 28 days before the accident or 12 months before the accident (or any part of that 12 months).<sup>44</sup> In many cases the figure will be the same, earnings varying little from week to week. The twelve month period is used in cases such as seasonal workers and persons receiving commissions etc.

In the case of self-employed persons, the Commission may consider earnings in the period 12 months, 2, 3 or 4 years before the accident, or any combination of these.<sup>45</sup> In practice the Commission exercises its discretion to give the highest possible figure.<sup>46</sup>

44. Section 104(2).

45. Section 104(3)

46. As long as this approach is not clearly unrealistic - for instance where the claimant had changed his business during this period.

The area of assessment of earnings related compensation, as mentioned before, is complex and at times unnecessarily vague. It is a problem which is at the heart of the accident compensation scheme, but it should be peripheral only to an examination of dependency claims.

#### B. Lump Sum Compensation

Section 124(b) of the Act provides for small<sup>47</sup> lump sum payments to dependent children of a deceased parent, provided that the child survived the deceased by at least 48 hours. Foster children and step children also qualify provided that the deceased was standing in loco parentis immediately prior to death.

Normally, a totally dependent child will receive the full \$500, but the maximum payable to dependants under s.124(b) is \$1,500. This, therefore, is a class fund which must be divided amongst dependants where there are three fully dependent children and other less dependent children.

Where the deceased parent was an earner the apportioning may be done on the same basis as earnings related compensation. For example, where the parent earned \$160 per week, the available fund for children will, as explained above, be \$60. If, therefore, the child is entitled to \$5 per week, entitlement under section 124 will be  $\frac{5}{60}$  of \$500, i.e. \$41.66. Supposing as in a case mentioned above, there are two children dependent to the extent of \$5 per week each, and 3 totally dependent

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47. In comparison with the lump sums for permanent disability awarded under sections 119 and 120 of the Act. For a discussion of these sections see B.J. Couper - Long Term Compensation. A research paper for the MPP degree, VUW 1976.

children, the two will receive \$41.66 each and the three will share equally the remaining \$1,416.68 and receive \$472.23 each. This method of calculation was used in the examples outlined above, where there were competing dependency claims. Until recently all section 124 assessments were done on this basis. However, there is now in addition to the strong presumption of total dependency for section 124 purposes, a tendency to simply put a percentage on the entitlement where it is clear that there was not full dependency. The figure arrived at should, of course, bear some relationship to the entitlement calculation under section 123, in as much as this should reflect the proportional extent of dependency as between claimants, but there is no necessity to use the convoluted fractions that may be produced by earnings assessments. It should be kept in mind that dependency under section 124 does not necessarily require financial support and the full amount may be awarded notwithstanding that dependency for the purposes of section 123 was only partial.

Where the deceased was an earner, the compensation to his dependants provided by section 124 is relatively insignificant. However, the lump sum provisions apply irrespective of the deceased's earnings status. It is interesting to compare the application of section 124 to that of s.61D of the Social Security Act. The lump sums under section 61D of the Social Security Act are payable where there is no entitlement under the Accident Compensation Scheme and the deceased parent is under 60 years of age. With this proviso the sections are identical, and, as we have seen, there have been attempts to ensure similar application.<sup>48</sup>

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48. See the discussion in Chapter ID

The lump sums provisions for dependants have a basis in the Worker's Compensation legislation where lump sum compensation was based on earnings, but the real justification for what is after all nothing more than a modest balm, is to give the dependents some cash in hand where there is a delay in assessing long term benefits such as earnings related compensation and compensation for loss of services. Where the fact and extent of dependency are not in dispute the lump sum payments will be made almost immediately.

The lump sum provision in respect of children is, however, an unusual one: the Woodhouse Committee recommendations in Australia<sup>49</sup> and New Zealand<sup>50</sup> both suggested small lump sums to the deceased's widow but not to a widower or dependent child. Similarly, Worker's Compensation legislation in Ontario<sup>51</sup>, Australia<sup>52</sup> and South Africa<sup>53</sup> provide lump sums for dependent spouses, but not children.

### C. Loss of Services

Section 121(2)(a) authorises the Commission to pay compensation to dependants of a deceased person in the following terms:

"(2) Where a person suffers personal injury by accident in respect of which he has cover under this Act, or where a person dies as a result of personal injury so suffered, the Commission, having regard to any other compensation payable, may -

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- 49. Report of the National Committee of Enquiry, p.176, para.386
  - 50. Report of the Royal Commission, p.121, para 302 (a).
  - 51. Workmen's Compensation Act s.36
  - 52. See for instance: W.C. Acts 1916-52, s.14
  - 53. Workmen's Compensation Act 1941. s.40.

- (a) Pay to any member of the household of which the injured or deceased person was a member on the date of the accident such compensation as the Commission thinks fit for any quantifiable loss of service proved to have been suffered by the person to whom the payment is made as a result of the injury or death for such period as the Commission thinks fit, not being longer than the period for which that member could reasonably have expected to receive the service".

This provision is used frequently where the deceased parent is the mother of young children.<sup>54</sup> In such cases the Commission will pay the cost of home help for a certain number of hours per week. Bearing in mind that this home help may be required for a considerable period of time, this benefit is of considerable importance.

The essential aspect of the "loss of services" claim is that the loss must be quantifiable. This imposes a requirement that the service must have been rendered on a regular basis and that it was of replaceable nature.

Some examples of the application of this provision are noted:

In Review No. 77/R0727<sup>55</sup>, the deceased was a married mother of two children, a girl of 15 and a boy of 11. The widower had just begun a new business venture and this required him to be away from home for many hours per day. The family lived in a country area and the children had to travel some distance to their schools. The daughter was busy studying for

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54. In such cases it is, of course, unlikely that the mother's earnings, if there are any, will be very high.
55. A Hearing decision on the final quantum of assistance has yet to be made.

UE examinations. In all the circumstances, the Commission decided to pay the cost of a housekeeper for some 24 hours per week until the family situation could allow self sufficiency. It was of particular importance that the girl's chances of successfully completing her secondary education should not be prejudiced by letting her bear the responsibilities of running the household and the small farm.

However, in review 75/R117<sup>56</sup>, the Commission decided that it was under no duty to reimburse relatives who gave up time to help out the family and children.

Review 76/R629<sup>57</sup> was another case where the deceased was a farmer's wife who had dependent children. The Hearing Officer applied the section this way:

"There is no doubt that the services which a wife renders to a husband, although unpaid in the sense of wages, attract compensation payments if they are terminated (...) The services become quantified when the husband is faced with employing alternative services. The Commission may, however, pay compensation of such amount as it may think fit and this means that payment is discretionary. The Commission must decide whether the payment claimed is reasonable and whether it was in fact reasonable to employ a housekeeper (...) Such decisions in the family framework should not be judged too narrowly".

Section 121(4) provides that where the deceased person was the recipient of any superannuation, pension or annuity which ceases on his death, the Commission may pay compensation to a dependant of that person who was dependant through the deceased on that income. Review 76/R0597<sup>58</sup> stated that "superannuation pension or annuity" would be interpreted strictly; in this case it was held that an invalid's benefits would not fall within this category. The Hearing Officer also pointed out

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56. Decided 26 November 1975.  
 57. Decided 30 September 1976  
 58. Decided 22 December 1976.

out that the provision is discretionary in its terms and the mere receipt of and dependency on this amount does not mean that compensation will be paid.

The section is obviously directed at cases where the deceased was not an earner (i.e. an employee or self-employed person) but had dependants who were dependent on his income from superannuation, pension or annuity. Having excluded social welfare from this, it is unlikely that the question will arise with any frequency in relation to child dependants as the deceased will usually be retired.

D. Dependants outside New Zealand

Brief mention should be made of this category of dependants. Section 130 applies to dependants of a deceased person who are not ordinarily resident in New Zealand.

Section 130 gives the Commission a discretion to pay compensation under section 123 or section 124. In these circumstances it is obviously necessary to establish fairly carefully the extent to which the dependants were dependent on the deceased for support.

The application of this section was considered in Review 76/R2467<sup>59</sup>. In that case the deceased was a Tongan who was killed in a work accident in Auckland in September 1976. At the time of his death his wife and family were resident in Tonga. The deceased had overstayed his work permit and enquiries with the Immigration Department revealed that he would have been deported at the end of 1976. Earnings related compensation would therefore cease at this date. However, the wife and family had applied for permanent residence in New Zealand and

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59. Decided 3 June 1977

if this were granted they would receive weekly compensation payments for the full period of dependency as they would then be "ordinarily resident in New Zealand".

The Commission's policy in this area is that as long as evidence of dependency and support is obtained payment will be made in the normal way, subject to periodic review.

A provision of relatively minor significance which should be noted here is s.133, which allows the Commission to commute entitlement to weekly payments to a lump sum award. The provision has not to date been used, but it is anticipated that it would be of use where the dependants are overseas and checks on continuing dependency are difficult.

#### E. Suicides

Section 137 of the Act provides that where an injury, whether fatal or non-fatal, was wilfully self-inflicted there is no entitlement to compensation, provided that where the dependants are in special need of assistance, compensation can be paid at the Commission's discretion.

Wilfully self-inflicted personal injuries and suicide

- (1) No compensation shall be payable under this Act in respect of
- (a) Any personal injury that a person wilfully inflicts on himself or, with intent to injure himself, causes to be inflicted upon himself, or death resulting therefrom; or
  - (b) The death of any person where the death was due to suicide, not being suicide that was the result of a state of mind that itself was the result of personal injury by accident in respect of which the person had cover under this act:

Provided that, in any case where a dependant of the injured or deceased person is in special need of assistance, and compensation would have been payable under this Act if the person had otherwise suffered personal injury or died as a result thereof, the Commission may, in its discretion and in such manner as it thinks fit, pay or apply the whole

or such part as it thinks fit of the compensation that would have been so payable for the maintenance and education of the dependant or dependants of the injured or deceased person in special need of assistance or of such of them as the Commission thinks fit.

- (2) It shall be presumed, in the absence of proof to the contrary, that the death of any person was not due to suicide.
- (3) Except so far as the Commission otherwise decides, no rehabilitation assistance under this Act in respect of or by reason of the incapacity of a person shall be given, if and so far as his incapacity is caused, continued, or aggravated, by any physical injury that he wilfully inflicts on himself, or, with intent to injure himself, causes to be inflicted upon himself.

The proviso to sub-section (1) has been applied on several occasions. The words "special need of assistance" and "maintenance and education" receive fairly liberal interpretation. Although the power is discretionary it may be anticipated that in any case where a parent commits suicide and leaves dependent children, compensation will be paid in the usual way.

80. The bulk of the Commission staff is based in the Head Office in Wellington. There are fairly large staffs at Commission offices in Auckland and Dunedin. The other offices are in Whangarei, Hamilton, New Plymouth, Gisborne, Napier, Palmerston North, Wellington, Christchurch and Invercargill.

81. An insurance company specialising in maritime insurance.

### III. ADMINISTRATIVE PROCEDURES

#### A. The Accident Compensation Compensation

The Accident Compensation Scheme is administered through a complex system of agencies and delegations of statutory power. The Act itself in Section 6 establishes the Commission which is to comprise three members, appointed by the Government, one of whom is to be Chairman. By Section 16 the Commission is empowered to do anything reasonably necessary to perform its functions, these including (inter alia):

- (2) (a) "the administration of this Act and the funds and schemes to which it applies".

Section 21 empowers the Commission to appoint as many officers and employees as are necessary for the efficient exercise of its functions and powers.

Section 25 empowers the Commission to appoint agents. The Commission has appointed several hundred staff who are distributed around the country in various offices.<sup>60</sup> The compensation claims handling staff comprise the Commission's Compensation Division. Most of the Compensation Division staff is recruited from the insurance industry. In addition to these staff, the Commission has appointed two claims receiving agents. All claims for compensation are made to the State Insurance Office at one of 26 branches. There is one exception - claims by or in respect of members of maritime industrial unions are received by P & I Services.<sup>61</sup>

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The Commission has delegated powers through the hierarchy of the Compensation Division and to its claims receiving agents. The agents' delegated powers are fairly limited: for example, they have no authority to decline any claim. More importantly for present purpose, they have no authority at all in respect of "fatal" claims. When a "fatal" claim is received by the agent it must be referred to the Commission's Compensation Division who will take the appropriate actions and authorise any payments.

Delegations of power to deal with claims within the Compensation Division are, as mentioned before, quite complex. The amount of delegated authority vested in any one individual varies with his or her hierarchical position. The claims processing side of this division consists of various sections which deal with different types of claim or different aspects of the same claim.

There is a section which deals only with claimants who have suffered a permanent disability. This section is charged with implementing the provisions of the Act relating to lump sum compensation for non-economic loss and long term compensation for loss of earning capacity in particular. (Permanent Disabilities Section).

Another section deals exclusively with the assessment of earnings related compensation to self-employed persons. (Self-Employed Assessment Section).

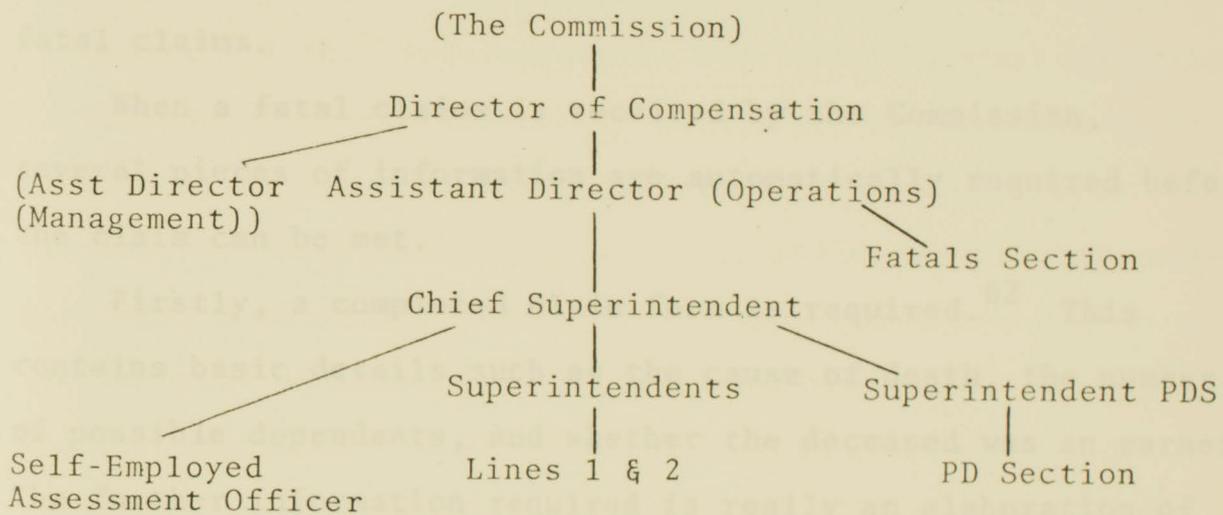
Another section deals exclusively with fatal claims. (The Fatales Section). This section was created in April 1976.

The last two sections deal with all compensation matters except those outlined above. They are responsible in particular for the supervision of the agencies' day to day

work. Responsibility of these two sections is determined by the geographical location of the claimant. These sections are called lines. Prior to April 1976 all fatal claims were dealt with by these sections.

Power to issue decisions on claims is vested only in the heads of these sections. In fact the decisions are made at a lower level than these, and thus the standard bureaucratic letter where the decision maker signs for the appropriate holder of authority.

The hierarchy of this Division is as follows:



#### B. Fatal Claims

As mentioned before, the Fataals Section only has authority to deal with claims made in respect of a fatal accident. Formal decisions (that is, any decisions carrying rights to review and appeal) are signed for the Assistant Director of Compensation.

The rationale for the different claims processing structure is that fataals claims can be met faster and more efficiently this way than if the normal agency procedure is used.

It is evident that speed and efficiency will be of particular importance in fatal claims where financial worries will compound what is in any case a difficult time for the deceased's dependants and relatives. Whether this system meets this objective satisfactorily is open to debate.

The "fatals" section is able to use the services of ACC liaison officers throughout the country, but is otherwise generally isolated by distance from the people it is dealing with. The eventual solution to this problem is likely to be empowering the Commission's regional offices to deal with fatal claims.

When a fatal claims is received by the Commission, several pieces of information are automatically required before the claim can be met.

Firstly, a completed claim form is required.<sup>62</sup> This contains basic details such as the cause of death, the number of possible dependants, and whether the deceased was an earner. The further information required is really an elaboration of these points.

A certificate of death, and, where applicable, a coroner's report, will be requested.

Copies of marriage certificate and birth certificates of the deceased and his dependants are required. In addition, the claimant must complete a dependency form, a copy of which is annexed to this paper.

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62. A copy of the present form is appended to the paper.

Where the deceased person was an earner, information as to his pre-accident earnings must be obtained. In the case of an employee, this information will be supplied by the employer, and in the case of a self-employed person details of income will be requested from the Inland Revenue Department and the person's accountants.

The Commission will also advise the claimant that under section 122 of the Act reasonable funeral expenses are payable by the Commission.<sup>63</sup> In fact, most funeral directors are aware of this and send the account straight to the Commission.

Once all this information is available a formal decision can be made. If the dependency issues are complex the opinion of a member of the Legal Division will be sought. Similarly if difficulties arise in establishing the deceased's earnings, a direction from the Self-Employed Assessment Section will be obtained.<sup>64</sup> Apart from these more specialised areas, Commission Liaison Officers are used to visit and report on families who have particular or unusual problems arising from the death.

However, the majority of fatal claims do not present any difficulties in assessing compensation or establishing dependency, and they are cleared quickly through the Fatals Section without any outside reference.

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63. The question of "reasonable by New Zealand standards" in relation to funeral expenses was discussed in Appeal Decision 1 Wall - in this case tangi expenses were excluded from the ambit of section 122.

64. Referral to various specialist sections of the Commission is made on all types of claims.

### C. Appeals

When a formal decision is made on a dependency claim, or any other claim, a right of review arises under section 153 of the Act. By section 154 the Commission is required to appoint a Hearing Officer to hear an application for review. The Hearing Officer then conducts a hearing, which allows the applicant to present his case against the Commission's decision, and then writes a decision, which may reject, allow, or allow in part, the application. This decision carries a right of appeal to the Accident Compensation Appeal Authority.

Although the hearing procedure has been described as "quasi-judicial"<sup>65</sup>, the Hearing Officer is an employee of the Commission and is bound not only by the Act but by Commission policy. There are now several full time Hearing Officers, each with his own geographical circuit. Hearing Officers may also be appointed from time to time from the ranks of senior Commission employees engaged in compensation, legal or medical work. The Commission is bound by a decision of one of its Hearing Officers, but a Hearing Officer who ignores strict Commission policy may be sanctioned by not being appointed to conduct any further hearings. The Appeal Authority is of course an independent judicial body.<sup>66</sup>

65. See the Appeal Authority Decision 16, Harvey, p.7,8: it seems clear for instance that Hearing Officers must adhere to the rules of natural justice, insofar as these apply to the hearing process.

66. For a discussion of the review and appeal procedures, see P.D. Kite, Research paper, LL.M. VUW 1977. It is particularly interesting to note the Appeal Authority's views as to the status of Commission policy. Blair J's observations in Appeal Decision 6 give the impression that some types of Commission policy will be treated as having the status of regulations (which could be made under s.181 of the Act. The issue in this appeal, and in the appeals where these comments were repeated (A.D. 13 and A.D. 15) was the Commission's policy on the payment of private hospital expenses under section 111 of the Act.

In practice, when an application for review is made it will normally contain further information which may warrant a favourable variation of the Commission's decision. The matter is returned to the original decision maker who has the opportunity to amend his decision. This may be done under section 151(10) of the Act. However, irrespective of whether or not he does so, the applicant has the statutory right of a hearing. Nonetheless, a substantial percentage of applications are resolved purely administratively.<sup>67</sup>

Decisions carrying right of review on a dependency claim can be of a wide variety and combination of subject matter: for instance the decision may relate to any of the following:

1. Cover under the Act.
2. The fact of dependency.
3. The extent of dependency.
4. The amount of the deceased's earnings.
5. Any quantifiable loss of services not related to earnings.

D. Payments to Children

The Commission will, in almost every case, pay a child's entitlement to earnings related compensation to that child's surviving parent or guardian unless it is clear that such payments would not be used for the child's benefit. In such cases the Commission will look for a suitable trustee.<sup>68</sup>

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67. In the year ended 31/3/77, 2711 applications for review were received; of the 2311 processed, 1504 were resolved administratively.

68. In a recent case, the deceased was a mother of six totally dependent children. It was apparent that the father could not be relied upon to use the earnings related compensation payments for the children's benefit. The secretary of the local school committee and the local Postmistress agreed to act as trustees for the children's entitlements.

It was noted in Chapter II that the Commission's policy in regard to lump sum compensation to minors is to pay all such amounts to the Public Trustee

"to be held in trust and applied by the Public Trustee (as to the capital as well as the income thereof) for the maintenance, education, advancement or benefit of that person in such manner as the Public Trustee thinks fit while that person is under 20 years of age".<sup>69</sup>

The rationale behind this rather inflexible policy is as follows. In the first instance, payment to the Public Trustee ensures the lump sum award is used solely for the benefit of the claimant. The principle is well established that if a Court were faced with appointing a trustee, a near relative of a beneficiary would not be appointed unless it were impossible to get someone unconnected with the beneficiary to act as trustee. Generally a Court would not appoint a person as trustee if to do so would be to put him in a position where his duty as a trustee and his personal interest might conflict.

Even assuming that there are a great many cases in which a parent could perform the duties of a trustee capably and conscientiously, the Commission feels that it would be put into an impossible position if it were required to be the judge of a parent's or parents' suitability as trustee.

The most frequent basis of objection to this policy appears to be that a higher rate of interest could be realised on investment in a private trust, and this point has some force when the lump sum is a large one. The Commission's reply is

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69. See section 126(4A)

that investment value is not a primary concern of the Commission, nor is it the reason for the award being made. The Commission's view is that payment to the Public Trustee ensures accessibility in case of need, security, a minimum of handling fees, an acceptable rate of interest, and, most importantly, an assurance that the funds will be used for the benefit of the claimant.

Departures from this policy will only occur where the lump sum is below \$250<sup>70</sup> in value, and where there is clear evidence that the minor is mature enough to handle the fund responsibly.<sup>71</sup>

The other point of interest in regard to this section, is that the Commission does not accept applications for review in respect of decisions to pay compensation to the Public Trustee. The basis of this policy is that the decision to pay to the Public Trustee is not a decision within the terms of section 153 of the Act (that is, a decision affecting "the granting or payment of compensation under this Act") but merely an administrative determination as to who should have control over the monies paid until the minor reaches the age of 20.

72

In Review 76/R1471, the Hearing Officer said

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70. The Public Trustee will not accept amounts below this value.
71. These circumstances are rare; where the claimant is say 18 or 19 and has been working for some time, or is contemplating marriage, the Commission may consider payment to the minor. Needless to say these circumstances are less likely still in a dependency claim.
72. Decided 7 April 1977

"Section 126 provides a means for disbursing compensation, it does not provide a means of assessing the quantum of compensation. Its effect is to substitute one recipient for another where the circumstances warrant this action being taken. The duties cast on the Commission by the terms of the Act are complied with when payment is made either to the claimant or to the substitute as provided by section 126. The amount of compensation is calculated in respect of the claimant or the person to be compensated. The amount is paid in respect of the person also, but because of reasons such as infancy, infirmity or the like, section 126 allows the actual payment or disbursement to be made to another person.

It follows from the above comments that a decision of the Commission does not come within the terms of section 153(1)(c) of the Act and hence a right of review does not arise".

Superficially, this appears to be a rather dubious interpretation of s.153(1)(c). A decision as to whom the payment will be made would necessarily seem to affect the payment of that compensation and it certainly affects the method in which the payment will be applied. The only apparent policy reason behind not accepting applications is that once payments have been made to the Public Trustee it would be difficult to change the trustees and vary the terms of the trust.

It has, however, yet to be established conclusively if a decision by the Commission not to accept an application for review, is a decision for the purposes of section 162(a).<sup>73</sup> The Commission's view is that the decision pursuant to section 126 could be challenged only in the Supreme Court.

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73. An appeal has been lodged against the decision of the Hearing Officer in Review 76/R2515 (decided 11/8/77). The applicant in this case is claiming on behalf of his 4 year old daughter. Her entitlement to compensation under section 120 of the Act was of course paid to the Public Trustee. The review application related to both quantum and payment to the Public Trustee. The Hearing Officer decided that the decision under section 126 was not reviewable and it is this aspect of his decision which is being appealed.

## CONCLUSION

The Commission has received roughly three and a half thousand fatal claims in the three completed years of its operation. It is an unhappy reflection on the Commission that this is virtually the only up to date statistic on fatal claims.<sup>74</sup>

In the absence of more detailed information on the number of dependants and the amounts and types of compensation paid to them, it really is difficult to assess the economic effects of the Accident Compensation Scheme on dependants.

If some references as to the effect of the scheme could be attempted from the claimants' reactions<sup>75</sup> to Commission decisions, the following areas would stand out as trouble spots.

The bulk of applications for review under section 153 of the Act appear to arise from dissatisfaction with the assessment of entitlement to earnings related compensation. This is not an adverse reflection on the Commission's application of the Act's provisions, but on the provisions themselves.

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74. To date, the absence of complete statistics, particularly on claims, is proving to be an impediment to planning and research.

The only survey of dependency claims made so far is Mr Miller's study. His statistics were obtained by examining every fatal claim file received by the Commission and interviews with dependants. This study was made largely in 1975.

75. Again, no figures have been published on the breakdown of applications for review on dependency claims. The following list is based very much on my own impressions from dealing with these applications.

In particular, the provisions relating to assessment of income from self-employment do not seem to be well understood by the people most concerned. The provisions of the Act direct that the basis for calculating loss of earning capacity in such cases must be the tax assessable income, yet it is well recognised that this does not represent the overall earning capacity but merely that which is affected by temporary physical incapacity. In other words, the provision did not contemplate the situation where the business or farm ceases to operate on death.

It is significant that the Commission now admits that the scheme resembles more a loss of profits insurance scheme rather than a personal accident insurance scheme.<sup>76</sup> Much less then is the scheme now able to offer "real compensation" to dependants of self employed persons.

It seems that there should be an amendment allowing the Commission to consider the overall financial dependency on the deceased's labour. At present such payments cannot be made under section 121 of the Act because of the provisos to s.121(1). Section 113 4B of the Act allows the Commission to make a "fair and just" assessment of the injured person's earnings where there would be undue delay in making an assessment in the usual way. In practice the Commission has taken a "fair and just" figure<sup>77</sup> on which interim compensation is based. This type of discretionary power might be a useful addition to the present section 123 whether it be

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76 Commission press release August 1977. A copy is appended to the paper. (Appendix C). See particularly p. 2.

77 See Appendix C. p.

intended to provide for interim or for long term compensation.

Another frequently criticised aspect of dependency compensation is the payment of children's lump sum entitlements to the Public Trustee. This is not a large sum and there is no reason why it could not be paid to the main dependant in the same way as earnings related compensation is. The rationale for this is that the lump sum was designed not as a "solatium" but as a contribution to help meet immediate expenses. The lump sum should be paid immediately the claim is received, if it is clear that there are no conflicting claims.

There is no provision in the Act for granting rehabilitation assistance to dependants.<sup>78</sup> In practice, the Commission's rehabilitation officers give limited assistance in the form of advice and counselling. There are instances, however, where financial assistance in the form of retraining or providing child care would be justified as a means of promoting the survivor's financial independence.

Finally, decisions on the fact or extent of dependency are frequently disputed, but one must conclude that the Commission has applied the provisions of the Act as liberally and fairly as it can. The presumption of total dependency is now fairly strong and will be rebutted only where there is clear evidence to the contrary. For example, where the husband and wife are both earning reasonably high salaries

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78. Section 49 restricts rehabilitation assistance to the injured person.

# Accident Compensation Commission

AGENCY STATE INSURANCE OFFICE

55.

DEPENDANT'S CLAIM FORM

(e.g. \$8,000) each, the fatals section is inclined to treat the widow or widower as a full dependant and the family situation as one of full inter-dependency with both earnings going into the family "pool".

A complete revision of the Accident Compensation Act is planned for about 1982, by which time it is hoped that all the problems relating to the scheme will have been recognised and that the answers will be available. In the meantime several amendments will be enacted, but at this stage no amendments to the dependency related provisions are planned.

# Accident Compensation Commission

AGENT: STATE INSURANCE OFFICE

## DEPENDANTS' CLAIM FORM

Completed by persons who claim to be dependent upon any person who dies as a result of personal injury by accident.

Surname or Last Name	Christian or First Names

Surname or Last Name	Christian or First Names

DATE OF BIRTH (attach a copy of your birth certificate) .....

Relationship to deceased? Widow  Widower  Child  Other  If other please specify ▶

Living with the deceased at the time of the accident? Yes  No  If 'no' where were you living? .....

Were you dependent upon the deceased at the date of death? Yes  No  If 'no' were you dependent upon the deceased at the date of death? .....

Are you now dependent? Yes  No  If 'yes' in what way did you become dependent? .....

How many dependent children are there? .....

Were you employed or in business? Yes  No  If 'yes' tick appropriate box or boxes: (a) at date of accident  (b) at date of death  (c) at present time

Give name of employer ..... Hours worked each week ..... Rate of pay ..... hourly/weekly  
Average weekly earnings \$ .....

Do you have any children dependent upon the deceased? Yes  No  If 'yes' give details overleaf.

Will you or other persons receive any legacy or other gain upon the death of the deceased person? Yes  No  If 'yes' give full details: .....

Were any other persons dependent upon the deceased either at the time of the accident or before? Yes  No  If 'yes' give names and addresses: .....

The Compensation Act states that compensation is payable to dependents who have arisen after the date of death and "the needs of each person concerned" are considered. Do you wish to make any representation in this matter or any other aspect of your claim?

I declare that I was dependent upon the deceased person named above and would have continued to be so dependent had he/she remained alive.  
I declare that I have not withheld any information likely to affect the assessment of compensation to dependents of the deceased person named above.  
I declare that I claim compensation on my own behalf and also on behalf of the following dependent children:

(Full Names)	(Full Names)
.....	.....
.....	.....
.....	.....
.....	.....

Signature of dependent or authorised agent: .....

NAMES OF DEPENDENT CHILDREN

FULL NAMES	Relationship to Deceased Person	Date of Birth	Present Address	STATUS: Show at work, at school, at university, pre-school.	INCOME: Show details of any regular income received
<p>(Name) (Date)</p> <p>(Name) (Date)</p>	<p>Relationship to deceased person</p> <p>Relationship to deceased person</p>	<p>Date of Birth</p> <p>Date of Birth</p>	<p>Present Address</p> <p>Present Address</p>	<p>STATUS: Show at work, at school, at university, pre-school.</p> <p>STATUS: Show at work, at school, at university, pre-school.</p>	<p>INCOME: Show details of any regular income received</p> <p>INCOME: Show details of any regular income received</p>

DEPARTMENT OF STATE INSURANCE OFFICE

Commission of Independent States

APPENDIX B

Social Welfare Widows' Benefits.

	<u>Weekly Benefit</u>	<u>Earnings Limit</u>
Widow only	\$41.30	\$884.00 p.a.
Widow + 1 child	65.84	"
Widow + 2 children	68.84	"
Widow + 3 children	70.09	"
Widow + 4 children	71.34	"
Widow + 5 children	72.59	"
Widow + 6 children	73.84	"

and each additional child  
over 6 children an additional \$1.25 per week.

The rate is the same for de facto widows. Rates are as  
27 July 1977.

BETTER ACCIDENT

COVER FROM OCTOBER 1

Because of a constant need to plan ahead, and an ability to predict the vagueries of the economy, the climate and the market, the primary producer is frequently forced into the role of an optimist.

However, it is precisely this optimism which can prove so vulnerable when the individual's livelihood and security is threatened by the unexpected accident, the resulting injury and incapacity.

As much as we would like, the possibility cannot be avoided. In economic and human terms, an accident can be a traumatic experience for any individual, but especially so for those involved in the primary industries. The situation can be further compounded by the need for quick and adequate compensation.

Since 1974, everyone living in New Zealand has possessed a comprehensive personal accident cover under legislation specifically designed to ensure and encourage a unique community responsibility for the compensation, and rehabilitation of the injured.

Under the Accident Compensation Act, earnings related compensation for the self-employed resembles a loss of profits insurance scheme rather than a personal accident insurance cover. Compensation is obtained on the loss of net taxable income suffered through personal injury by accident.

The situation facing the self employed raised a variety of questions during the past three years among them - how could the loss suffered during a short period of incapacity be proved when net profits are the result of a full 12 months work?

"Fair and just" guidelines operate in cases where the injured person applies his personal exertions to his self-employed business. Some loss will be assumed and compensation will be paid:-

During the first week following the accident, the self employed person must carry his own compensation, but

During the following four weeks of incapacity, compensation is paid at 80 per cent of the pre accident earnings, with a maximum payment of \$80 a week.

After this period, compensation will be provided at 80 per cent of pre-accident earnings, subject only to a statutory maximum of \$240.00 a week.

Payments on this basis are maintained for two months, after which the individual may be asked to show that he or she is suffering a loss as a result of being incapacitated.

Under these provisions, those with a reasonable level of pre-accident earnings are well compensated. However, it became apparent that those self-employed with particularly low levels of

re accident earnings could meet with some difficulty. The Accident Compensation Act requires that loss of earning capacity be calculated by initially establishing relevant earnings, (pre-accident earnings) on tax assessable income. Earnings during the period of incapacity are deducted from this with maximum compensation at 80 per cent, or in some cases 90 per cent of the resulting shortage.

Low assessable incomes have many causes - among them major expenditure on the development of new production areas, large amounts of special depreciation on the purchase of new plant, other tax incentive deductions, or the totally unpredictable accidents which can occur at any time.

It was precisely this special problem which led to the decision to amend the minimum level of relevant earnings - a change which takes effect from October 1 1977.

From this date, any fulltime self-employed person will be assumed to have a minimum level of relevant earnings of \$3,600.00 per year, a level which will support earnings related compensation at the rate of \$60.00 a week for a single person and \$62.31 for individuals with a dependant wife or children.

The scheme, funded through a minimum annual levy of \$36.00 defines a "full-time self-employed person" as an individual who worked an average of not less than 30 hours a week in his or her self-employed business during the 12 months ending September 30 of the year prior to the accident."

These are the minimum figures. If the tax assessable income during the latest financial year is more than \$3,600.00, relevant earnings will be higher.

These changes reflect the flexibility of the New Zealand accident compensation programme in meeting changing and complex social issues. The self-employed person in New Zealand is, naturally entitled to adequate and realistic compensation for personal injury through accident. While the act does not compensate for every financial consequence, particularly the result of employing someone to maintain the business or livelihood, it does ensure an additional sense of lasting security. The self-employed New Zealander faces an especial vulnerability when faced with incapacity through accident. The latest amendments are a clear recognition of their special case.

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