



# A Historical Perspective on Contemporary Challenges in Workers' Compensation

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# A Historical Perspective on Contemporary Challenges in Workers' Compensation

## **Abstract**

Workers' compensation has entered a period of rising complexity and increasing pressures for system change. This article explains the extent to which important assumptions and assertions made in this process are historically correct. The discussion includes the historical interaction of tort liability with workers' compensation, and the current proposals for "privatization."

# A HISTORICAL PERSPECTIVE ON CONTEMPORARY CHALLENGES IN WORKERS' COMPENSATION®

BY TERENCE G. ISON\*

Workers' compensation has entered a period of rising complexity and increasing pressures for system change. This article explains the extent to which important assumptions and assertions made in this process are historically correct. The discussion includes the historical interaction of tort liability with workers' compensation, and the current proposals for "privatization."

Le régime des accidents du travail franchit présentement une nouvelle phase remplie de complexités et de pressions croissantes visant sa modification. Cet article explique dans quelle mesure les arguments soutenus à cet effet sont justifiés d'un point de vue historique. Entre autres, la présente discussion traite de l'interaction traditionnelle entre la responsabilité extra-contractuelle et les accidents du travail, ainsi que des projets de privatisation de ce régime.

I. INTRODUCTION .....	808
II. SCOPE OF THE COVERAGE .....	810
A. Coverage by Industry .....	810
B. Types of People .....	810
C. Types of Disability .....	811
D. Causes of Disability .....	813
E. Types of Benefits .....	817
F. Levels of Benefits .....	817
III. THE MEASUREMENT OF PERMANENT PARTIAL DISABILITY .....	817
IV. REHABILITATION .....	819
V. THE EVOLUTION OF TORT LAW .....	820

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\* Professor Emeritus, Osgoode Hall Law School. This is a slightly revised version of the Meredith Memorial Lecture, given in Edmonton in June 1996. The lecture is given annually at the congress of the Association of Workers' Compensation Boards of Canada to honour the memory of Sir William Meredith.

VI. FUNDING .....	822
VII. COST ESCALATION AND WASTE .....	824
VIII. PRIVATIZATION .....	825
IX. CONCLUSION .....	832

## I. INTRODUCTION

It is commonly forgotten what a unique contribution Sir William Meredith made to public administration in Canada, as well as to social insurance and labour relations, and particularly to our legal structure.

Until fairly recent years, almost all of our law was drawn from England, though a substantial proportion of Quebec law was drawn from France. It was not until the 1960s that there began to emerge on any broad scale a distinctly Canadian jurisprudence, and a body of Canadian legal thought.

To that general picture, there was an outstanding exception. In 1913, we introduced a major change in our legal structure. We did it in a way that was out of character for the time. We used our own imagination. We devised a new legal regime that drew features from Britain, from Germany, and from some of the United States; but a substantial dose of native imagination was added to the mix to produce a new legal regime that was indigenously Canadian.<sup>1</sup> This was done through the appointment by the government of Ontario of a Royal Commission conducted by Sir William Meredith, the Chief Justice of Ontario. The system of workers' compensation that he recommended<sup>1</sup> was adopted with very little change by the Ontario Legislature,<sup>2</sup> and subsequently copied with modifications in all jurisdictions of Canada.

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<sup>1</sup> Hon. Sir. W.R. Meredith, *Final Report on Laws Relating to the Liability of Employers: to Make Compensation to their Employees for Injuries received in the course of their employment, which are in force in other countries* (Toronto: L.K. Cameron, 1913), (reprinted 1989), [hereinafter *Meredith Report*].

<sup>2</sup> *An Act to provide for Compensation to Workmen for Injuries sustained and industrial Diseases contracted in the course of their Employment*, S.O. 1914, c. 25 [hereinafter *Workmen's Compensation Act*].

The system that Meredith designed also became unique in another way. As far as I can recall, workers' compensation is the only legal subject in which a system was designed in Canada and subsequently adopted in other countries. This came home to me a few years ago when I was invited to speak at a conference on workers' compensation in South Africa. While there, I called at the office of the Compensation Commissioner in Pretoria. Above his desk was a portrait picture of Meredith. I asked him why. He explained that when the first *Workmen's Compensation Act* was passed in South Africa, they copied the *Workmen's Compensation Act* of Ontario, so he thought of Meredith as the founder of their system, too.

Meredith was an ideal candidate for commissioner. He had long experience in the subject, and he was a person without a political future. In appointing him to conduct the Commission single-handedly, the government recognized the hazards of interest-group representation on a Royal Commission. It recognized that an efficient system of public administration can never be designed or substantially revised by any process of bargaining or compromise among interest group representatives. Prevalent among the problems is the propensity for such bargaining to result in compromises of inclusion. If organized labour wants the system changed to include this and this; and organized management wants the system changed to include that and that; the temptation is there for any government to conclude that the system should be changed to include this and this, and that and that. Successive revisions made in that way can make a system too complicated.

In some provinces, the system was revised from time to time by the appointment of a Royal Commission similar to that of Meredith,<sup>3</sup> but after the 1960s, that practice fell into disuse. With those subsequent royal commissions, as with the first one, the most important role played by each commissioner was the rejection of most interest-group proposals. In that way, each commissioner was able to achieve the paramount goal in the design of any social insurance system; that is, "keep it simple." It is no surprise that since the appointment of single-person Royal Commissions fell into disuse, some of our systems of workers' compensation have become increasingly complex, to the point of being unwieldy.

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<sup>3</sup> Probably the best of these was the 1952 report of the commission in British Columbia: British Columbia, Workmen's Compensation Board Inquiry, *Report of the Commissioner, the Hon. Gordon McG. Sloan, Workmen's Compensation Board Inquiry (1952)* (Victoria: Don McDiarmid, Printer to the Queen, 1952). See also, for example, Manitoba, Commission to Inquire into and Investigate Every Aspect of the Workmen's Compensation Act, *Report of the Commissioner, W.F.A. Turgeon, the Workmen's Compensation Act, Manitoba, 1958* (Winnipeg: The Commission, 1958).

In appointing Meredith, the Government of Ontario also adopted another principle that would seem strange on the contemporary political stage. The principle was this: before deciding on major system changes, you should have someone conduct an inquiry into the facts.

## II. SCOPE OF THE COVERAGE

It is commonly said in contemporary debate that the coverage of the system has expanded beyond what was originally intended. It may be of interest to summarize the extent to which this is so. As a statement of the original intention, I will take the recommendations of the *Meredith Report*, at least to the extent that they were enacted in the first *Workmen's Compensation Act*.

### A. *Coverage by Industry*

The range of industries covered by the *Acts* has expanded in recent years, but this does not deviate from any original intention. Meredith recommended that a prescribed list of industries should be covered, but this list was to serve only as a starting point. It was one of his recommendations that others could be added later.

### B. *Types of People*

There has been no significant change in the category of people who are covered. Where an industry is covered by the *Acts*, all employees in that industry are generally covered. No use has been made of the classifications that were subsequently introduced in labour legislation for the purposes of collective bargaining.

The system has always covered workers of both sexes, but for many decades it was heavily male-oriented. Women were more readily recognized as widows than as workers. This male orientation changed substantially during the seventies, when most governments changed the name or the system from "workmen's" to "workers'," and women were hired in substantial numbers at the boards for decision-making roles. During the eighties, however, the *Canadian Charter of Rights and*

*Freedoms*<sup>4</sup> arrived to provide a setback for sex equality. Its predictable interpretation, at least among those responsible for the preparation of statutes, demanded sex equality on the face of the statutes, regardless of how much inequality that produces in the results. So major forms of sex discrimination remain. The most important shows in the etiological statistics classified by sex. Among people of normal working age who become disabled, the proportion of men who were disabled by injury is significantly higher than the proportion of women who were disabled by injury.<sup>5</sup> Thus, a system that compensates for injury more readily than it compensates for disease will also be one that compensates the disabilities of men more readily than the disabilities of women.

### C. Types of Disability

There was a consensus at the Meredith inquiry that disabilities from trauma should be covered. Disabilities from disease were controversial, with the unions taking the view that they should be covered, and the Canadian Manufacturers Association taking the view that they should not. Concerns were raised about the difficulties of distinguishing between diseases that result from employment and those that result from other causes, bearing in mind also that many disease conditions result from multiple etiology. In the result, Meredith recommended that diseases be covered, but in a more limited way than injuries.<sup>6</sup> The first *Workmen's Compensation Act* provided for the coverage of an "industrial disease;" which was defined to mean the diseases itemized in a schedule to the *Act*, plus those that would be declared in future by regulations of the (then) Workmen's Compensation Board (WCB).<sup>7</sup>

Other types of disabilities that were subsequently recognized as covered were:

- those resulting from a sudden strain,
- those resulting from the psychological consequences of trauma,
- those resulting from repetitive strain, and

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<sup>4</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>5</sup> See, for example, "Statistics of Disability Pensions Being Paid," October 1992, (Ottawa: Canada Pension Plan, 1992) Tables A and B.

<sup>6</sup> *Meredith Report*, *supra* note 1 at 13.

<sup>7</sup> *Workmen's Compensation Act*, *supra* note 2, s. 2(h).

-those resulting from the psychological harm of a frightening experience without trauma.

In more recent years, there has been some recognition of disabilities resulting from occupational stress, though only in some jurisdictions and only in a limited way.<sup>8</sup>

Whether the coverage of these disabilities should be seen as an expansion of the original intention depends upon which way one looks at it. They were not a focus of contemporary debate in 1913, and it would be hard to find in the *Meredith Report* any expressed intention that they should be covered. On the other hand, the category of disabilities that were intended to be covered was defined only by the term "personal injury." This term was drawn from the common law. It was a term used in tort liability and it was the term used in the British *Workmen's Compensation Acts*.<sup>9</sup> Meredith would have expected that when the boards were deciding on the meaning of this term, they would follow the decisions of common law courts. The common law, however, is always evolving; and in the courts, the perception of "personal injury" evolved to include disabilities resulting from a sudden strain, the psychological consequences of trauma, repetitive strain, psychological harm without trauma resulting from a sudden fright, and emotional distress.

This expansion in the common law perception of "personal injury" is relevant to another important feature of workers' compensation. It was the original intention that workers' compensation should be a complete substitute for employers' liability in the industries to which it applied.<sup>10</sup> Thus a benefit for employers of the new system was to be a complete immunity from employers' liability claims. Providing that immunity required that the types of disability for which a worker could claim compensation should be coextensive with the types of disability for which an employer could be sued at common law. Since it was the original intention to provide this immunity for employers, it is a logical corollary that the boards should interpret the phrase "personal injury" in a way that would keep it coextensive with the usage of that term in the common law courts. On this view, the expansions in the coverage that have taken place by type of disability are a fulfilment of the original intention.

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<sup>8</sup> See, for example, *Decision No. 636/91* (1992), 21 W.C.A.T.R. 277 (Ont.). See also K. Lippel, *Le Stress au Travail : l'indemnisation des atteintes à la santé en droit québécois, canadien et américain* (Cowansville, Que.: Yvon Blais, 1992) at 11-98.

<sup>9</sup> See *Workmen's Compensation Act, 1897* (U.K.), 60 & 61 Vict., c. 37, s. 1.

<sup>10</sup> *Meredith Report*, *supra* note 1 at 15.



These developments were also essential if the system was to achieve its moral and economic objectives; including good social cost accounting. These goals required compensation for disabilities that result from employment. It would have been harder to find a rationale for covering only disabilities that result from employment in a particular way.

While decisions of the common law courts were the primary impetus for this broader perception of "personal injury," it was also supported by legislative changes, particularly in jurisdictions that repealed the word "accident" as a requirement of eligibility for compensation in injury cases and retained that word only as a requirement for the statutory presumption relating to employment causation. Ontario rounded the matter off by enacting that the coverage applies to any "disablement arising out of and in the course of employment."<sup>11</sup>

#### *D. Cause of Disability*

It is commonly said that there has been an expansion in the range of disabilities attributed to employment, and therefore classified as compensable. This appearance of expansion has been partly real and partly illusory. The real expansion has come in relation to disabilities of multiple etiology. These are disabilities that result from the concurrent or sequential influence of two or more causative factors, not all of which are events or circumstances of the employment. This expansion is a concomitant of the expansion that I have already mentioned in the types of disability that are covered. Questions of multiple etiology are not generally seen as a problem in traumatic injuries. They are raised in many cases of disease, strain, psychological disorders, or emotional stress. Thus, in these types of cases there has been some expansion by cause of disability.

It does not follow, however, that this is an expansion beyond what was originally intended. The comments made in relation to type of disability are also relevant here. In cases of multiple etiology, the criterion of eligibility commonly used is whether some event or circumstance of the employment was a significant contributing cause of the disablement. That always has been the correct legal criterion. All that has expanded in recent years is the recognition that that is the correct legal criterion.

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<sup>11</sup> *Workers' Compensation Act*, R.S.O. 1990, c. W.11, s. 1(c) (definition of "accident").

The other areas of expansion sometimes alleged with regard to cause of disablement relate to the burden and standard of proof. Here again, there has been no significant change in the legal criteria. What may appear to be a contemporary dispute is the continuation of a dispute that has been with us since the system began. For example, a recent discussion paper<sup>12</sup> alleging relaxation in the standard of proof suggests a requirement that employment causation be "clearly" established. This illustrates the position taken among some employers' representatives; namely, that employment causation should be established to a certainty, or to a high degree of probability. Conversely, it has sometimes been argued by labour representatives that, where employment causation cannot be ruled out, the *possibility* of employment causation should be enough to qualify for compensation.

Neither of those positions was ever adopted in the Royal Commission reports, nor in the statutes. The general common law rule (except in criminal cases) is that the standard of proof is the balance of probabilities. In other words, where the causes of a disability cannot be determined with any certainty, a board must consider which of the probabilities is more likely. It must search for the best available hypothesis. This common law rule, the balance of probabilities, generally applies to tribunals as well as to courts when the legislature has not specified any other criterion.

With regard to the burden of proof, workers' compensation in Canada has always been different from common law proceedings. Our systems were established to work on an enquiry model, not an adversarial model. There is no burden of proof on anyone except the board. Since workers' compensation was not to be adversarial, a rule was required for situations in which the evidence for and against employment causation is judged to be evenly balanced. In that situation, a common law regime would require that the claim be denied; but a more benevolent view was taken in workers' compensation. It has commonly been provided that, where the evidence relating to the disputed probabilities is judged to be evenly balanced, the matter should be decided in favour of the claimant. That variation of the common law position has been enacted in some jurisdictions<sup>13</sup> and established by tribunal or board decisions in some others.<sup>14</sup> It is sometimes referred to

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<sup>12</sup> Hon. Cam Jackson, *New Directions for Workers' Compensation Reform: Report of the Honourable Cam Jackson, Minister Without Portfolio Responsible for Workers' Compensation Reform* (Toronto: Minister Without Portfolio, 1996) at 30; and generally at 28-33.

<sup>13</sup> For example, *Workers' Compensation Act*, R.S.B.C. 1996, c. 492, s. 99.

<sup>14</sup> For example, *Decision No. 20*, (29 June 1988) Nfld. W.C.A.T. at 10 [unreported].

as giving the worker the benefit of the doubt. It only applies in cases where the evidence each way is judged to be evenly balanced.

As the administration of workers' compensation was initially established at the boards, relatively little use was made of lawyers. Indeed, one of the goals of the *Meredith Report* was to avoid the cost and delay of involving the legal profession. It was recognized, however, that workers' compensation claims would involve medical issues. Doctors were hired by the boards, and they became the dominant profession in claims adjudication. The propensity was for staff doctors to become decision makers, rather than medical advisers. They became decision makers, not only on questions of medicine, but also on non-medical facts and questions of law, including the burden and standard of proof. This dominance of board doctors in claims adjudication resulted in a burden and standard of proof being applied that were more appropriate to scientific research than to the determination of legal rights. A positive answer on employment causation was thought to require a standard of proof coming close to a certainty, or at least much higher than the balance of probabilities that was prescribed by law. As a result, the legally correct standard of proof was submerged for several decades.

It will be appreciated that I am talking here and elsewhere about the general position. There are exceptions relating to particular types of cases in some jurisdictions. For example, in a case of non-scheduled disease in Quebec, a worker has a burden of proving that the disease is characteristic of his work or directly related to the risks peculiar to that work.<sup>15</sup>

For cases involving multiple etiology, it has often been suggested that one of the contributing causes should be classified as "predominant," or "dominant," and compensation paid or denied according to whether the "predominant" or "dominant" cause was a feature of the employment. That suggestion has been adopted in some legislative changes relating to claims for disease. A problem with that approach is that, where a disability has resulted from the interaction of two or more causative factors, and it would not have occurred in the absence of one of them, there is no scientific way in which any one of them can be classified as "predominant." This classification can only be made by arbitrary choice or political judgment, and this is so, even if the decision is allowed to masquerade as a medical opinion. A decision either way would be hard to justify because it could not be supported by logical reasoning. The use of this ostensible criterion could also tend to clog the appeal system.

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<sup>15</sup> *Act respecting Industrial Accidents and Occupational diseases*, R.S.Q. 1977, c. A-3.001, s. 30.

Perhaps I should digress for a moment here to say a word about the eternal dilemma that underlies workers' compensation. The system was based in the first place on a false assumption. It assumed the feasibility of distinguishing—fairly, promptly, and economically—between disabilities that result from employment and those that do not. It has never been feasible to administer that distinction efficiently, and it never will be.

The dilemma for policymakers is that if the system were confined to trauma cases, the determination of employment causation would be much easier; but the system would not then accord with the primary rationale for its existence; that is, to achieve good social cost accounting by containing the cost of occupational disabilities within the industries that produce them. If the system covers all disabilities that result from employment, regardless of trauma, this would appear to achieve the primary goal of good social cost accounting, but it maximizes the difficulties of proving or disproving employment causation.

Compounding the difficulty of administering the distinction is the difficulty of justifying it by reference to any public need. The human need for insurance protection against the risk of disablement or premature death does not vary according to how it happened. This point was mentioned recently by the insurance industry in response to suggestions in Ontario that the coverage should be extended to the service industries, including insurance. The Insurance Bureau of Canada made the point that the employees of insurance companies would rather have insurance coverage for disability regardless of the cause, as under policies of disability insurance, than coverage that is limited to disabilities that result from a particular cause.<sup>16</sup> This is not surprising. It is hard to conceive of any reason why anyone would want disability insurance coverage only in respect of disabilities that result from a particular cause.

The rationale for workers' compensation relates to cost distribution, not to compensation needs. That being so, the argument is profound that insurance coverage for disablement and premature death should be universal, regardless of the cause. It is perfectly feasible to design a system that provides that coverage while, at the same time, preserving cause as a criterion for cost-distribution.<sup>17</sup>

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<sup>16</sup> See Insurance Bureau of Canada, *Submission to the Standing Committee [Ontario] on Resources Development, Public Hearings on Bill 165, An Act to Amend the Workers' Compensation Act and the Occupational Health and Safety Act* (Toronto: September 1994) [unpublished].

<sup>17</sup> See T.G. Ison, *Compensation Systems for Injury and Disease: The Policy Choices* (Toronto: Butterworths, 1994) c. 8.

### E. *Types of Benefits*

Meredith recommended the provision of monetary benefits. Medical aid was added later. The reason for not providing medical coverage initially seems strange to those who read current news reports of health care costs. Meredith felt that the injured worker should be able to pay for medical care.

### F. *Level of Benefits*

The level of compensation benefits rose over the years in one way, but declined in another. The rate of compensation for total disability was originally 55 per cent of the gross wage rate.<sup>18</sup> In subsequent decades, this rose to 75 per cent of the gross wage rate.<sup>19</sup> In more recent years in some jurisdictions, that was converted to 90 per cent of notional net earnings, and more recently in some jurisdictions, that has been reduced to 85 per cent or 80 per cent of notional net earnings.<sup>20</sup> The primary reduction, however, came in the ceiling. The original ceiling was above the wage rate of the highest paid industrial worker. It was Meredith's expressed intention that the ceiling should only curtail compensation for "highly paid managers and superintendents of establishments."<sup>21</sup> The inflation of subsequent decades took its toll. Even though the ceiling was later adjusted by statutory changes, and then by indexing, it has always fallen well short of Meredith's intention. This decline in the ceiling undermined the insurance character of the system.

## III. THE MEASUREMENT OF PERMANENT PARTIAL DISABILITY

This has always been the most difficult topic in the history of compensation for disability. It is too complex to discuss at the same time

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<sup>18</sup> *Workmen's Compensation Act*, *supra* note 2, ss. 37, 39.

<sup>19</sup> For example, *Workmen's Compensation Act*, R.S.O. 1970, c. 505, ss. 39, 41 (unamended).

<sup>20</sup> For example, in New Brunswick, it is now 80 per cent of notional net earnings for the first 39 weeks of injury, and 85 per cent thereafter: *Workers' Compensation Act*, R.S.N.B. 1973, c. W-13, s. 38.2(2.1), as am. by S.N.B. 1992, c. 34, s. 12.

<sup>21</sup> *Meredith Report*, *supra* note 1 at 16.

as other subjects,<sup>22</sup> but I will mention the situation briefly. It was not well-canvassed in the *Meredith Report*. After some initial flirting with compensation by reference to actual loss of earnings, the boards generally adopted the physical impairment method as the primary way of compensating for permanent partial disability. An estimated degree of impairment was determined and expressed as a percentage of total disability. That percentage rate was then applied to the level of pension that would have been payable if the worker had been totally disabled. This method was adopted in all provinces. From time to time, a province reverted to some version of the actual loss of earnings method, but it was abandoned when the consequential injustices, costs and difficulties of administration were rediscovered.

During the last fifteen years, several provinces<sup>23</sup> have again reverted to some version of the actual loss of earnings method, and again the consequential problems have emerged. A common dilemma involves a worker who is partially disabled and who cannot obtain any substantial employment. Either:

- a) the principle of compensation for actual loss of earnings is applied. Full compensation benefits continue to be paid because the disabled worker cannot obtain employment. There may then be complaints from employers' representatives that compensation is being paid as a result of labour market conditions rather than as a result of the disability; or
- b) the worker is *deemed* to be capable of earning a substantial income in a phantom job. This is a job that the disabled worker is physically capable of doing but which he or she will never obtain in a competitive labour market. Benefits are then terminated; and there are complaints from labour representatives that compensation is being denied, notwithstanding that the disability continues, and so does the consequential loss of earnings.

This illustrates one of the fundamental problems with the actual loss of earnings method. Whether anyone can obtain employment always depends upon the interaction of the characteristics of that person, including any disability, with the state of the labour market. At times of high unemployment, it is always difficult for disabled people to

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<sup>22</sup> For a more detailed discussion of this topic, see T.G. Ison, "The Calculation of Periodic Payments for Permanent Disability" (1984) 22 Osgoode Hall L.J. 735.

<sup>23</sup> See, for example, *Workers' Compensation Act*, S.S. 1979, c. W-17.1, ss. 68, 69, as am. by S.S. 1984-85-86, c. 89, s. 15; and S.S. 1993, c. 63, s. 21; *Workmen's Compensation Act*, R.S.Q. 1977, c. A-3, s. 49; *Workers' Compensation Act*, R.S.N. 1990, c. W-11, s. 74; and *Workers' Compensation Act*, S.Y. 1992, c. 16, ss. 22, 23.

obtain jobs, at least those who do not have higher education or special talents that are in demand. Because of this interaction, most disabled people unable to obtain employment cannot be classified into those for whom the lack of employment resulted from the disability and those for whom it resulted from the state of the labour market. The impossibility of using such a classification was recognized, explicitly or implicitly, in the reports of the Royal Commissions that followed the *Meredith Report* as well as by the boards. It was a traditional reason for maintaining the physical impairment method of calculating benefits for permanent partial disability.

It was also a founding principle of our system, and one that has generally prevailed that, except in cases of minor disability, pensions for permanent disability should be payable for as long as the disability lasts. There have been three rationales for this traditional Canadian position. First, justice to the injured worker requires that periodic payments for a permanent disability should last for as long as the disability lasts. Second, most of the cost of occupational disabilities should be borne as costs of production, not thrust onto disabled workers and their families, or onto taxpayers through the welfare budget. Third, workers' compensation is a substitute for tort liability, and under that system the calculation of the amount reflects estimated loss of earnings for the working life of the claimant.

#### IV. REHABILITATION

Rehabilitation services were not part of the original plan. They were added later. Rehabilitation services have taken the form of individual casework by trained rehabilitation personnel. When it was the economic policy of the federal government to maintain full employment, these services worked well, at least at some of the boards some of the time; but the achievement of rehabilitation in this way became increasingly difficult with the advent of "free trade," greater "competitiveness," and continuing high levels of unemployment.

The recent trend has been away from individual casework in favour of promoting rehabilitation by means of legal obligations upon employers, and economic incentives upon employers and workers. These techniques of seeking the rehabilitation of disabled workers appeared to have the attraction that they could be applied on a broad scale without requiring, at the boards, the training, resources, and sensitivity needed for individual casework. The difficulty with these broad-scale methods is that, except to a limited extent in the short-run,

they will not work. They will never assure the long-term employment of disabled people. Where a disabled worker is seen by the employer to be sufficiently productive that the employer *wants* to continue the employment, these techniques of rehabilitation have no value. Where that is not the case, these techniques are unlikely to prevail in the long-run against the perceived economic incentive to terminate the employment. Indeed, some of these techniques may well be counter-productive in that their use tends to stigmatize disabled workers as undesirable employees.

## V. THE EVOLUTION OF TORT LAW

It was mentioned above that the term “personal injury” was drawn from court decisions, and that the inclusion within that term of non-traumatic disabilities was copied in workers’ compensation.

Another change in recent decades has been the significance of the *Charter* in relation to the statutory bar against common law claims. Prior to the *Charter*, a legislature was free to define the statutory bar as it wished. In practice, common law actions against employers and workers were generally barred for disabilities that were covered by workers’ compensation. It would have been constitutionally valid, however, for a legislature to provide that a particular type of disability is not covered by workers’ compensation, and yet that no common law action shall lie in respect of it. Nowadays, such a provision would be vulnerable to constitutional challenge.

The point can be illustrated in relation to occupational stress, a subject of much political controversy, particularly with the likelihood of increasing stress from “free trade,” “globalization,” and increasing “competitiveness.” A legislature can provide, if it so wishes, that no compensation is payable for occupational stress. What is now questionable is whether a legislature could also provide that no common law action shall lie against an employer for damages for occupational stress.

The leading case on the constitutional validity of the statutory bar is a decision of the Court of Appeal of Newfoundland. A widow wanted to sue the employer of her deceased husband for wrongful death, and, of course, the defence was raised that the claim was barred by the *Workers’ Compensation Act*.<sup>24</sup> The case went to court on a *Charter*

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<sup>24</sup> S.N. 1983, c. 48, ss. 32, 34.



challenge to the validity of the statutory bar. The court decided that the statutory bar was valid; but in reaching that conclusion, the court said :

The validity of the displacement must be tested by the replacement—"the right to compensation". If this right is found not to measure up to a point where it can be said that there is no discrimination or no unreasonableness or unfairness, then the displacement will have offended s. 15.<sup>25</sup>

That decision was affirmed by the Supreme Court of Canada.<sup>26</sup> The resulting position is this: if a legislature wishes to provide that a particular type of disability is not compensable, it may do so. There would be no breach of the *Charter* if the worker is free to pursue an action for that disability in the common law courts for damages against the employer. However, if the legislation also prohibits the common law action, that provision would be vulnerable to constitutional challenge, and may well be struck down.

There is another aspect of the Newfoundland decision that may be relevant in this age of retrenchment. The court upheld the statutory bar by looking at the range and levels of benefits that workers receive under the *Workers' Compensation Act* and comparing them with workers' rights at common law. The court said that this comparison should be made on an overall or global basis. It should not be done by comparing the level of workers' compensation benefits with the level of damages at common law on the facts of a particular case. Based on that comparison, the court concluded that the workers' compensation benefits were a reasonable substitute for common law actions. Therefore the statutory bar was valid.<sup>27</sup> This means that if the range or levels of benefits, as they operate in practice, deteriorate, the argument might be made that they are no longer comparable to workers' rights at common law; and that therefore the statutory bar violates the *Charter*. If that argument succeeds, employers would require employers' liability insurance as well as paying workers' compensation assessments.

Two other developments raise the likelihood of this happening. First, bearing in mind that the case taken to court is likely to be a sympathetic case, the hasty manner in which benefits and qualification criteria have sometimes been changed in recent years, without the changes being preceded by a properly constituted Royal Commission or any other real study of their significance, might tend to undermine

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<sup>25</sup> *Reference Re Sections 32 and 34 of the Workers' Compensation Act (Nfld.)* (1988), 67 Nfld. & P.E.I.R. 16 at 35 (Nfld. C.A.) [hereinafter *Newfoundland Reference*].

<sup>26</sup> *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922.

<sup>27</sup> *Newfoundland Reference*, *supra* note 25 at 35-36.

judicial confidence in the system. Second, several provinces have changed the rules of legal practice to permit the charging of contingent percentage fees in personal injury claims. When combined with excess capacity in the legal profession, this adds to the incentive for lawyers to challenge the statutory bar.

## VI. FUNDING

In recent years, we have heard a great deal of debate and political rhetoric about funding. A particular board is said to have an “unfunded liability” of a substantial amount. In Ontario, for example, the *Annual Report* of the WCB for 1994 showed an “unfunded liability” of \$11,402,000,001.<sup>28</sup>

There has been much confusion about what this term “unfunded liability” really means. It is used to assert or imply that a system is underfunded, but in relation to what? The usual implication is that a system should be “fully funded.” It should have enough reserves to pay out all future compensation benefits, rehabilitation assistance, and medical aid, in respect of all current and past claims. Thus, the mention of an unfunded liability usually implies that a system is underfunded in relation to what the level of reserves would be if the system were fully funded.

Continuing with Ontario as the example, it is interesting to reflect on how it came to be accepted that the system ought to be fully funded. The legislation does not include any such requirement. It has never included such a requirement. When the system was being designed, Meredith carefully considered the question of funding. The unions argued for a full-funding requirement while the Canadian Manufacturers Association argued for current cost financing.<sup>29</sup> Meredith concluded that there were serious objections to each of these positions, and he recommended a compromise between them. The level of reserves should be a matter for the judgment of the WCB, and the system should be funded only to such extent as the Board might consider necessary to prevent the passing of undue burdens to future generations of employers.<sup>30</sup> That recommendation was enacted, and it has remained substantially the same to this day.

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<sup>28</sup> Ontario Workers' Compensation Board, *Annual Report—1994* (Toronto: Communications and Public Affairs Division, Workers' Compensation Board, 1995) at 15.

<sup>29</sup> *Meredith Report*, *supra* note 1 at 6.

<sup>30</sup> *Ibid.* at 7.

In other jurisdictions, the statutes vary in their prescription of funding obligations. Commonly a board is required to establish reserves that will provide full funding for future periodic payments of compensation, but is not required or permitted to establish reserves for future rehabilitation costs, medical aid, or lump sum payments. Despite the prohibition, in most jurisdictions, of funding in relation to some types of future obligations, and despite the variations in funding requirements among the various statutes, the practice emerged among all of the boards of *assuming* a full funding requirement, and then declaring an "unfunded liability" when reserves fell short of that fictitious requirement.

It is not hard to imagine how this came about. Advising the boards in relation to funding requirements became a function of actuaries, not of lawyers. Whereas a lawyer would have recognized the obligation of each board to comply with the legislation by which it was created, actuaries seem to be trained primarily in the funding principles that apply to private insurance companies. They transferred those principles to workers' compensation, regardless of their compatibility with the legislation that was supposed to govern the behaviour of each board. In the result, all of the boards appear to have adopted the principle that they ought to be fully funded, and then they have portrayed themselves as being "underfunded" or "overfunded" by reference to that benchmark. Legal objections to the use of that benchmark were overlooked or brushed aside.

Even to the extent that the statutes require funding, they still do not require an annual recalculation of the extent to which funding requirements are being met in respect of past claims, but that became the standard practice. Each board makes an annual recalculation of the extent to which it is funded in relation to future obligations on past and current claims, and then announces the extent of its "unfunded liability," or its "surplus." This practice does not seem open to any legal objection, but neither is it usually a legal obligation.

Sometimes, a crucial question is whether a substantial "unfunded liability" should be a matter for serious concern; but of course that question should not be considered at all unless it is first determined that the reserve requirements have been calculated in accord with the statute law of the jurisdiction. Whether an unfunded liability should be cause for concern depends upon what is causing it. Consider two examples.

Example One: a board is functioning close to a state of balance in its annual operating account and, after providing sufficient reserves to meet funding requirements for the current year's claims, perhaps it has a small surplus that is applied to reserves. However, the benefits are

indexed for inflation, and during the relevant time period, the Consumer Price Index and interest rates are higher than usual. This can cause an "unfunded liability" to rise dramatically, but that is not due to the current year's operations. The "unfunded liability" is a book figure that arises because the current inflation rate used to re-estimate future claims costs has risen above the average rate of return that the board is receiving on its past investments. This type of rise in an "unfunded liability" is not a matter of concern because it is self-correcting. When interest rates and the inflation rate decline, that will tend to eliminate any "unfunded liability" and to create a "surplus" in the reserves.

Example Two: a board has a substantial and rising "unfunded liability" because it is not raising enough revenue in each year to meet the obligations which it must provide for during that year. It has a deficit for several years in its annual operating account. That is obviously a matter for serious concern that requires corrective action. It would be a matter of particular concern if a substantial "unfunded liability" is rising over a period of years during which interest and inflation rates are unusually low.

The assertion of a full-funding requirement, compliance with which is measured annually as a benchmark of performance, has become a diversion from reality in several jurisdictions because of the change from fixed pensions for permanent disabilities to periodic payments that are subject to change from time to time by reference to changes in the estimated earnings or deemed earnings of the recipients. In jurisdictions where this change has been made, the lack of fixed pensions makes it impossible to calculate reserve requirements in a mathematical way. Because future benefits for permanent disabilities in these jurisdictions depend upon future judgments, it is impossible to calculate any funding requirement except by the use of highly speculative assumptions. Thus, in these jurisdictions, the continued use of a full-funding principle is open to the objection that it diverts attention from realities to illusions. In these jurisdictions in particular, but also in the others, it could be healthier, though politically difficult, to abandon the annual ritual of re-estimating the funding performance, and focus instead on maintaining a balance in the annual operating account and a steady level of reserves.

## VII. COST ESCALATION AND WASTE

Over the last twenty years in particular, there have been significant cost escalations that seem to be unrelated to any benefit

derived by claimants. This is particularly so if externalized costs are included. The system has become more adversarial and more complicated. These features cause delay, with consequential increases in administrative and compensation costs, as well as impediments to rehabilitation. These developments have also generated excessive professionalism in the system; and of course each new profession that becomes involved brings its own complications, its own interests, and its own increases in costs. Another cause may have been the expansion in the range of service-providers, coinciding as it has with the ideology of deregulation. This may have made it more difficult for the boards to control over-servicing in health care and rehabilitation.

## VIII. PRIVATIZATION

When Meredith designed our first workers' compensation system, there was no question of it being administered by the insurance industry. Management and labour groups both wanted a system of insurance administered by a government board. Also, Meredith saw insurance companies, lawyers, and courts as parts of the problem.<sup>31</sup> The solution had to be one that required their exclusion. This model of a government board was copied and prevailed throughout all of the provinces, though insurance companies were used for a while in the territories.

For the next seventy years, there does not seem to have been any serious effort by the insurance industry to enter workers' compensation in the provinces of Canada. Over the past five years, however, portions of the insurance industry have shown changing expectations, and there is now a campaign for "privatization." The reasons for this are not entirely clear, at least not to me, but they may include the following:

- 1) The success of Chicago School ideology on the political scene has promoted an overriding faith in market theory that distracts from rational analysis about the significance of markets, their values, and their limitations, in particular contexts.

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<sup>31</sup> This is more implicit in the conclusions than it is explicit in the reasoning of the *Meredith Report*, but it receives a passing mention: *ibid.* at 5 and 12.

2) When the *North American Free Trade Agreement* (NAFTA)<sup>32</sup> replaced the *Free Trade Agreement*<sup>33</sup> and expanded it to include the service industries, this seems to have been seen by some American insurance companies as a possible opportunity to administer in Canada the same kind of workers' compensation coverage as they administer in the United States. Also, the resulting political climate has created downward pressures on benefits, including the duration of benefits for permanent disability, and this may make the system more attractive to insurance companies.

3) Taking over the administration of workers' compensation could be another possible springboard for a takeover of health insurance in general.

In speaking about "privatization" here, I am referring only to the monetary benefits and health care. "Privatization" in relation to rehabilitation services would involve different issues, and it would be a separate topic.

The only arguments that I have heard so far in support of "privatization" are, quite frankly, superficial or irrelevant. Some of the arguments are simply ideological generalizations that do not reflect any depth of understanding in relation to compensation for human disablement. Others use misleading numbers. For example, one can hear it said that the average rate of premium paid by employers in some American state, where the system is administered by insurance companies, is X-amount less than the average rate of assessment paid in some Canadian province. Assuming that to be true, such a statement tells us nothing about why the average rate of premium there is lower than the average rate of assessment here. Perhaps the benefits are lower, or perhaps the industries covered there involve lower risks than those covered here. Also, such a simple comparison does not count the greater externalized costs under a system administered by insurance companies.

Almost certainly, the given American state does not provide employers with the same immunity from tort liability as we do here. The limitations on their workers' compensation coverage may be producing higher insurance costs for employers in another form. Even if the state is one in which a company has no significant risk of tort claims from its

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<sup>32</sup> *North American Free Trade Agreement: between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, Can. T.S. 1994 No. 2.

<sup>33</sup> *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, 22 December 1987, Can. T.S. 1989 No. 3.

own employees, it would still be exposed to the risk of tort claims by the workers of other employers. For Canadian employers, the risks of causing injury to the worker of another employer are usually covered by workers' compensation. So the compensation cost of such injuries in Canada is reflected in workers' compensation assessments. In the American state, the compensation costs of such injuries might be reflected in the premium paid for liability insurance.

I do not have any detailed familiarity with cost distribution in relation to occupational disabilities in the American states as between different types of insurance, but I believe that I have said enough to illustrate the point. A simple comparison of an average workers' compensation insurance premium in some American state with an average workers' compensation assessment in some Canadian province (even if the "average" is calculated in a comparable way) tells us nothing about the significance of administration by insurance companies compared with administration by a government board. If proper studies were made of comparative costs, using an appropriate and tight methodology, they would almost certainly show that administration by a government board is generally cheaper.

A more persuasive argument for privatization could probably be developed around the inefficiencies that have sometimes resulted from the failure of some politicians to insulate workers' compensation boards from political pressures.

The reasons why Canada has preferred to have workers' compensation administered by a government board have been mentioned in various places over the years, but I have never found them gathered in one place. It may be useful, therefore, to list what those reasons are.

1. The first priority in this subject area is surely occupational health and safety. A responsible approach by government to occupational health and safety must be eclectic, and the techniques used must include sanctions for non-compliance with regulations, or unduly hazardous conditions. The only efficient sanction that is available for use in any broad range of situations is the penalty assessment based on observed conditions, as used in British Columbia. The insurance industry cannot offer anything comparable, except to some extent in those industries for which it is feasible to conduct a survey before writing the coverage, and repeat surveys later.

2. A workers' compensation board is not only an insurer, but also a tribunal, with a public law duty to adjudicate each claim fairly, impartially, and according to law. That status cannot be conferred constitutionally upon any business corporation. Thus, in any system

administered by insurance companies, the first level of adjudication is the courts, or a specialized tribunal. Primary adjudication is then in an adversarial system, which increases cost and delay. To avoid those consequences, bargaining processes are commonly used, but the negotiations do not take place between parties in an equal bargaining position. One of the traditional goals of the Canadian structure has been to save injured workers from bargaining processes by providing instead a system of prompt adjudication. It was also one of Meredith's goals that an injured worker should not be harassed "by compelling him to litigate his claim in a court of law ..."<sup>34</sup>

3. It is more conducive to rehabilitation if a disabled worker is brought into personal contact quickly with an adjudicator who has a duty of impartial adjudication and a close connection with a rehabilitation consultant. It is least conducive to rehabilitation if a disabled worker has a perceived need to look his or her worst at a date in the distant future for the "day in court."

4. An insurance company system creates costs that are not incurred in a government system. These items of extra cost include marketing costs, profit, and taxes. For most jurisdictions, the profit component of cost would also represent a drainage of money out of the province or territory. There would also be additional costs to ensure that employers are complying with the compulsory coverage requirements. An insurance company system also requires a regulatory structure administered by government, and that would be another additional cost. Also, economies of scale might be lost through the multiplicity of administering agencies. It is also understandable that insurance companies tend to prefer lower-level risks. In systems administered by insurance companies, it is often found that certain employers in higher risk categories have difficulty in obtaining insurance. Of course, that problem can be overcome. Some sort of pooling system can be developed for covering the employers that no insurance company would otherwise want to cover; but such an arrangement is another extra cost.

5. The value and limitations of an insurance market vary with different types of insurance. Since workers' compensation coverage would be compulsory in any event for most employers, an insurance company system would require a statutory form of policy. Neither employers nor workers would, therefore, derive one of the primary benefits of a market; that is, choice of product for the consumer.

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<sup>34</sup> *Meredith Report*, supra note 1 at 12.



6. There would be the problem of who is going to select the insurer for each enterprise. In jurisdictions that use insurance companies, it is generally the employer. Workers do not usually participate in the choice. Yet it is part of traditional market theory that markets work most efficiently when the consumer or user of a product can select the supplier. This helps to explain why some types of insurance administered by insurance companies seem to work much more efficiently than other types.

7. Insurance companies seem to operate with a high level of efficiency in the administration of weekly indemnity insurance, and with regard to short-term claims under long-term disability policies, though claims of those types do not involve the complexities of workers' compensation. Insurance companies do not have the same track record of efficiency in the administration of long-term claims under long-term disability policies. Judging from the law reports and complaints at agencies advising disabled people, long-term disability insurance in cases of permanent disability appears to involve more controversies than any other type of insurance (with the possible exception of liability insurance).

8. The introduction of insurance companies, brokers and actuarial firms into workers' compensation would bring large and powerful interest groups into the system. To the political power that they have already, there would be added the power that derives from constant presence and interactions, the development of experience, and the consequential claim to expertise. The problem with this is that the interests of the insurance industry in the ongoing operation and development of the system would not always coincide with the interests of employers, workers, or taxpayers.

9. Related to this last point, the insurance industry and the litigation bar go hand in glove. A social insurance system can operate efficiently without much involvement of lawyers, at least if it operates without experience-rating; but an insurance company system cannot operate without the use of lawyers for advocacy in claims adjudication, and in appeals. This heavy involvement of lawyers adds to the cost of processing individual claims. Less obviously, it adds to the overall cost of the system in other ways. First, it brings onto the scene yet another interest group to demand that its needs be accommodated in subsequent system development, and it is another powerful group with interests that will not always coincide with the interests of employers, workers, or taxpayers. Second, the use of courts and the doctrine of precedent mean that the law of the system evolves in the context of particular cases, and that the law is developed by a disparate array of people who are

commonly unfamiliar with what is needed to process claims in bulk. Inevitably, this makes the law of the system more complicated, more refined, more uncertain, and more expensive to administer.

10. Apart from its public law duty of fairness and impartiality in individual claims, a government board may properly be seen as having a more general duty to act in the public interest by taking account of other public policy objectives. An insurance company has no such duty. This is critical in workers' compensation, bearing in mind that one goal of the system has always been to protect the welfare budget from the cost of occupational disabilities.<sup>35</sup> The boards traditionally were conscious of this, and it was one reason they generally maintained a restrictive posture in relation to the commutation of pensions in cases of significant permanent disability. Insurance company systems have often favoured lump sum pay-outs. Another example might be seen in relation to rehabilitation. If a government board is mindful of the public interest, it will try to achieve vocational rehabilitation in an occupation that is likely to last, and that will not pose an undue risk to the health and safety of the worker, or other workers. The economic interest of an insurance company in vocational rehabilitation may not go beyond the placement of a worker in a job.

11. Over the last twenty-five years, it has come to be recognized by several of the compensation boards in Canada that decentralization is essential to efficiency. Local personal contact between the adjudicator and the worker, employer, physicians, and union officials is most conducive to speed and accuracy in claims adjudication, and to rehabilitation, as well as to the prevention of fraud. It would become more difficult to divide the total caseload geographically if it is divided among different insurance companies.

12. The choice of insurance structure may also be, to some extent, a choice of benefit structure. In workers' compensation in Canada, it has been normal for most benefits to be a matter of statutory right, but there have also been some discretionary benefits, particularly for rehabilitation. It is more difficult to have discretionary benefits in a system administered by insurance companies and, if they are found, it is only reasonable to expect that they will be administered in the economic interests of the insurer, which may or may not coincide with the public interest.

13. Workers' compensation benefits are not taxable income. Historically, this is not clearly traceable to a single rationale, but the influences that produced this result might have included a loose

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<sup>35</sup> See, for example, *ibid.* at 14 and 17.

association of workers' compensation benefits with notions of crown immunity. If the benefits were seen to come from insurance companies, there might be some risk of Revenue Canada taking the opportunity to make them taxable. If that happened, either the premiums would be increased dramatically to achieve the same level of net benefits, or there would be a drastic cut in net benefit levels. Either way, employers or workers would have to bear the extra cost of this drain-off to Revenue Canada.

14. Since the WCBS provide health care (medical aid), privatization would expand the role of the insurance industry in relation to health care. At the moment, insurance companies provide what might be called supplementary coverage; but any takeover of the WCB role would move the industry into what might be called primary coverage. There might be apprehensions, therefore, that this expansion could threaten the broader public health care system.

15. Any switch to an insurance company system would probably increase the range and numbers of employers who would claim an exemption from compulsory insurance and a right to be self-insured. Given the contemporary pace of change in technology and in markets, as well as the political pressures, it would be difficult for any government to make a rational judgment on which, among those so claiming, could be relied upon to meet their financial commitments indefinitely into the future. Resistance to such claims could be politically impossible while acquiescence in them could produce additional costs for future employers or future taxpayers.

16. The necessity for marketing, coupled with the contemporary emphasis on "competitiveness," would bring into workers' compensation a group of executives whose specialty is marketing. The talent for promotion that is a part of that role can also be used for self-promotion, with the result that marketing executives can tend to rise in a corporate pyramid proportionately more than others. Thus, in an insurance company system, there would be a risk of some CEOs being drawn from a background in marketing, rather than in production, systems, services, or one of the professions. A background in marketing is less conducive to efficiency in systems and service delivery.

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It will be appreciated that this list of reasons for having workers' compensation administered by a government board does not attempt a judgment on the cogency of each reason. That would require further elaboration and enquiry.

As an alternative to having the system administered by a government board or by insurance companies, it is sometimes suggested that there could be some sort of halfway house. For example, a workers' compensation board could retain the overall responsibility for the system, but the function of claims administration could be delegated to certain insurance companies. Arrangements on these lines have been tried in Australia, with the state of Victoria having had the most experience. In Australia, however, this was *not*, for the most part, a move towards privatization. It was *not* a move towards insurance companies because of dissatisfaction with administration by a government board. Except for some recent back-tracking in South Australia, it was a move towards a government agency because of dissatisfaction with administration of the system by insurance companies.

There are serious problems with the idea of a halfway house. Some of the problems that I have mentioned above in relation to an insurance company system would still apply to this structure. For example, a company that is making decisions on a claim can hardly be considered impartial if it is selected by one party to that claim? Such a structure would also have problems of its own. For example, how could one devise a payment formula that would provide an economic incentive for an insurance company to make the right response to each claim. If an insurance company is simply paid a fee per case, there would be an economic incentive to close the file on each claim as soon as possible, with an obvious risk of serious injustice to injured workers. If that problem is avoided by paying the insurance company a fee for each month that a file is open, there could be an economic incentive to keep each claim going for as long as possible, with an obvious risk of waste.

Perhaps some proposal might emerge for a halfway house that would avoid these and other problems, but I have not seen such a proposal so far, nor have I seen any credible argument in support of this structure.

## IX. CONCLUSION

It may be of interest to reflect on what Meredith might have said if he had been able to see our workers' compensation systems as they operate today. Perhaps he would be pleased that they have survived, that they have served the nation as well as they have, and that they have served as an international model.

On two major points, however, I think Meredith would have been disappointed by developments of the last twenty years. First, some

of our workers' compensation systems have been allowed to become far too complicated. The first principle of efficiency in the design of any social insurance system is "keep it simple." There has been a loss of adherence to that principle. Second, the view that major system changes should be preceded by principled and analytical inquiry has been largely discarded. Governments abandoned the practice of conducting such inquiries by the use of a properly constituted Royal Commission. Some have substituted the making of major system changes in response to interest group pressures without the intervention of a fact-finding inquiry or rational analysis, or they have conducted only token enquiries. Sometimes they have made major changes in a way that can fairly be described as flippant, or as government by fumble and tumble. Perhaps the memory of Meredith will remind us that it *is* possible to do better.

