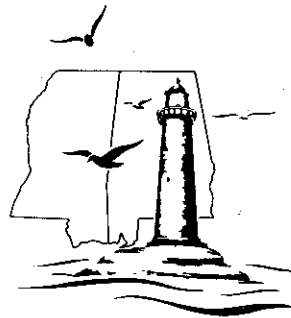


WATER LOG

***A Legal Reporter of the
Mississippi-Alabama Sea Grant Consortium***



ARTICLES

The Business of Marine Insurance

Improved Forms of Compensation for Fishing Vessel Injury

Congress Responds to the Crisis

No-Fault in New Zealand: It Works

Vol. 6, No. 2

Sea Grant Legal Program

April-June 1986

LAGNIAPPE (A Little Something Extra)

Under a memorandum of agreement signed in March between the federal government and the State of Mississippi, the state will manage the first "Special Management Area" established on the Gulf Coast. Some 3200 acres of wetlands and contiguous uplands in eastern Jackson County will thus be preserved from development. In exchange for the protection of vital estuarine habitat, the agreement clears the way for the development of other wetlands under the management of the Pascagoula Port Authority.

The Environmental Protection Agency has objected to an Army Corps of Engineers plan to deepen the Mobile Harbor navigation channel and dispose of the dredged material in Mobile Bay. In comments on the proposed Alabama project, the EPA said that the dredging would create fill that would diminish wetlands and bottomlands in a way that could not be mitigated elsewhere in the estuary. The agency added its view that materials from construction and maintenance of the harbor should be disposed of in the Gulf of Mexico. EPA reviewed and submitted comments on the proposal in its advisory capacity under the National Environmental Policy Act and section 309 of the Clean Air Act.

WATER LOG

The *Water Log* is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

If you would like to receive future issues of the WATER LOG free of charge, please send your name and address to: Sea Grant Legal Program, University of Mississippi Law Center, University, Mississippi 38677. We welcome suggestions for topics you would like to see covered in the WATER LOG.

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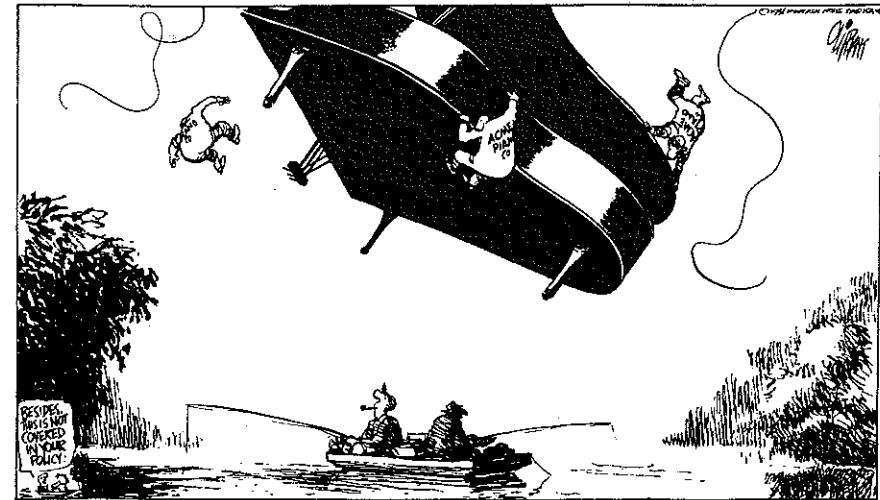
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'MY INSURANCE COMPANY? I CAN'T AFFORD INSURANCE ANY MORE - WHY DO YOU ASK?'

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SPECIAL ISSUE: THE CRISIS IN FISHING VESSEL INSURANCE

THE CRISIS IN FISHING VESSEL INSURANCE

If you are a commercial fisherman and have your own boat, chances are that the topic of insurance has been on your mind a lot lately. You know that you are paying a lot more for insurance than ever before, if you can get it at all. You may be wondering whether you will have to leave the fishing business because of your insurance problems. If, on the other hand, you are a seafood lover who gets no closer to the source of your meal than the supermarket counter, you may be unaware that events happening in the insurance business are affecting your choices and how much you pay for them.

Citing a combination of the rising numbers of claims, increasing and sometimes arbitrarily high jury awards for personal injury, and decreasing yield on investments, many providers of fishing vessel insurance have withdrawn from the field altogether, while others have increased their rates beyond what many commercial fishermen can afford. The availability or affordability of insurance to cover fishing vessels and those who fish on them has never been worse.

Although the situation developed earlier and is particularly acute in fishing vessel coverage, it is by no means unique to that sector of the industry. For the same reasons cited above, the entire insurance industry in the United States is in a state of uncertainty, if not actual "crisis."

Many legislative solutions have been proposed, but they usually fall into one of four categories: (1) enact a "cap" on liability that reduces the incidence of frivolous claims and unreasonably high jury awards; (2) provide for increased government regulation of the insurance industry; (3) provide for a state-administered no-fault insurance system for personal injury; or (4) provide a favorable legislative climate for cooperative self-insurance or group mutual insurance.

Not surprisingly, the insurance industry favors the first alternative, arguing that it can provide coverage at lower cost when liability is limited. Consumer advocates, on the other hand, tend to be skeptical of industry claims that the "liability explosion" is to blame, and instead fault the insurance industry for bad investment policies and bad faith in seeking to inflate the contribution of higher court awards to higher premium costs. Thus, consumer advocates tend to favor the second alternative—increased government regulation. However cogent the arguments of those who advocate more regulation, for reasons explained in the lead article that follows they may not be applicable to the marine insurance industry, which differs in several important respects from the rest of the insurance business.

The third alternative—state-administered no-fault insurance—is highly controversial and not often proposed today, having been vigorously opposed in the past by both the insurance industry and the legal profession. Because of its success elsewhere, however, it remains an option to be reconsidered.

This issue of **WATER LOG** includes articles by two respected scholars that provide radically different perspectives on how to relieve the insurance crisis. One proposes that a slight tinkering with the current system of providing coverage for fishing vessels may be enough to solve the problem; the other suggests that the time may be ripe to consider a thorough overhaul of the entire American system of compensating personal injury.

For greater depth on the issues raised in what follows, we refer the reader to the original forms of the articles presented herein, and also to two recent and important law review articles: Graydon S. Staring, "Meting Out Misfortune: How the Courts Are Allotting the Costs of Maritime Injury in the Eighties," 45 *Louisiana Law Review* 907 (1985), and Deborah K. Periman, "Direct Actions Against Marine Insurers: A Call for Uniform Legislation," 21 *Willamette Law Review* 279 (1985). For the consumer advocate's point of view, see "The Manufactured Crisis," *Consumer Reports*, Aug. 1986 at 544.

THE BUSINESS OF MARINE INSURANCE

Dennis W. Nixon

Introduction

Fishermen and insurance underwriters have more in common than one might suspect. Like fishermen, who rely on their skill to find and harvest fish in the daily gamble of income vs. expenses, insurance underwriters gamble on their ability to judge risks and to generate enough premium dollars to pay for the inevitable losses. Just as "high-liners" within the fishing fleet earn the respect of their colleagues, so do the underwriters who consistently produce a good profit ratio to premiums earned.

History

Marine insurance developed along with other concepts of maritime law in the late Middle Ages and formed the basis of the vast insurance industry today. The industry was well established in England by the seventeenth century, and those involved in the business met in a number of coffeehouses in London, the most famous of which was operated by Edward Lloyd. That original association of insurers, now known collectively as Lloyd's of London, has retained its prominence in the marine insurance world and provides the facilities for over 10,000 underwriters and approximately 300 syndicates. The procedure for spreading the risk among individuals at Lloyd's was responsible for the term "underwriter": once an individual had decided to accept the risk of insuring a ship or cargo, he would ask his colleagues to share a fixed percentage of the risk (and the premium) and write their names under his on the policy.

Although some larger vessels and groups of vessels are underwritten in the London market, most United States fishing vessels today are insured with American companies. There are two important facts to be aware of in understanding the United States marine insurance market today: first, in comparison with other types of insurance activity it is virtually unregulated; and second, insurance companies are able to make money while they are apparently losing money.

Regulatory Authority

In fields other than marine insurance, individual states have developed elaborate insurance commissions which regulate everything from maximum premiums to how quickly claims must be paid. In states with high losses in categories like automobile theft, it's not unusual for all of the companies operating in that market to be charging virtually the same premiums. Without the flexibility to change the rates to meet higher losses, the only choice companies have in a regulated market is to pull out altogether.

That is not the case with marine insurance. The underwriter has far more control over pricing decisions and whether or not he wants to accept the risk at all. There are two reasons for this continued independence in what is otherwise a highly regulated industry. The first reason is the unique nature

of every "marine adventure." No two vessels or captains are alike. If an automobile is not maintained properly, it may not start on a cold winter morning; if a bilge pump is not maintained properly the vessel may sink on a cold winter morning. There is a much greater potential for catastrophic loss in the marine market, and for that reason marine insurers have managed to maintain their independence.

The other reason relates to the international nature of the business of marine insurance. A highly regulated United States marine insurance company would not have the flexibility to compete with the comparatively unregulated markets of London, Norway, Sweden, and Japan when they quote on vessels in the United States. Since a broker has the ability to choose either United States or foreign markets, United States insurance companies would be under a substantial handicap if they alone worked in a highly regulated environment.

Profits and Losses

The second important fact about the insurance industry today is that insurers can make money while they are apparently losing money. The method is very simple. Insurance companies are "cash cows." Huge sums of dollars are generated from premiums and quickly invested before losses must be paid. When interest rates are high and the companies are very successful at investing their dollars, they can afford to "lose money" on the premium-to-loss ratio as long as it is offset by substantial investment income. Underwriters are pressured to generate dollars by lowering premium costs in spite of increasing loss ratios. According to some industry officials, "the ability to underwrite effectively is lost" during a highly competitive scramble for dollars, and the companies are unable to adjust quickly when interest rates decline.

All of the above is pretty good news for the commercial fisherman. High investment income for the past six years has offset an alarming increase in underwriting losses for ocean marine insurance. Despite the painful bite insurance premiums take out of operating expenses, the cost could have been much worse! So much for the good news.

The bad news is that, with the lowering of interest rates to more moderate levels, the investment departments of the insurance companies aren't producing as well, and insurers can no longer rely upon investment income to offset underwriting losses. According to *Best's Aggregates and Averages*, an industry rating source, the picture is particularly bleak in ocean marine insurance. For the period 1977-81, the category of ocean marine had the second-worst loss to premium-earned ratio among the 12 kinds of insurance rated. The percentage loss of -7.6 was exceeded only by the category of medical malpractice. The combined loss and expense ratio for 1981 was 110—which means that for every \$1 of premium earned \$1.10 was paid out for expenses and losses.

It is not possible to separate fishing vessels from all other vessels covered in the ocean marine category. However, discussions with a variety of industry

officials support the conclusion that fishing vessels have contributed their share to the combined loss ratio. The *Journal of Commerce* reported on March 23, 1983, that the mysterious sinkings of five crab boats in Alaskan waters caused the domestic insurance companies to pull out of that market. The London companies stayed in, but have doubled their rates. Later reports have indicated that one or two domestic companies, with London backing, are still in the market but with much higher rates.

With less money to be made in marine insurance, companies may make the decision to pull out of the ocean marine market altogether and emphasize other lines of business. That contraction of the capacity of the market has been offset by the decline of operating merchant ships due to the worldwide economic recession. However, with any reduction of capacity, coupled with increasing losses and decreasing interest rates, one thing is clear: premiums will increase, probably steadily, for several years until one or more of the conditions affecting the market discussed above reverses its current trend.

Another factor affecting premium costs, if not the rate, is inflation. Well-maintained older boats have increased in value at or better than the rate of inflation. Thus, if a fisherman wants to insure his boat for its current market value, his premium costs will increase each year even if the rate charged for hull insurance remains the same. That can be a bitter pill to swallow if the price per pound paid to the fisherman has not increased at the same rate.

The rapid expansion in capacity of the United States fishing fleet after 1976 had an impact on an individual fisherman's insurance costs as well. In many cases, successful fishermen sold their fully-paid-for, older wooden boats, which usually were under-insured because there was no bank mortgage requiring full coverage. The newer steel vessels were insured at a lower rate, but with dramatically higher declared hull values; hence, premiums soared. Partial assumption of the risk or self-insurance of a percentage of the value was no longer an option, since the bank wanted its substantial interest fully protected. Rather suddenly, insurance costs became a major operating expense.

Group Insurance Programs

One method for keeping that cost under control is to participate in a group insurance program as a member of a fishermen's cooperative or association underwritten by one company under a single policy. There are several reasons why participation in a group program should be less expensive. First, the insurance company's overhead costs (typically, 25-30% of the premium dollars generated) can be reduced somewhat by working with one large client rather than 50 small accounts. Central billing and claims processing can be used for further savings. Second, an association generating hundreds of thousands of dollars of premiums annually is a much more attractive client for the reinsurance company seeking to maintain a strong cash flow, and frequently a better rate will be available. Third, if the association is relatively stringent on admission and safety standards for the

fleet through self-regulation, claims against the group program will be reduced to the point where rates can be kept stable or lowered. Finally, if a group stays with the same company for several years, an independent loss record for that group can be developed, giving the underwriter an independent (and, it is hoped, lower) statistical claim base upon which a lower rate can be based. However, the converse can be true as well. If a group is not selective about the members it admits to a group program, if it is not aggressive with safety and loss-prevention programs, the group as a whole may find itself paying higher premiums than normal based upon a higher than average loss record. The conclusion is simple: if the fishermen's association helps the insurance company save some money, it is likely that those savings will be passed on to the group through rate reductions or credits.

Another method groups of fishermen have used with mixed success is self-insurance. Initially, the idea has great appeal. Rather than let an insurance company and its shareholders profit from fishermen's premiums, why not form a company owned by fishermen to do the same? The problem, very simply, is exposure. Not the kind of exposure problem you run into in a survival suit in the North Atlantic, but a legal and financial exposure to claims far in excess of the capital assets of the fledgling company. The premiums generated for the year may be able to pay routine claims but would not be able to cover catastrophic fleet losses. To spread some of the risk of that potential catastrophic loss, the fishermen's group would have to purchase reinsurance in the commercial market—a very costly undertaking because of the high exposure involved. In most cases today, the start-up costs of a new company, coupled with even a good premium-to-loss ratio and the costs of reinsurance, make it very difficult for a new venture to compete financially with the established commercial firms. Even when Bermuda-based "captive" insurance companies are formed (requiring less start-up capital than in the United States), the costs of reinsurance in today's market make it difficult, if not unusual, for a plan to succeed.

There are, however, always exceptions to the rule. The United Marine Fund in the state of Washington was formed over 50 years ago by a group of fishermen unwilling to pay increased hull rates. In 1981, there were 240 members paying \$1 million in premiums annually. Enough capital has accumulated over the years so that small claims are paid with the interest earned on investments. The reason for the group's success must be attributed to the strong membership standards they have maintained, seeking seasoned operators with proven records. The Massachusetts Lobstermen's Association has also developed a successful program by carefully scrutinizing membership applications. They have imposed some operational limitations as well: the vessels must not travel more than 25 miles from shore and must make port at least once every 24 hours. Reinsurance covers the association for any single loss above \$20,000. Reserves are slow to accumulate when reinsurance must be purchased for such a small amount, but such plans have an important psychological advantage over completely commercial

programs: substantial peer group pressures exist to keep claims at a minimum, since each claim has an impact on the eventual success or failure of the pool.

Insurance Brokers

This discussion of the "business of marine insurance" has focused on the insurance company, represented by the underwriter, and the fisherman. However, the fisherman rarely has any personal contact with the underwriter; rather, he deals with a broker who places the business with the insurance company that he believes will provide the best coverage, market security, service, and price for the fisherman. The broker's primary legal obligation is to the assured—the fisherman.

If a broker represents himself as particularly skilled in marine insurance matters, he must exercise the skill and care expected of an experienced broker; he is legally responsible for any errors and omissions in his recommendations. Marine insurance brokers, like doctors and lawyers, have to be concerned about malpractice actions from clients who are materially injured by their negligence. Suits against brokers are likely to occur when an insurance company refuses to pay a claim not covered under the terms of its policy, although it was a type of coverage the assured requested. If the broker's liability is established, he is usually required to assume the position of insurer and pay the claim. Most marine insurance brokers purchase malpractice, or "Errors and Omissions," insurance to protect themselves in that type of situation.

The foregoing excerpt from *A Commercial Fisherman's Guide to Marine Insurance* is reprinted with permission and is intended as an introduction to what follows. The complete text is available for \$4.50 from *National Fisherman*, 21 Elm Street, Camden, ME 04843. The author is Coordinator of the graduate Marine Affairs Program at the University of Rhode Island.

IMPROVED FORMS OF COMPENSATION FOR FISHING VESSEL INJURY

Dennis W. Nixon

Introduction

The United States commercial fishing industry is facing its most serious test since the years before passage of the Magnuson Act in 1976, when foreign fishing was threatening the livelihoods of many domestic fishermen. A combination of circumstances has made the cost and availability of marine insurance a serious problem for the fishing fleet. Just as the increasing pressure of foreign fishing in the 1970s demanded a change in federal law, so today significant changes in law must be made before the marine insurance situation will improve.

This study discusses and evaluates the most troublesome part of the marine insurance crisis: the method by which injured fishermen are compensated, and the impact of that method on the cost and availability of a Protection and Indemnity (P&I) policy. Before discussing the results of this study, we must put the present situation in historical context. This year marks the third, and probably the most urgent, time this issue will be presented before Congress. Either the method of insuring fishermen against injury will be changed, or the fishing industry will not be strong enough to return from its present state of crisis.

In the early 1950s, the fishing industry encountered its first major vessel insurance dilemma. In response, the federal government sponsored a survey of the problem which culminated in a two volume report, complete with case histories, analysis, and recommendations. Danforth & Theodore, *Hull Insurance and Protection and Indemnity Insurance of Commercial Fishing Vessels*, Special Scientific Report—Fisheries No. 241 and 241 Supp., Fish & Wildlife Service (1957). The report recommended that some type of workers' compensation for fishermen be enacted, and that a study be undertaken to that end.

No detailed study was forthcoming, however, until the early 1970s when insurance coverage for commercial fishing activity once again became a topical issue. In January 1973, the National Oceanic and Atmospheric Administration (NOAA) convened a nationwide conference on commercial fishing vessel insurance. Although issues were hotly discussed, the composition of the conference was too unwieldy to develop a consensus. The Conference did agree, however, to form an Ad Hoc Group on Commercial Fishing Vessel Insurance in order to recommend solutions to the commercial fishing industry. That group met for two years and released its report in June, 1976. *Summary Report of the Ad Hoc Group on Commercial Fishing Vessel Insurance January 1973—May 1975*, (Ed. Lyon & Theodore), NOAA (1976).

The Ad Hoc Group devoted most of its attention to the insurability of personal injury, and concluded that an alternate system of coverage should

be enacted. It produced a draft bill, the "Vessel Safety and Fishermen's Benefit Act," introduced in the House of Representatives as H.R. 9716 on September 19, 1975. That bill would have provided an optional no-fault compensation system for vessel owners. H.R. 9716 failed to gain support from the fishing industry for three principal reasons: (1) vessel owners were uneasy about the costs of such a system of compensation; (2) vessel owners feared the potential change in status of a crewmember from independent contractor or joint venturer to employee; and (3) passage of the Magnuson Act the following year made a more urgent demand on the attention of the leaders of the fishing industry. The bill died in committee, and in the late 1970s and early 1980s, as insurance companies competed for premium dollars to invest during that era of high interest rates, the cost of insuring fishing vessels stabilized without congressional intervention. Once again, the need for reform receded.

This latest version of the crisis is approximately two years old. In response to a serious situation in Massachusetts, congressional hearings began in Boston on October 16, 1984. On March 25, 1985, a further hearing was conducted in Washington, D.C. In both cases the lack of hard data on the extent of the problem made it hard for proponents of reform to recommend alternative solutions.

The study on which this article is based is a result of those hearings and the worsening situation in the availability and cost of P&I insurance. In 1985, concerned members of Congress urged the Department of Commerce to make available emergency funding for a factual assessment of the existing compensation system. This author was awarded a grant to study the problem and recommend solutions, and the project began on July 8, 1985. This article summarizes the conclusions of that study.

Methodology of the Study

The objective of the study was to analyze the cost of the current method of compensating insured fishermen and compare it with the cost of alternative methods. Development of those alternative methods was guided by three principles: (1) the alternative chosen must be fair to fishermen and their heirs; (2) insurance costs must be affordable to the vessel owner; and (3) the system of compensating losses should be sufficiently predictable to induce insurance companies to reenter the market.

Five hundred actual cases from the time period 1980-1984 were analyzed. The files were located in the offices of marine insurance companies, brokers, and claims adjusters in Boston, Philadelphia, Norfolk, Jacksonville, Houston, San Diego, and Seattle. The net result is the most accurate, unbiased, and representative sample of P&I cases ever assembled.

Each injury was identified by the region and the year of the award. Medical costs were calculated, and the total amount awarded includes all medical and other costs paid to the fisherman (including attorney's fees), but not the costs of the insurance company in investigating and defending the claim.

Because one of the complaints about the current system has been the delay inherent in the system of determining fault and consequent liability, the length of time between the injury date and the final award was calculated. It should be noted, however, that medical costs and maintenance are generally paid quickly. The final award for monetary damages takes substantially longer.

The claimant's age, dependents, and annual income were calculated because they are all important facts to be considered in recommending alternatives. Home port, type of fishery, and vessel length were determined to learn more about the "typical" injury and claim.

Summary of Findings

For the period covered, the average nationwide award was \$32,000, or \$24,000 after attorney fees had been deducted. Attorney fees were remarkably similar around the country: 33 percent of the total award if settled before trial and 50 percent if the case went to trial. The average delay between injury and award was one year, while the average period of disability was only fourteen weeks. The average fisherman was thirty-three years old with one dependent. Average income was \$24,000. Vessels involved in claims averaged one hundred ten feet long.

Several observations stand out from the data. First, in the study period there has been a substantial increase in both award size and attorney involvement. Most likely this represents a causal relationship. Attorneys have been winning larger awards for injured clients. Second, the elimination of Public Health Service medical coverage for fishermen in 1981 has had a clear impact on increased medical costs, which almost tripled during the study period. Finally, the average term of disability was only fourteen weeks, while the award for disability required an average of one year to collect. This indicates that the current system of compensation does not provide a timely response to the needs of injured fishermen.

Alternative Systems

The alternative recommended below has been designed to reduce costs to the insurance industry while remaining fair to fishermen. When all variables remain constant, one can assume that lower awards for injury will lead to lower premiums. Unfortunately, however, there can be no guarantee that some critical variables will remain constant. Two important ones are discussed below.

The first important variable is the general health of the United States fishing industry. Virtually every major American fishery is troubled by one or more of the following conditions:

- (1) declining stocks, either through overfishing, environmental degradation, or poorly understood natural causes;
- (2) competition from cheaper imported products and lack of tariff protection;
- (3) reduction in the marketability of exports because of the strength of the dollar;
- (4) loss of access to stocks because of boundary delimitations;

(5) overcapitalization as the result of fleet expansion.

The health of the fishing industry is important in assessing insurability simply because fishermen are injured less frequently in profitable fisheries. Reasons for this are not difficult to understand. In an unhealthy fishery, vessels must fish longer and with greater effort to earn the same income. Fatigue of both crewmen and equipment becomes a serious danger. When a vessel's profits have been low or nonexistent, critical maintenance tends to be delayed, and equipment is more likely to fail and cause injury. In fisheries where the future looks bleak, a crewmember may decide to "cash out," either staging an accident or exaggerating a minor injury.

When such problems trouble the fishing industry, it becomes clear that the escalation of premiums cannot be turned around overnight. Fundamental changes within the structure of the fishing industry and its management must be made before this downward spiral can be corrected.

The future of the other major variable, the health of the liability insurance industry, is also difficult to predict. Fishing vessel insurance represents only a small part of the marine insurance industry, which in turn represents a small component of the property and casualty insurance market. During the late 1970s and early 1980s, just as the domestic fishing fleet was growing in size and capacity, interest rates stood at an all-time high. In an effort to capitalize on those rates, insurance companies began to practice what is known as "cash-flow underwriting"—cutting premium costs below predicted claims to quickly take advantage of high money-market interest rates, in the hope that investment income would make up the difference between premiums and payment on claims.

This tactic was profitable for several years. But a few years ago interest rates began to fall, and intense competition within the insurance industry kept premiums artificially low. The combination of lower interest rates, higher awards, and a competitive market added up to record losses for many companies. Today, few companies are willing to insure the fishing business. Those that remain in the market are understandably nervous and are charging record amounts for premiums.

The chief complaint raised by the insurance companies about the current system of compensation is that with wildly varying court awards for similar injuries, there is no way to predict losses and to adjust premiums on a sound actuarial basis. An award for a fractured arm, for example, can be as low as \$5,000 or as high as \$500,000.

The problems of vessel insurance represent only a part of the general chaos that exists in liability insurance today. Municipalities, taverns, and even day care centers have faced enormous increases in insurance premiums. In the view of the insurance industry, these increases are justified by large settlements for everything from police brutality to child abuse. Product liability awards are virtually out of control. An extreme example: a Massachusetts federal court recently awarded \$1.7 million to a fisherman seriously injured by the winch aboard his boat. The defendant had built the winch in 1938!

Tringali v. Hathaway Winch Co., (Mass. 1985), account in *National Fisherman*, Nov. 1985 at 11. The defendant subsequently filed for bankruptcy and on October 2, 1985 his business burned to the ground.

In summary, the liability insurance industry is not in good shape. Because companies have been losing money for several years, there is no guarantee that a reduction in claims will result in automatic reduction in premiums. However, it is also clear that unless something is done to reverse or stabilize the trend of escalating awards, insurance companies may drop out of the fishing vessel market completely. The fishing industry needs the insurance companies or it cannot operate; the converse, however, is not true.

Evaluation of Existing System

To evaluate the implications of any proposed changes, it is important to understand the strengths and weaknesses of the current system. Three distinct remedies for injured fishermen are involved. Personal injury lawyers refer to them collectively as "the blessed trinity."

The first is the traditional maritime law remedy of "maintenance and cure." When a seaman is injured in the course of his duties, maritime law requires the vessel owner to maintain and cure him to the maximum extent practicable. Until mid-1981, most of the costs of "cure" for injured fishermen were actually paid by the Public Health Service. The amount of "maintenance" paid varies substantially, from a low of \$8 to a high of \$30 per day. Maintenance is paid automatically, without regard to fault.

The second remedy is the Jones Act, passed in 1920, which extended to seamen the right to sue their employers for damages when injured through the employer's negligence. 46 U.S.C. §688. The standard of proof required to show negligence has steadily eroded over the years, due in part perhaps to the Act's provision for jury trials, otherwise not found in admiralty courts. Damages may include all of the traditional elements of negligence awards from pain and suffering to loss of consortium.

The concept of "unseaworthiness" is the third and final remedy. It has evolved to apply a standard near that of strict liability to accidents aboard fishing vessels. Under this standard, plaintiff seaman need show only that an unseaworthy condition of the vessel caused his injuries. The leading case is *Mitchell v. Trawler Racer*, 362 U.S. 539, decided by the Supreme Court in 1960. Virtually every maritime slip and fall case in the past twenty-five years has cited this case. The plaintiff had slipped on some fish gurry on the rail of the vessel and had injured his back. The Supreme Court found the vessel unseaworthy for the purpose of disembarkation, and awarded damages. Today, except in cases of deliberate self-injury, it is difficult for a plaintiff to lose an unseaworthiness case.

With these three remedies, the current system is flexible in its operation, and that flexibility accounts for both its strengths and weaknesses. Minor cases—especially if the fisherman seems honest, the boat is clearly at fault, and no lawyer is involved—are usually settled for lost wages and medical

costs. If a lawyer becomes involved, the adversarial relationship takes over, and typically only minimum maintenance is offered.

Serious cases of permanent partial or total disability sometimes produce high jury awards, but more often awards fall within the same range as awards made under state workers' compensation laws. Greatest uncertainty is found where the injury is a temporary total disability. Fearful of high jury awards, insurance companies have been settling such cases for increasingly higher sums. As word of a high settlement spreads through a port, an epidemic of claims can follow. The consequences, as discussed above, have been disastrous. Any improved system of compensation will eliminate or minimize this type of abuse.

Evaluation of Proposed Alternatives

One option, discussed earlier, is a revived and updated form of the bill introduced in the House of Representatives as the "Vessel Safety and Fishermen's Benefit Act" of 1975. The bill would have provided an optional no-fault compensation system for vessel owners.

The initial appeal of the compensation bill was reduced by a variety of uncertainties, explained above. There are additional problems that pose an obstacle to the bill's revival. Today, premiums for workers' compensation insurance are nearly as volatile as those for P&I, and enactment of the program most likely would not produce a reduction in premiums. Finally, since the program represents a major change filled with uncertainties, it is not clear how many insurance companies or vessel owners would choose to exercise the option to enroll. Thus, revival of this bill is not a promising alternative.

A better alternative would be to raise the amount paid to an injured fisherman under maintenance, and to enact a limitation of liability. This combines two suggestions that have been proposed to increase the availability and affordability of vessel insurance: first, enact a law that raises the amount of maintenance paid to \$30 per day for all ports; and second, limit the vessel owner's liability to \$600,000 for death cases. The proposed maintenance award is increased to \$30 per day both to be fair to the fisherman and to discourage him from filing suit for general damages. Research has disclosed many cases where the fisherman hired a lawyer and filed suit simply because he was insulted by the offer of \$8 per day. The incentive to sue is reduced when the individual is treated better; however, it is impossible to evaluate how many fishermen would have settled for the \$30 per day and never filed suit.

This proposed alternative, however, does not achieve the goal of predictability. No computer can accurately predict the effect of this change on award sizes, because it cannot analyze human behavior.

Recommended Alternative

The alternative recommended by this study goes further than the above. It would make three important changes in the existing system. The author believes that Congress should:

- (1) raise maintenance to \$30 per day;

- (2) create a disability income insurance program for fishermen;
- (3) amend the Jones Act to bar claims where disability is temporary and less than 1 year duration.

The reasons for each of the changes are as follows.

Maintenance and cure is a no-fault system too often ignored in recent years in favor of a potentially more lucrative lawsuit. By raising the award to \$30 per day (\$11,000 per year) the vessel owner is contributing to the injured person's recovery a more realistic figure that represents approximately half of the average fisherman's annual income. Greater realism in the cost of maintenance and cure will serve to discourage speculative lawsuits.

The difference between the fisherman's actual wages (based on his previous year's tax return) and the \$11,000 base maintenance would be made up by compensation from a disability income insurance program. Such a program already exists in the United Kingdom, and it works well. The vessel owner buys policies for his crew at the start of the year, and deducts the premium from their crew shares throughout the year. If premiums charged in the U.K. are indicative, a disability income policy should cost the average fisherman several hundred dollars for one year of coverage.

The combined effect of increased maintenance and additional compensation from disability insurance will give the fisherman a no-fault remedy that pays full income and medical expenses for up to a year. Since the average length of disability is just fourteen weeks, this combination will compensate the vast majority of cases fairly, predictably, and without need for an attorney or a court to assign fault.

In light of the above, the elimination of temporary disability cases of less than one year's duration from the coverage of the Jones Act places no burden on commercial fishermen. In permanent disability or death cases, a party would be free as before to pursue larger and long-term compensation. Thus, the change recommended above is minimal and realistic, just enough to preserve and improve the existing system of compensation by minimizing the potential for enormous awards for relatively minor injuries.

The fisherman would have the new cost of disability insurance to bear, but that cost need not be unreasonable nor unduly burdensome. In some cases, the savings to the vessel owner on the P&I policy may be great enough to increase the crew share more than the amount paid out for the disability policy.

In light of the initial objectives of this project, this proposal is fair to the individual fisherman: it provides full wages and medical costs for as much as a year without regard to fault. In addition, the program will be more affordable to vessel owners. The crew will be sharing in the insurance costs (as a legitimate independent contractor should), and there will be a reduction in the number of abuses that drive up premiums. The proposal will also please the insurance companies, since it will limit their liability to medical costs and lost wages in the vast majority of cases.

Finally, it should be noted that the proposed system is more generous than a workers' compensation plan which typically provides an injured worker with 66 percent of his average weekly wage. Yet, because a new bureaucracy is not required to administer it, the proposed plan is less expensive to operate.

Conclusion

Because of existing conditions in both the fishing and insurance industries, improving the cost and availability of P&I insurance for commercial fishermen will not be an easy task. However, steps which will have a dramatic and positive effect on reducing the abusive awards that are crippling both industries can be taken now.

The existing system for compensating injured fishermen should not be scrapped in favor of a more radical compensation law. Rather, it should be modified and improved so that it will no longer be necessary to file suit for relatively minor injuries. Disability income insurance has proven successful in the United Kingdom and should be made available to fishermen here. Elimination of the need to assign fault for the first year of a temporary disability case will save both time and money. The commercial fisherman deserves an improvement in the existing maintenance and cure system and a raise in the coverage provided.

The time for change has come. This study is the third since 1957 that has called for an improvement in the system of compensating injured fishermen. It may be the last opportunity we have.

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CONGRESS RESPONDS TO THE CRISIS

On March 13, 1986 Congressman Walter Jones of North Carolina introduced H.R. 4407, entitled the "Fishing Industry and Seaman's Protection Act of 1986," to limit liability in the operation of fishing vessels that comply with improved safety standards. Senator John Chafee of Rhode Island introduced its companion, S. 2546, entitled the "Commercial Fishing Vessel Liability and Safety Act of 1986," on June 9, 1986. Both bills amend the Jones Act, codified at 46 U.S.C. §688. As proposals to aid the ailing fishing industry by providing incentives for insurers of fishing vessels to lower premiums, the two versions differ in important ways.

The House proposal would allow suits by injured fishermen only if disability precludes a return to duty within one year, provided that the employer meets certain other conditions. To enjoy coverage, the employer must provide for the seaman's "cure," i.e., for his medical expenses, and "maintenance" at a daily rate of 80 percent of the amount the fisherman would have earned had he not been injured, or \$15,000 per year—whichever is greater. The Senate version contains no one-year limitation, but rather disallows suits under the Jones Act or general maritime law by fishermen for a "temporary illness, injury, or disability"—defined as one which, after "cure," requires no further medical care, involves no loss of sight, hearing, nor appendage, nor permanent disfigurement, and from which the seaman can return to his previous employment. As in the House proposal, the employer who claims that an injury is "temporary," and thus noncompensable under the Jones Act, must nevertheless provide maintenance and cure for the disabled fisherman. Maintenance under the Senate bill must be provided during the period of disability at a daily rate equal to 80 percent of a complete day's wage or crew share on the date of injury, or \$11,000 a year—whichever is greater.

The two bills contain nearly identical provisions for updating the alternative minimum dollar amount (House—\$15,000; Senate—\$11,000). Both provide for annual review by the Secretary of Transportation, who may adjust the figure upward to reflect a rise in the cost of living to a maximum determined by the Consumer Price Index. Also common to both proposals is a two-year statute of limitations for actions by fishermen against employers or vessel owners.

Both bills also provide a ceiling on large claims by injured fishermen. The House bill would limit judgments for nonpecuniary damages to the lesser of \$350,000 or three times the amount awarded for pecuniary losses. In an apparent quest for simplicity, the Senate proposal instead sets a single limitation on liability of \$500,000. Both bills remove their limitation of liability protection from the defendant against whom gross negligence or willful misconduct is proven.

In each version, the limitation applies both to civil actions brought under the Jones Act, and under general maritime law. The Senate version extends

its limitation also to suits brought under the Death on the High Seas Act (DOHSA)—a statute now seldom invoked because of a Supreme Court decision, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (recognizing an action for wrongful death under general maritime law—see **WATER LOG**, Jan.-March 1986, at 21-24 for discussion). Absence of limitation on damages to suits brought under DOHSA in the House version, if enacted, would revive the usefulness of that statute for plaintiffs seeking to avoid limitations.

Both bills purport to offer fishermen something in exchange for the imposition of limitations on the amount they may recover for injury. The Senate bill sets forth a list of specific safety requirements for fishing vessels. In addition it directs the Secretary of Transportation to develop new safety regulations concerning navigation, lifesaving, and firefighting equipment. The House version mandates only that the Secretary promulgate regulations and apply them to fishing, fish tender, and fish processing vessels over five tons net weight for which the keel is laid after December 31, 1986. The Senate version adopts no distinction based on weight but provides for promulgation of additional safety standards for fish processing vessels entering service after December 31, 1987 with more than 16 persons on board. The House bill requires that all new workers on processing vessels be trained in vessel safety.

The Senate proposal establishes a "Commercial Fishing Industry Vessel Advisory Committee" of 17 members, to advise the Secretary of Transportation on all matters within the scope of the bill. Both bills provide civil and criminal penalties for violation of safety standards, and both amend the Magnuson Fishery Conservation and Management Act to encourage fishery management councils to consider the effect of their regulations on fishing vessel safety.

Insiders are hopeful for passage of some form of compromise between these bills, but are dubious that Congress will resolve the issue this year. It is, of course, debatable what impact liability ceilings, such as those now pending, would have on the cost and availability of insurance to the commercial fishing industry. Reduced "total exposure" may lead to lower rates, though this result is by no means certain. Even when one considers the current necessity of high exposure reinsurance to small insurers and to fishermen's insurance pool cooperatives, there is no guarantee that liability ceilings will lead to reduced premiums.

In addition, passage of either of these bills will withdraw from an injured plaintiff a certain degree of negotiating leverage, and may reduce incentives for attorneys to provide representation. Whether the benefits will outweigh potential costs to future plaintiffs, perhaps only time and experience will tell.

Robert O'Dell

NO-FAULT IN NEW ZEALAND: IT WORKS

William C. Hodge

In 1972 New Zealand, a nation long known for its pioneering social legislation, adopted a no-fault accident compensation scheme that represents one of the most far-reaching reforms of tort law in the English-speaking world. The effects of the reform on the courts, the insurance industry, and those who suffer personal injury have been profound, and largely beneficial.

Consumers are satisfied with the product. There is no move from any quarter to return to the liability lottery for personal injury, and the direct charge on government funds in the year ending March 31, 1982 was a mere seven dollars (N.Z.) per resident. [At press time NZ\$1=US\$0.57—ed.] This article will review the basic entitlements and costs under the scheme, survey the legal assumptions of its authors, and discuss the surprising revival of punitive damages in New Zealand's highest court. Finally, it will show in what ways the scheme has been successful.

Review of the Scheme

1. Historical

A Royal Commission of Inquiry was appointed in New Zealand in 1966 "to report upon the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons in employment and the medical care, retraining, and rehabilitation of persons so incapacitated. . . ."

Expecting technical review and proposals to reform the worker's compensation legislation, the government was stunned into shocked silence when the commissioners reported back in December 1967 with a report entitled, "Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry." (Commonly called "The Woodhouse Report." Available in the United States from Lawrence Verry Inc., Mystic, Connecticut 06355.) Rather than adjusting legislative coverage of certain injuries suffered on the job and tinkering with common law fault and recovery, the commissioners tackled the entire system of recovery for personal injury. They cast it aside as outmoded, excessively expensive, and characterized more by caprice than by justice.

The commissioners outlined five objectives to be achieved:

1. Compensation for injury should extend to all, not only workers on the job, but also the self-employed, the unemployed, housepersons, children and workers off the job.
2. Compensation should be awarded consistently, according to the nature of the injury, regardless of cause.
3. Physical and vocational rehabilitation must be the primary and ultimate goal.
4. Both earnings-related compensation and lump sum awards for permanent injury, must be provided.

5. Administration of compensation must be swift and cost-efficient.

The commissioners found certain attributes of common law tort recovery incompatible with their stated objectives: "The philosophy upon which it depends [is] illogical, the verdicts . . . entirely uncertain and affected by mere chance, the procedure . . . costly and slow moving, and the nature of the award and the whole process . . . an impediment to rehabilitation." Woodhouse Report at 47. The vagaries of contributory negligence, jury decisions that are often irrational, overloaded court calendars and years of consequent delay, procedural technicalities that are incomprehensible and infuriating to the parties, the problem of unknown, unavailable, or penniless tortfeasors, and other all-too-familiar aspects of the search for fault have overtaxed and effectively burnt out the nineteenth century common law tort remedy.

The Woodhouse conclusions were transformed into legislation and adopted in the New Zealand Accident Compensation Acts of 1972 and 1973. The Accident Compensation Act [hereafter ACA], codified and consolidated in volume 3 of 1982 N.Z. Stat., was signed into law on October 20, 1972. The substantive portions of the Act came into force on April 1, 1974.

2. Basic Legal Concepts

The ACA established two important complimentary legal concepts. First, the Act provides "cover" for all wage-earners, all those who suffer a motor vehicle injury, and all other injured persons not covered by these classifications. Secondly, the Act abolishes the common law tort action. Section 27, as amended in 1973 and consolidated in 1982, provides:

[W]here any person suffers personal injury by accident in New Zealand or dies as a result of any injury so suffered . . . no proceedings of damages arising directly or indirectly out of the injury of death shall be brought in any Court in New Zealand independently of this Act, whether by that person, and whether under any rules of law or any enactment.

3. Coverage

It must be emphasized that the scheme attempts to be all-inclusive. Workers who suffer injury are covered, whether they are on the job, "frolicking and detouring," vacationing, or self-employed. Nonworkers, whether they are children, householders, tourists, the permanently unemployed, or the criminally self-employed, are covered by the supplemental scheme. The clumsy bank robber who shot himself in the arm with his hair-trigger sawed-off shotgun was held entitled to a lump sum payment for his lost limb. (No earnings-related compensation, however, was paid.) A tourist, arriving in New Zealand for the first time, is covered if he falls on a loose tread and breaks his leg at the airport while handling over his passport. The same tourist is also covered if he negligently trips himself with his own fly-rod. He is even covered if he innocently questions the constitutional position of Ulster in a pub, and a local of Irish extraction smashes his nose. Conversely, New Zealand tourists and residents overseas are not covered by the New Zealand scheme. Exceptions exist for the New Zealand Armed Forces, other government servants, and civilian seamen and aircrew.

"Accident" is defined from the point of view of the injured person—the tortfeasor's intentional punch is the victim's broken nose by accident. Intentional risk-takers—mountain climbers, skydivers, participants in body contact sports, rescuers who rush into a burning house—are all covered, but a suicide or intentionally self-inflicted injury is not.

Thus, the scheme is not supplemental to, an alternative to, nor a small claims version of the common law tort system. It replaces, *holusbolus*, the common law relief for personal injury.

Coverage, however, is provided for personal injury only. It does not extend to real property, chattels, reputation, privacy, or business interests. The common law prevails, as before, where such interests are damaged or invaded. Common law actions for assault and false imprisonment not involving personal injury also survive.

No exclusive definition of personal injury is provided in the Act, but expressly included are medical, surgical, and dental misadventure; incapacity resulting from occupational disease; and cardio-vascular impairment which is the result of abnormal effort, strain, or stress in employment. Expressly excluded is damage to mind or body caused exclusively by disease, infection, or aging. Problems of definition, overlapping causation and obscure etiology will no doubt continue to arise. But with a "fair, large, and liberal" interpretation of the Act the legal problems of frostbite, sunburn, insect sting, pregnancy arising from rape, "bad back," poisoning, bursitis, arthritis, and many others will loom larger in the academic literature than in the law reports.

It should be noted that the scheme is built around the victim. The questions to be asked are, "How badly are you hurt?" and "What help, specifically, do you need?"; not "What was the tortfeasor's state of mind?" and "To what standard of care shall we hold the defendant?"

4. Compensation

Although not generous when measured in United States dollars against American jury awards, the level of compensation is adequate by New Zealand standards. It is panoramic in scope, from emergency transport at the time of the injury up to and including funeral expenses. Included are not only immediate emergency transport, but also costs necessary to consult a specialist anywhere in the world. Ancillary meals and lodging are included. Although coverage of the Act does not extend to property loss, intimate personal effects—such as spectacles, contact lenses, artificial limbs, teeth, and clothing damaged in an accident—are covered. Medical treatment includes hospitalization, surgery, and prosthetics. Pharmaceuticals, if prescribed, are paid for in all cases. Also included are physical rehabilitation, retraining, structural adaptation of a residence, and provision of a hand-operated motor vehicle.

The employer compensates 80 percent of the first week's lost wages, if the accident occurred on the job. If a wage-earner's accident occurred elsewhere, and in any case every week after the first week, the Accident Compensation Corporation pays 80 percent of the lost wages in certain cases.

Earnings-related compensation for the self-employed is payable at 80 percent of the average weekly earnings (up to a maximum of NZ\$700 a week) during the last financial year. The nonemployed—i.e., students, children, householders, and other nonearners—are compensated for the loss of future earning capacity.

Maximum lump sum payment for permanent loss or incapacity is set at NZ\$17,000, with varying percentages of that amount payable for loss of, for example, a finger or a hand. Lump sum payment for nervous shock and neurosis, loss from disfigurement, and decreased capacity to enjoy life, is set at a maximum of \$10,000. This figure may appear paltry to American personal injury lawyers, accustomed to the final, global award in a jury trial. But the traditional common law award, it can be argued, is guesswork—a once-and-for-all stab in the dark, meant to carry the plaintiff through a lifetime of medical costs and adjustments, to say nothing of the attorney's contingent fee.

Also paid are funeral expenses in an amount "reasonable by New Zealand standards," but food and drink for a *tangi* (a Polynesian wake) are not included. Earnings-related compensation is also payable to dependent survivors. However, this is not payable where the otherwise entitled survivor murdered the deceased. Nor is it payable in cases of suicide.

Outline of the Scheme

1. Funding

Commissioners and employees of the Accident Compensation Corporation (ACC) administer revenue collecting, compensation, and implementation of policy. Compensation is paid out of three funds, separated for accounting purposes for the three types of coverage—an Earners' Compensation Fund, a Motor Vehicle Compensation Fund, and a Supplementary Compensation Fund. The Earners' and Motor Vehicle Funds are "funded" like private insurance companies, having on hand or invested sufficient capital to meet the ongoing and future claims of past accidents. The Supplementary Fund is not a "fund" at all, and merely draws upon government revenue. Administrative cost is spread over the three substantive funds, and is labeled "General Fund" in the annual reports.

The Motor Vehicle Fund is generated by a levy on every registered motor vehicle. The post office acts as agent in the collection of these fees, which in 1986 stand at \$43.10 for a private automobile. The Earners' Fund is generated by a tax on employers at an average rate of 0.74 percent of the wage bill. Provision is made for premiums and rebates, where appropriate, and the tax department acts as agent for the collection of that levy.

2. Claims Handling

Most claims require no documentation by the injured person. In the case of a minor injury not requiring immediate hospitalization, the injured person may consult a private physician of his choice. Medical treatment, minor surgery, inoculation, or X-rays, as appropriate, may be used at the physician's discretion. Referral may be made to a physiotherapist or other specialist, and

prescription medicine may be ordered. Neither the physician nor the pharmacist nor the physiotherapist would render a bill to the patient. Instead, claims would be forwarded to the corporation without the patient's written statement or signature. The patient, therefore, remains unaware of the cost of his claim to the state. If the injury were a lost-time accident, costing the patient wages, the physician would certify the injury on a separate form, to be filed by the worker with his employer (in the case of an on-the-job injury) or with a claims office (if an off-the-job injury). In the former case the employer would complete the application and forward it to a claims office.

A stated goal of the commission that administers the ACA is to decentralize claims handling and increase the opportunity for face-to-face communication between claimants and responsible officials.

3. Appeals Procedure

Access to the courts and opportunity for appeal are generally more than adequate. Initial appeal for a dissatisfied claimant consists of an "application for review." Upon receipt of the application the corporation reconsiders the claim and may "revise" its earlier decision, with special attention given to new evidence, or review of false or misleading evidence. After reconsideration, roughly half of submitted appeals go to a review hearing.

An applicant may be represented by counsel at the hearing; the procedure is informal but a complete record is taken. If the applicant "has acted reasonably in applying for a review," he may be awarded costs.

An applicant dissatisfied with the decision of the hearing officer may apply to the Appeal Authority, set up under the ACA. This appeal consists of a rehearing. It is not an appellate argument on a point of law, and the judge may thus rely on facts recorded at the hearing. As a last resort, an appeal may be taken to New Zealand's civil court system on a question of law or a matter of public importance.

Thus, there are five tiers of appellate review: (1) internal reconsideration, (2) hearing by ACC Hearing Officer, (3) substantive rehearing by ACC Appeal Authority, (4) appeal on a point of law to the Supreme Court, and (5) final appeal on a point of law to the New Zealand Court of Appeals.

Review of the Scheme: Sticky Wickets and Hard Points

The following paragraphs are not intended as conclusive discussion of the issues raised above. They are intended, rather, as preliminary analysis of certain problem areas, and discussion of questions begged by the foregoing description.

1. Deterrence

The common law tort system not only compensates victims and reallocates loss; it also imposes retribution. In punishing deliberate or negligent tortfeasors, it helps to engineer society. It might reasonably be asked, Does not New Zealand's system of social insurance provide security at the cost of sacrificing the deterrent value of a common law tort action?

It must be admitted, and even emphasized, that the abolition of the private tort action removes a valuable, if irregular, policing mechanism. Without

it, the preservation of individual and commercial responsibility can be assured only by enforcing and tightening laws governing human and corporate behavior.

Toward this end a unanimous appellate decision of March, 1982 held that private actions for *punitive* damages survive the ACA's abolition of proceedings for compensatory damages. *Donselaar v. Donselaar*, [1982] 2N.Z.L.R. 97. The Court of Appeal held such damages not plaintiff's damages at all, but rather punishment of the defendant. In the first such case to reach New Zealand's highest appellate tribunal, the "naked" pursuit of exemplary damages was heard, notwithstanding the bar in the ACA. The retributive, deterrent, and punitive functions of tort law therefore survive in New Zealand.

2. Criminal Activity: A Spurious Issue

A political controversy recently arose regarding injuries suffered during criminal activity. Before 1982 an artless bank robber, a burglar badly cut while breaking and entering through a window, even the drunken brawler who loses the punch-up he started—all were entitled to full medical coverage. In the popular imagination the emergency wards of New Zealand's public hospitals were full of criminals and brawlers. In response to the widely shared image of hosts of wrongdoers feeding at the public trough, the government in 1982 passed amending legislation that makes it possible for the ACC to deny a claim even though "cover" may exist. Under §92 of the 1982 Act, a person injured in the course of committing a criminal offence may, upon conviction, be denied compensation if such payment would be "repugnant to justice." Except for drunken driving offences, the incidence of injured criminals is not significant statistically.

3. Sickness and Disease

The most cogent and logically consistent criticism directed at the ACA is not that it goes too far, but rather that it falls short of what is needed. As we have seen, disability resulting from an "accident" is covered. A similar disability resulting from a disease, however, is not. The hardest line to draw, and the least justifiable—in the ACA as in United States workers' compensation schemes—is the line between accident and disease. Even more difficult are those cases where contributing causes may be jointly pathological and traumatic: environmentally-induced cancer, for example. Open-heart surgery may be appropriate for the victim of an on-the-job cardiac episode, the patient with degenerative cardiovascular disease, and the child with a congenital heart defect alike, but only the first is covered. The football player, neck broken in a scrum, may share a quadraplegic ward with a victim of polio, but only the injured athlete is covered.

The current ACA can only be understood as the result of deliberate reform of a common law that never recognized disease as a cause of action. To that foundation must be added the inarticulate fear of unacceptable cost escalation, and the necessary political compromise that results. In terms of social justice and the due process ideal of treating like cases equally, the

current accident compensation plan is best seen as a transition to fuller coverage in the future.

4. The Bottom Line: Economics

Putting social justice to one side, we may ask, What has the ACA cost? How many cents in the dollar are eaten up by lawyers and paper-pushing bureaucrats? A critic may respond, All very well in theory, but can society afford it?

The short answer to these questions is that while the administrative overhead of the ACC has mildly disappointed its most ardent advocates, the cost/benefit ratios have confounded the Act's critics. In 1985, administrative costs stood at 8.0 percent, and the trend has been downward in recent years. About 90 cents or more of each dollar collected in any year since enactment has gone or will go to the victim. Add to this the real but indeterminate savings to the Justice Department in easing the pressure on court dockets and reducing the judicial workload. To be sure, the judicial establishment in New Zealand has not shrunk with the introduction of the ACA. But neither has it grown at a rate which might otherwise have been expected.

Critics should ask themselves: How does all this compare with the distribution of the American personal injury insurance dollar?

The Real Bottom Line: It Works

In twelve years of operation the system has proven itself. No one wants to return to the bad old days of jury lotteries, and there is no demand from any quarter to abolish the system. Beneficiaries of the ACA are more than satisfied with the product. They receive the economic satisfaction that a high percentage of their insurance dollar goes to the victim. They buy better wrap-around protection for fewer dollars, paying under the ACA \$43.10 to register a car. New Zealanders now purchase auto insurance only to cover property damage. The insurance industry grumbles, but continues to turn profits on other types of insurance. There has been no general collapse of the insurance industry, and good lawyers continue to prosper.

More significantly, there is humanitarian satisfaction in the sure knowledge that wounds will not go untended, that hospital doors will not slam in the face of the uninsured, and that percentage cuts will not be taken from pain and suffering awards.

Opponents of accident compensation plans have been quick to cry "socialism." The moral vigor of a country, so the argument runs, is sapped by lazy habits of narcotic dependence on state insurance. Sturdy self-reliance is exchanged for the swollen expectations of cradle-to-grave welfare. This argument, with all due respect, is pure rubbish. A more sturdy people than the New Zealanders will not be found. And enactment of a component of basic social justice can only strengthen the fibre of a country—especially if the alternatives are more expensive.

Professor Hodge is a member of the California and Oregon bars and is Senior Lecturer in Law at the University of Auckland. An earlier and fuller version of this article appeared in the April 1983 issue of *Insurance Counsel Journal*. The views expressed in this article are the author's, and do not necessarily reflect those of the editors or their Sea Grant sponsors.