REVIEWs

The New Zealand Accident Compensation Reform

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As many students of tort and compensation law undoubtedly are aware, New Zealand embarked on an experiment in law reform and social change with the passage of the Accident Compensation Act of 1972. The Act, together with subsequent amendments, bars all causes of action for death or personal injury suffered by accident and substitutes a no-fault system employing state-administered compensation funds. In Compensation for Incapacity, Geoffrey Palmer describes and analyzes the provisions of this complicated legislative scheme, together with their likely effects on New Zealand society, and chronicles the political processes that led to the passage and implementation of the Act.

As an academic lawyer who has taught and published in his native New Zealand as well as in Australia and the United States, Palmer is uniquely qualified to write a book on this subject. He was involved, sometimes intimately, for more than a decade in the succession of commission reports and legislative drafting efforts that culminated in the New Zealand reforms. His perspective as participant and observer lends a lively immediacy to a technical and complicated subject. Although his primary focus is upon New Zealand, where the abolition of tort liability has become a reality, for comparison he includes an account of similar legislation proposed, but not yet passed, in Australia.

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2 G. Palmer, Compensation for Incapacity (1979) [hereinafter cited without cross-reference as Palmer].
3 E.g., id. at 131-96.
Palmer has combined a readable style with an experienced intelligence to produce what should become a classic in the insurance literature. For American legislators, lawyers, and scholars considering alternatives to tort liability, the book will provide an important source of information and insight. Comparative lawyers also should find it rewarding, and the book should enjoy a substantial audience among nonlawyers interested in either the no-fault idea or the legislative and political processes by which legal and social changes are effected.

Despite the book’s general excellence, I am compelled to disagree with the two major conclusions to be drawn from the author’s analysis: first, that the New Zealand reforms are theoretically justifiable; and second, that the reforms are historically of great significance. After summarizing the substance of the reforms, I shall explain my disagreement with both conclusions.

I. THE SUBSTANCE OF THE NEW ZEALAND REFORMS

The Accident Compensation Act of 1972 in its original form abolished rights to recover in tort and substituted rights to receive no-fault compensation for personal injury or death suffered by earners and motor vehicle accident victims. For the first group, worker’s compensation was extended to include employees and the self-employed on a twenty-four-hour basis without a work-connection requirement. For the second group, a statute resembling the automobile no-fault schemes implemented in a number of jurisdictions in this country was enacted. A year later, coverage under the Act, together with the accompanying bar to recovery in tort, was extended to all persons, including nonearners, suffering personal injury or death by accident. The consequence of the expansion was that the Act virtually eliminated liability in tort. Claimants tortiously injured other than “by accident” may bring common law actions; but the phrase “by accident” has been interpreted broadly

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4 On motor vehicle no-fault insurance in the United States, see Henderson, No-Fault Insurance for Automobile Accidents: Status and Effect in the United States, 56 OR. L. REV. 287 (1977); O'Connell, Operation of No-Fault Auto Laws: A Survey of the Surveys, 56 NEB. L. REV. 23 (1977); Note, No-Fault Automobile Insurance: An Evaluative Survey, 30 RUTGERS L. REV. 909 (1977). Many of the American plans are “mixed” in that some rights to sue in tort (e.g., in serious cases) are reserved. Thus the comprehensiveness of the New Zealand motor vehicle scheme renders it more ambitious than many of the American no-fault plans.

5 See PALMER at 108-09, 271.
enough to approach what Palmer describes as "the complete abolition of common law rights." 6

Variable levies on employers and flat-rate levies on the self-employed fund the coverage for earners; 7 variable levies on motor vehicles fund the motor vehicle compensation system; 8 and appropriations by Parliament fund the supplemental scheme covering nonearners. 9 In cases of overlapping coverage, the motor vehicle coverage is primary. Illnesses not caused by accident are excluded, thus creating the difficulty of distinguishing between an "accident" and an "illness." 10 Willfully self-inflicted injuries also are excluded, as is death due to suicide unless the suicide was caused by a state of mind that was the result of a compensable accident. 11 The Act does not cover property damage. 12

Under the system, compensation is available for medical, rehabilitation, and funeral expenses; lost earnings and impairment of earning capacity; some pecuniary losses other than medical expenses and lost earnings; nonpecuniary losses such as pain and suffering; loss of bodily function; 13 and payments for support of dependents in death cases. 14 Medical expenses include reasonable expenses for medical treatment and hospital care not paid for under social security, ambulance expenses, nursing care expenses, dental expenses, and expenses for artificial limbs. Full costs of rehabilitation are provided for, including a full-time personal attendant when necessary. 15 Reasonable funeral expenses are covered. 16

Compensation for lost earnings and reduced earning capacity is equally generous. Earners and the self-employed are paid eighty percent of their lost earnings up to a fairly high weekly limit. Except for certain persons, 17 earnings are not imputed to nonearners.

6 Id. at 107.
7 See id. at 367.
8 See id. at 418.
9 See id. at 419.
10 See id. at 249-70. The distinctions that must be drawn under the Act sometimes border on the ridiculous. If a person drinks contaminated water and becomes ill, presumably he will not recover compensation; but if the same person contracts malaria from having been bitten by a mosquito that came into contact with the water, he can recover because the bite was an "accidental" injury. See id. at 252.
11 See id. at 291.
12 See id. at 274.
13 See id. at 214-43.
14 See id. at 301-15.
15 See id. at 414.
16 See id. at 416.
17 Earnings are imputed for children under 16 years of age and persons studying for, or
Thus, a housewife accidentally incapacitated cannot recover lost earnings that were not actually received on a regular basis prior to the accident. Nonearners are allowed to receive all other elements of compensation, however, including payments for loss of bodily functions.\textsuperscript{18}

The New Zealand compensation system generally avoids lump-sum payments. Medical expenses are paid when incurred and payments for lost earnings are made periodically.\textsuperscript{19} Lump-sum payments are authorized only in exceptional circumstances.\textsuperscript{20} The only significant exception is for some nonpecuniary losses, where large lump-sum payments are expressly called for by the Act.\textsuperscript{21} Widows, minor children, and other dependents of persons killed accidentally are paid stated percentages of the amount the decedent would have received had he survived and been totally incapacitated.\textsuperscript{22} Lump sums also are paid to surviving widows and minor children according to a schedule.\textsuperscript{23}

Coverage under the Act extends to New Zealand residents who are injured by accident outside the country if the accident occurs within twelve months after departure and if the claimant is either an earner continuing to earn in New Zealand or a self-employed person temporarily absent on business.\textsuperscript{24} Such persons presumably are free to pursue tort claims overseas in addition to recovering compensation in New Zealand. Members of the armed services also are covered while abroad, as are government employees assigned overseas.\textsuperscript{25} It is interesting that nonearners who are not government employees are not covered while out of the country—a member of the New Zealand Olympic hockey team injured in overseas competition, for example, probably would be forced to seek recovery elsewhere than the compensation system.\textsuperscript{26} Visitors to New Zealand are covered by the system while in the country and are barred from bringing tort actions for accidental injuries.\textsuperscript{27}

The New Zealand system is administered by an Accident beginning, a career or occupation. See id. at 413.

\textsuperscript{18} See id. at 413.
\textsuperscript{19} See id. at 412.
\textsuperscript{20} See id.
\textsuperscript{21} See id. at 223-24.
\textsuperscript{22} See id. at 415-16.
\textsuperscript{23} See id.
\textsuperscript{24} See id. at 417.
\textsuperscript{25} See id.
\textsuperscript{26} The hockey player will not recover unless he is an earner. Id. at 299-300.
\textsuperscript{27} See id. at 417.
Compensation Commission comprised of three members, one of whom must be a lawyer. Administration of the system reflects something of a "catch-as-catch-can" quality. The primary agent for levies is the Department of Inland Revenue, but levies on motor vehicles are collected by the Post Office as part of the annual vehicle licensing operation. Applications for compensation are filed with the State Insurance Office, which serves as the Commission's sole disbursal agent except for a specialized company that handles seamen's claims. The State Insurance Office has no authority to decline claims. Instead, claims that are not granted are referred to a Commission Officer. Claimants denied at this level are entitled to a hearing before a Commissioner or hearing officer, with the right to appeal to an Independent Appeal Authority. From there, a claimant may obtain judicial review by the Court of Appeal and then by the Supreme Court. Palmer reports that the number of applications for review has increased rapidly since the Act was first implemented, as has the involvement of lawyers in compensation cases.

The relationship between the compensation system and the common law tort system presents interesting questions. As a general rule, tort actions are barred only in connection with accidental injuries for which compensation is payable. Thus, because compensation may not be recovered for property damage, actions at law will lie when property is tortiously damaged or destroyed. Coverage under the Act and the barring of tort claims are not coextensive, however. Strangely, the 1973 amendments, which are designed to extend the Act's coverage, take away the right to proceed in tort in some situations that the extended coverage does not reach. To prevent injustice, the drafters provided a curious solution: the amendments empower the Compensation Commission to make ex gratia payments to persons who suffer injury by accident

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28 See id. at 381. The administration of the system is described in id. at 381-403.
29 See id. at 384.
30 See id.
31 See id. at 400.
32 See id. at 400-01.
33 See id. at 401.
34 See id. at 402.
35 Id. at 401.
36 Palmer argues that damages for harm to property should not be recoverable in tort when the accident also results in personal injuries. Id. at 274.
37 See id. at 272-73.
but who are not covered by the Act.\textsuperscript{38} Also, by making the Commission's determination conclusive, the Act avoids a situation where a claimant "falls between the stools" procedurally, that is, where the Commission first denies a claim on the ground that no statutory coverage exists, and a court then denies tort recovery because coverage does exist.\textsuperscript{39}

The New Zealand compensation system is a funded, as opposed to a pay-as-you-go, system.\textsuperscript{40} An amount of money is collected and set aside each year that should be sufficient to pay all future claims arising from injuries suffered during the year of collection. The amount necessary to fund the system in this manner is calculated each year by estimating the value of all future claims arising out of accidents occurring that year and reducing that estimate to present value at a conservative rate of interest.\textsuperscript{41} If the claims predictions are accurate and the discount rate employed approximates the actual rate of return received, there will be just enough left from the monies collected in any given year to pay the last claim for compensation. The cost estimates under the system seem fairly accurate, although Palmer says this is not certain.\textsuperscript{42} The claims rate has risen somewhat more rapidly than had been anticipated, perhaps due to increasing public awareness of the system.\textsuperscript{43}

Palmer is admirably candid in assessing the first four years' experience under a new system in which he obviously and passionately believes. He admits, for example, that "there 'has been a tendency for people to claim for some rather curious matters.'"\textsuperscript{44} His narrative reveals that abuses have occurred in some industries in

\textsuperscript{38} See id. at 273.
\textsuperscript{39} See id.
\textsuperscript{40} For a description of the funding of the system, see id. at 338-44, 348-55, 360-61.
\textsuperscript{41} See id. at 338-39.
\textsuperscript{42} Id. at 344.
\textsuperscript{43} Id. By the spring of 1978, the Commission was handling roughly 500 claims per day, with an average period of 12 days between documentation and payment. Id. at 404.
\textsuperscript{44} Examples include the cost of doing odd jobs around the home, the cost of an engine hoist and luxury bed, cost of repairing window frames of a house, the cost of new shoes of a soft sort made necessary by the injury, legal costs and land agent's fees incurred in the sale of a house, recompense for time spent preparing papers for review and appeal, cost of visiting a spouse in hospital, some money for relatives of an injured person who helped him move house, cost of charitable donation made by injured person to a group who cleared up garden, legal expenses for seeking solicitor's advice after being bitten by a dog, and the cost of a pressure pump to clean a cow-yard. Id. at 242. Palmer adds that "[s]ome of these claims were allowed although most were declined." Id.
which employers are required to pay one hundred percent of the employees' wages for the first week of incapacity arising out of work-related injuries. Moreover, he describes the administration of the system as "too often . . . characterized by an abundance of caution, a stubborn inflexibility, and an undue sensitivity to public criticism." Notwithstanding these flaws, however, the author insists that few of the problems relate to the fundamental principles of the system. He concludes:

Against the difficulties encountered must be matched the achievements of the new scheme. There is much less room for argument . . . than there was under the common law. Everyone who is incapacitated is paid and paid quickly in most cases. The social problem posed by the uncompensated victim has disappeared. Rather than providing a brake on rehabilitation the new scheme promotes it. The removal of the right to sue has been accompanied by no floods of protests. The common law action for personal injury in New Zealand has been buried and there is no demand for its exhumation.

II. IS THE NEW ZEALAND SYSTEM THEORETICALLY JUSTIFIABLE?

A generally accurate if oversimplified summary of Palmer's answer to this question might be as follows: Of course the New Zealand compensation system is theoretically justifiable, because it solves the important social problem of the uncompensated accident victim. Before 1973, the common law tort system in New Zealand addressed this problem inadequately. The rules governing liability were vague and difficult to apply. The common law system resembled a game of chance: most accident victims recovered nothing, while those who were successful often received too little, too late. To make matters worse, the tort system absorbed an outrageously high percentage of benefits in the form of attorney's fees. The deterrent effect on conduct of exposure to tort liability was diminished by the widespread reliance on liability insurance. By responding to these shortcomings, the New Zealand compensation system provides a fair and efficient solution to a significant social problem. Instead of a relatively small fraction being entitled to compensation, all accident victims who suffer personal injury are

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44 Id. at 373.
45 Id. at 404.
46 Id. at 405.
covered. Benefits in most cases are more generous than under the common law, and are paid more promptly. Rehabilitation is a stated goal and a realized objective. The system’s negative impact on allocative efficiency, although regrettable, probably is exaggerated and is in any event acceptable in light of the gains in social welfare.

The primary problem with Palmer’s rationale is accepting his first premise, namely, that the failure of the New Zealand common law tort system to compensate everyone who suffered injury was an “important social problem.” The common law never was intended as a means of accomplishing such a compensation objective. Even if one accepts the premise that every injured victim should be compensated, the insistence of the New Zealand system that in order to be compensable the injuries must be suffered “accidentally” is clearly inconsistent with that premise. Furthermore, the system’s potential negative effects on allocative efficiency, rather than having been exaggerated, have been underestimated. In the paragraphs that follow, I shall consider each of these points in turn.

A. The Failure to Compensate Some Accident Victims Was Not a Significant Social Problem

One who believes that accident victims who recover little or nothing through the tort system present a significant social problem probably is thinking of the relatively few instances in which serious and permanent injuries cause great financial hardship for the victims and their families. Such cases do occur, and some are tragic. But there was no strong correlation in New Zealand between suffering accidental injury and experiencing financial hardship. Only a small percentage of accident victims encountered significant financial hardships, because of the availability of free medical care and, for many accident victims, of other benefits, including public welfare and personal savings. To the unfortunate few who fell into the hardship category, of course, the problems

48 Studies of automobile accident cases in the United States, for example, indicate that a small percentage (no more than five percent) of accident victims suffer significant dislocation costs. See 1 U.S. DEPARTMENT OF TRANSPORTATION, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENTS 362, Table 56FS (1970). It seems reasonable to assume that in New Zealand, with its greater public welfare programs, the percentage was no higher, and probably lower.

were significant. But it would seem more realistic to view this minority as part of the problem of poverty than as part of the problem of uncompensated accident victims. Given New Zealand's traditional commitment to ambitious welfare programs aimed at helping the poor and the disadvantaged, it may not even have been a significant poverty problem.

Thus, the New Zealand compensation system can be justified on the basis of social welfare principles only if those principles are expanded to include welfare for those not in particular financial need. Indeed, the book reveals that such an expansion of social welfare is precisely what is involved. Although Palmer cites a vivid "hardship" case at the outset to show how the tort system fails those in great need of assistance, the New Zealand compensation system is mainly concerned with delivering benefits to persons who need them only in the sense that they would otherwise be financially inconvenienced.

Palmer admits that this is, in essence, a social welfare system for the middle and upper-middle classes. He describes the concerns voiced in New Zealand over whether the system might divert public attention from the question of adequacy of welfare benefits for the poor; and he addresses the policy questions inherent in having a system that provides benefits to those who do not need them. But the book conveys the impression that the compensation system addressed a pressing and significant social problem in much the same way that an airlift of food and medical supplies alleviates the problems presented by a flood or an earthquake. In fact, such an impression is mistaken. The circumstances the compensation system addresses deserve to be called "significant social problems" only if that label applies to all unexpected disruptions, great or small, in the economic status of individuals.

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50 Palmer refers to "a new sort of welfare state." PALMER at 56. Referring to the earnings-related nature of the benefits for incapacity, he explains:

The position involves acceptance of the proposition that the person on $15,000 a year has a claim to be supported at a level proportionate to that amount and "deserves" more than the person on $5,000 a year. . . .

. . . [T]he idea [is] that everyone lives up to their income whatever it is.

Id. at 324-25.

51 Id. at 13-22. The case involved a motor vehicle accident. Palmer characterizes the trial as "an Alice-in-Wonderland fantasy." Id. at 22.

52 Id. at 325.

53 Id. at 221-22, 325-27.
B. The Common Law Tort System Never Purported to Address All Unexpected Financial Hardships of Individuals

The book implies that the tort system failed in its efforts to compensate to accident victims and therefore deserved to be replaced with a more efficient means of providing compensation. Palmer recognizes that the first part of this statement is wrong—tort law never set out to compensate victims of misfortune. But the impression conveyed by the book is to the contrary.

A mistaken interpretation of the actual objectives of tort law pervades Palmer's thesis, as it did the analysis of the reformers who supported the Act. The reformers understood that the expanded no-fault compensation system could become a reality only if it replaced the tort system, because otherwise the need for new funding would be so great as to render unattractive any expanded commitment to compensation. Thus, there had to be an "utterly devastating" attack on the common law. If the reformers had focused on the true objectives of tort law—the enhancement of social utility and the promotion of shared notions of fairness—the attack would have fallen short. The reformers possessed no empirical data to support conclusions that the "tort system had failed to achieve either of these objectives," so the focus of attention had to be shifted to the compensation objective for the attack to succeed. Indeed, once the compensation objective is considered paramount, it is self-evident that a system promising "integrated and comprehensive . . . compensation that is usually swift and sure" is preferable to one that offers only "[u]ncertain, uncoordinated, and capricious remedies."

Thus, the strategy of reform that led to the Act was to attack the tort system for failing to achieve an objective that it never purported to recognize and then to belittle as tangential and ineffective its efforts to enhance utility and fairness. Palmer uses this

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54 "The most frequent charge levelled against the [tort] system stems from its failure to compensate all accident victims." Id. at 23.
55 Id. at 35.
56 Id. at 25.
57 See text and notes at 78-79 infra.
58 PALMER at 26.
59 Id. at 405.
60 Id. at 23-25. Even when he tries to explain the goals of tort law in a positive way, Palmer finds it difficult. He describes (and dismisses) the deterrence objective in an offhand manner; he says, for example: "The effectiveness of tort law as a deterrent has been the subject of great debate but whatever efficacy it had has undoubtedly been reduced with the
same strategy to persuade readers of the desirability of the New Zealand system. Although he includes all of the arguments relevant to the underlying policy issues, his confessed bias causes him to stack the deck at every opportunity.\footnote{The author confesses his bias and recognizes its effects on his analysis. “My increasing personal involvement in the process of reform has made it impossible to preserve the sort of scholarly detachment usually expected from those who chronicle important social changes. My point of view is that of a committed believer in the type of reform with which this book deals.” Id. at 11. His bias is sometimes obvious, as when he begins a chapter with a quotation from Professor Ison: “[L]iability for negligence is a capricious and unsatisfactory method of compensating the victims of injury and disease.” Id. at 23. Other times it is subtle; summarizing his analysis, for example, he explains: “So far we have seen how . . . [tort law] works in practice, inspected a catalogue of its weaknesses, and compared its importance with other means of support.” Id. at 35 (emphasis added).}

I, too, have vigorously attacked the common law tort system.\footnote{See, e.g., Henderson, Expanding the Negligence Concept: Retreat From the Rule of Law, 51 Ind. L.J. 467 (1976); Henderson, Judicial Review of Manufacturers’ Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531 (1973). Palmer cites my work to support some of his criticisms of the common law tort system. PALMER at 45 n.56.} Where I differ with Palmer, however, is on how to remedy the shortcomings of the common law. He focuses on compensation rather than utility and fairness, and advocates a complete replacement of the tort system. I urge that we continue to focus on utility and fairness, and that we change only so much of the tort system as needs changing.\footnote{See, e.g., Henderson, Manufacturers’ Liability for Defective Product Design: A Proposed Statutory Reform, 56 N.C.L. Rev. 625 (1978).} An example of our different viewpoints is our reactions to the use of a significant proportion of insurance premiums in the tort system to cover insurance company overhead and to compensate lawyers who handle claims. Palmer views these expenditures as impediments to the compensation objective, and urges that they be eliminated whenever possible.\footnote{Insofar as one views the tort system as performing functions other than insuring against losses, the costs of running the system may be acceptable even if relatively high. In contrast, Palmer’s objective is to return the highest possible percentage of premium dollars to claimants. For him, costs may be unacceptable even if relatively low. See id. at 385.} By contrast, I view these expenditures as essential to the utility and fairness objectives, and would seek to reduce them only when they are unnecessarily high.\footnote{Id. at 31, 35, 362-65.}

Although Palmer belittles the ability of tort law to enhance either utility or fairness, he does recognize the legitimacy of both objectives.\footnote{Although I believe that utility and fairness are}
sacrificed to too great an extent in the New Zealand scheme, I rec-
ognize the legitimacy and necessity of the no-fault idea in more
limited contexts.\textsuperscript{67} Even with these caveats, however, there is some
mutual exclusivity between the objectives of universal compensa-
tion and utility and fairness. It is probable that, to a significant
extent, the one objective is accomplished only at the expense of the
other.\textsuperscript{68} The problem with Palmer's treatment of the objectives is
not that he has clearly chosen the wrong one to emphasize, but
that he has failed to develop the implications of his choice. By
adopting the rhetorical strategy that led to political victory in 1972
and 1973—attacking the tort system for its ineffectiveness as a
means of accomplishing an objective at which it never was
aimed—he assumes away some of the most philosophically inter-
esting aspects of his thesis.

C. The New Zealand System Is an Inadequate Solution to the
Problem of Financial Disruptions

I have expressed doubts about the significance of the uncom-
pensated-victim problem and disagreement with attempts to blame
the tort system for its ineffectiveness as a compensation mecha-
nism. Here I am willing to assume for the sake of argument that a
problem exists and that more than tort liability is required to solve
it. My criticism of the New Zealand system in this context is that
there is no reason why victims of misfortunes other than accidents
should not have equally valid claims to compensation as accident
victims. Why, for example, should the working person whose leg
must be amputated because of cancer be denied benefits because
he lost his leg through disease rather than by accident? Diseases
such as cancer may often cause more significant disruptions in peo-
ple's lives than accidents.

One answer offered by some proponents of the New Zealand
reform seems truly remarkable: they extended the compensation
system to include only accident victims because that is as far as

\textsuperscript{67} See Henderson, Book Review, 56 B.U.L. Rev. 830 (1976), in which I reviewed Profes-
sor Jeffrey O'Connell's proposals for elective no-fault plans. My problems with his proposal
are mostly problems of implementation, not basic principle. I have also written favorably on
the prospects for no-fault approaches to medical accidents. See DESIGNATED COMPENSABLE
EVENT SYSTEM: A FEASIBILITY STUDY 53-101 (1979) (study sponsored by the ABA Comm'n on
Medical Professional Liability). The important feature shared by these plans is their com-
mitment in principle to allocative efficiency.

\textsuperscript{68} See text and notes at notes 80-82 infra.
the common law tort system extended. The statement must be considered in connection with another argument advanced earlier by these same reformers in a different context: "The tort system deserves to be replaced because it fails to extend accident compensation far enough." It appears that the tort system's benefits policy is either to be condemned as short sighted or relied upon for support, depending on whether it suits the reformers' purposes.

The real reasons for limiting the New Zealand system to accident victims have little to do with basic principles. An important point in favor of the reforms of 1972 and 1973 was the promise that the total cost of the new system would not exceed the cost of the old; the savings generated by dismantling the tort system were to cover the additional costs of extending benefits to all accident victims. There also may have been a few vague promises of actually reducing total costs; similar promises, rather than an appeal to basic principles, generated much of the support for motor vehicle no-fault legislation in the United States in the early 1970s. No such promises of holding costs constant, or reducing them, would have been possible if harm associated with diseases were included along with accidental injuries, so the line was drawn at accidents. To the stirring reformist rhetoric of "community responsibility" and "comprehensive entitlement" was added the unspoken contradictory phrase, "so long as it does not add to our costs."

Palmer does criticize the New Zealand system for failing to cover diseases and congenital disabilities, and he urges that the system be amended to cover them. Of course, if the 1972 and 1973 reforms are but an initial step toward a more comprehensive and internally consistent system, the present criticisms lose much of their force. But based upon the information in this book, I doubt that coverage will be significantly extended. Nothing is likely to occur that will make the question of added costs any easier to answer; and some of the problems of abuse under the present system probably will become more significant with the passage of

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69 See Palmer at 316.
70 See note 54 supra.
71 See Palmer at 365.
72 Id. at 56.
73 Id.
74 Id. at 327.
75 In an addendum dated October 1979, Palmer indicates that no important changes are in sight. Id. at 407.
76 See id. at 242, 373.
time, exacerbating the problem of costs. If the New Zealand system is not expanded, what will have emerged from the reforms is a system that violates the principle of compensating victims of unexpected misfortune even as it purports to embody that principle. One may wonder whether the critics who spoke of the "false morality" of tort law77 will be able to appreciate the hypocrisy reflected in the system they helped create.

D. The New Zealand System Is Likely to Have Negative Effects on Allocative Efficiency and Fairness

The tort system's objectives include the enhancement of allocative efficiency and the promotion of shared notions of fairness. The former objective is accomplished by deterring unacceptably risky conduct,78 the latter by providing private remedies against those who commit wrongs.79 The tort system does fail to compensate some accident victims who have suffered loss, but it must neglect the compensation objective if it is to accomplish the others. Replacing the tort system with a compensation system may well generate benefits only at the cost of detracting from efficiency and fairness.80

The book supports both of my conclusions. Palmer recognizes the problem of the effects on allocative efficiency: "One problem of such loss-spreading programs for all injuries is that incentives for safety may be lost unless care is taken to draw the contributions for payment of the scheme from activities that engender the injury losses."81 His point about "incentives for safety" requires further examination. Generally, if actors are not required to pay a fair share of the costs of their activities, including the accident costs, they will tend to overengage in those activities whose costs they can most successfully escape from paying.82 Thus, if everyone were required to pay into a universal accident compensation fund on a

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77 Id. at 24, 27.
78 The tort system deters in two basic ways: specifically, by causing actors to modify their conduct in order to escape liability; and generally, by forcing actors to bear the costs of avoiding accidents or insuring against them. Some actors will decide not to engage in activities that have high avoidance or insurance costs. On the subject of specific and general deterrence, see G. Calabresi, The Costs of Accidents (1970).
79 Fairness in tort admittedly is a vague, largely intuitive concept. For a recent effort to render it more intelligible, see Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972).
80 See text and notes at notes 66-68 supra.
81 PALMER at 53.
82 For Palmer's treatment of this subject, see id. at 362-65.
flat-rate, per capita basis, those who engaged in comparatively safe activities would pay more than their share of the total accident costs generated by all activities, and those who engaged in relatively risky activities would pay less. The resulting wealth transfers would encourage actors at the margin (those indifferent to which sort of activities to engage in) to switch from safe to risky activities. Not everyone would switch, but enough would to cause the overall accident costs in the society to increase over what they would have been if those engaging in relatively safe activities had not been required to subsidize their risk-preferring fellow citizens. Resources would be misallocated to relatively risky activities; the increase in accident costs would constitute social waste.

The solution to this problem of waste, one that to a limited extent was incorporated in the New Zealand scheme, is to require contribution to the compensation fund in proportion to the risk of accidents created by the actor. If the amount contributed is appropriate, the proper balance between safe and risky activities will be achieved. The tort system consciously aims at attaching the appropriate price tags to risky conduct, but there is no reason in theory why a system providing universal compensation could not do the same thing.

Palmer addresses these issues in some of the most interesting sections of the book. The problem is practical: how can the costs be properly allocated among accident-generating activities? The sponsors of the New Zealand system apparently believed they could achieve adequate safety incentives by providing separate

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83 Under a negligence system, activities will reflect the costs of avoiding accidents. In theory, if one assumes zero transaction costs, those are the only "accident-related" costs that will be reflected—all actors will act reasonably and escape liability by investing adequately in avoidance measures. Under a strict liability rule, activities will also reflect the expense of insuring against accident costs that cannot be avoided efficiently. To the extent that the tort system achieves the general deterrence objective, it does so more effectively under a strict liability approach. Strict products liability, for example, causes the prices of various commercially supplied products to reflect their relative defect-related accident costs. Palmer never really addresses the role of strict products liability, although he mentions its development, id. at 42-43. His attack is on the "negligence system" more than on the "tort system"; when he thinks of a "tort case," he thinks of one like the automobile accident case he uses as an example at the outset. See text and note at note 51 supra.

84 In theory, nothing prevents the separation of the pay-in and the pay-out mechanisms. So long as the pay-in mechanism is related to risk or cost, general deterrence will be achieved regardless of how the pay-out mechanism is designed. For an interesting recent proposal making this point and calling for a government-operated system of cost internalizations (pay ins) and compensation (pay outs), see Pierce, Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 Vand. L. Rev. 1281 (1980).

85 See Palmer at 362-80.
funds for earners and motor vehicles supported by independent, variable levies. The annual levies on motor vehicles in 1978, for example, varied from $2.00 to $86.25, depending on the type, size, and estimated risk potential. But the levies reflected relative risks crudely; for example, all privately owned automobiles were assessed at $14.20. Palmer points out that such a flat rate makes no attempt to distinguish among vehicles by factors affecting risks, even such obvious ones as the varying amounts of use automobiles receive. He suggests a fuel tax as a more appropriate method of funding the motor vehicle compensation scheme.

Despite his fuel tax suggestions, Palmer sees little likelihood of achieving adequate safety incentives under the New Zealand scheme. He sets forth his conclusions as follows:

In the injury reforms in New Zealand . . . the economic deterrence issue caused a good deal of debate with wide differences of opinion. . . . There is a reasonable consensus of opinion that the effort to rate differentially should be made. Few people actually get down to the administrative problem of designing an actual system of contributions which is based on reliable data, achieves a high degree of internalization of accident costs, is reasonably cheap to administer, and is fair. I began as a firm believer in the validity of the theory; I have ended up as a skeptic as to whether any scheme capable of implementation will achieve much by the way of economic deterrence, at least so long as it is attached to a compensation scheme. Knowledge about accident prevention is, however, in such a primitive state, that anything offering a hope of reducing accidents should be tried.

As these comments indicate, the sources of Palmer’s pessimism are lack of information and costs of administration. Our knowledge of which activities generate which costs is inadequate; even given such knowledge, the cost of imposing differential levies reflecting such information would be too great. The tort system spends sig-

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**Id. at 369.**

**Id.**

**Id.** The tort system is entitled to low marks for the way it has handled motor vehicle accidents, from the perspective of achieving allocative efficiency. This judgment also applies to those states in this country that have adopted no-fault automobile insurance plans. See note 4 *supra.*

**Palmer at 380.**

**For some activities, the costs of imposing levies would be prohibitive. Activities of**
Compensation for Incapacity

significant sums trying to achieve more finely tuned cost allocations.\textsuperscript{91} One who would dismantle the tort system to eliminate those expenditures will not welcome suggestions that the overhead of the compensation system be increased to achieve more informed cost allocations.

In addition to considering the potential negative effects on allocative efficiency of moving to a compensation system such as the one adopted in New Zealand, such a move must be assessed from the standpoint of shared notions of fairness. A New Zealand-type system can be criticized on several fairness grounds. First, citizens would no longer have some of the traditional methods of vindicating individual rights in our legal system. A person intentionally struck by another, for example, would no longer be entitled to a legal judgment that his right to personal integrity had been violated.\textsuperscript{92} Second, the anomalies created by the Act are open to attack. For example, distinctions drawn between illness and accidental injury under the system cause persons similarly disadvantaged to be treated differently. Third, the measures of recovery include a number of arbitrary limits that cause persons dissimilarly disadvantaged to receive essentially the same benefits.\textsuperscript{93} Finally, the procedures under the compensation system reflect a willingness to sacrifice the interests of the individual to the greater good.\textsuperscript{94}

These criticisms of the New Zealand system do not suggest that the common law tort system achieves nearly perfect fairness. In areas of tort law that have come to be dominated by vague rules and excessive reliance on supposed experts and lay juries, fairness can sometimes be difficult to detect. But the tort system creates the appearance, at least, of trying to reach individualized results that are fair to all concerned. If the necessary reforms of the rules

\textsuperscript{91} Tort law may not succeed in achieving finely tuned allocations, however. There are reasons for suspecting that it falls well short of perfection. See generally Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 YALE L.J. 554 (1961).

\textsuperscript{92} For a discussion of the desirability of barring assault or battery actions, see PALMER at 277.

\textsuperscript{93} Id. at 227. I am not suggesting that a New Zealand-type system would for these reasons necessarily be open to challenge on constitutional grounds. Palmer suggests that federalism might hamper enactment of such a scheme in the United States. Id. at 406.

\textsuperscript{94} The remedies under a tort system are tailor-made to fit individual cases; a compensation system cannot afford such “luxuries.” See id. at 229-33.
and processes of decision in the tort system were achieved, the appearance might begin to conform more closely to reality. Moving from a properly functioning common law tort system to a system like that in New Zealand might cause many citizens to feel that traditional commitments to fairness had been compromised or even abandoned. Although more victims of misfortune would be receiving benefits under the new regime and in a democracy it may be presumed that the appropriate balance of interests has been struck, I would not be surprised to discover a general feeling in the community that fairness to the individual had been sacrificed in the name of the greatest good for the greatest number.

Has there been such a feeling in New Zealand? Palmer admits that "[t]he administration of the Act . . . has not matched the vision of the original blueprint." But he insists that the system has worked for four years "without much sign of public dissatisfaction." He suggests that many of the difficulties are due to administrative suspicions about claims, and concludes that "[f]ew of the problems relate to the fundamental principles of the scheme." But if significant numbers of persons have experienced frustration in dealing with the New Zealand system, that may be the product of the system itself rather than of overworked or uninspired clerks.

On balance, however, Palmer's conclusion that New Zealanders are happy with the changes made in 1972 and 1973 is convincing. Thus, it probably is true that "[t]he common law action for personal injury in New Zealand has been buried and there is no demand for its exhumation." Although the compensation reforms appear successful in New Zealand, it is doubtful that the tort system would succumb so easily in the United States. Palmer attributes the probable resistance to such a change in this country to what he sees as support for the common law tort system by powerful vested interests. This may be a significant factor, but it is not the only factor; rather, I believe that the sentiment favoring the tort system in this country is widely shared by its citizens. Apart from the opposition of trial lawyers, public dissatisfaction on fairness grounds with a proposal to embrace a New Zealand-type system probably would be widespread.

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95 Id. at 404.
96 Id.
97 Id. at 405.
98 Id.
99 Id. at 406.
III. HISTORICAL PERSPECTIVE

Some American readers may conclude from this book that, from the initial Royal Commission Report in 1967 to passage of the Accident Compensation Act of 1972, New Zealand experienced a legal and social revolution aimed at the shortcomings and abuses of the common law tort system. Palmer repeatedly employs phrases such as "changing the law to meet new demands," and refers to "big policy changes" and "radical" solutions in characterizing the changes. He quotes New Zealand newspapers as describing the 1972 Act as "breathtaking" and "so revolutionary that interested parties had been stunned into silence." His account of the events leading to passage of the Act conveys a sense of mounting frustration over the failures of the old system coupled with growing excitement over the prospects for the new.

Despite the views of Palmer and the New Zealand press, however, when the reforms of 1972 and 1973 are placed in their proper historical perspective they are neither radical nor revolutionary. This is not to deprecate the New Zealand experience nor to suggest that Palmer has deliberately misled his readers. Technically, the New Zealand reforms are significantly innovative, and Palmer cannot be faulted for expressing his enthusiasm with having observed and participated in an intellectually exciting experience. But judged in relation to the social context of New Zealand in the 1970s, the Accident Compensation Act of 1972 did not represent the momentous social revolution that American readers, imagining the implications of a similar change in this country, are likely to assume it was.

There are several reasons for this conclusion, which are derived from the book. First, there was no public outcry in New Zealand over the deficiencies of the tort system. To the contrary, the reformers readily admitted that there was an almost total absence of public demand for change. One reason for this lack of demand may have been that New Zealand is a sparsely populated, economically prosperous country that has long prided itself on making sub-

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100 Id. at 11.
101 Id. at 83.
102 Id. at 71.
103 Id. at 74-75.
104 To do this, Palmer relies in part on data from the United States indicating that the tort system is in trouble. Id. at 48-49.
105 Id. at 83.
stantial commitments to public welfare programs. Another is that, except for the automobile-accident area, the tort system had not expanded in New Zealand to the point of taxing the limits of the judicial process. Indeed, the areas of medical malpractice and products liability, thought by some observers to be in a crisis in the United States,106 were not a significant problem in New Zealand.107 The relative paucity of tort cases in New Zealand seems attributable mostly to a lower level of litigiousness, rather than to any deficiencies in the system of tort law.

To be sure, the New Zealand no-fault system for motor vehicle accidents replaced an active area of tort law. But this part of the 1972 reform was hardly a startling innovation. Not only had many jurisdictions in the United States and elsewhere already adopted that particular type of reform, but New Zealand had defeated only narrowly a motor vehicle no-fault system proposal as early as 1928.108

If the tort system played a less significant role in New Zealand than it does in the United States, and if there was no public demand for change, why did the change in New Zealand come about? The answer is that a small group of judges and legal academics launched an attack on the tort system, based solely on principle and rhetoric, and saw a bipartisan, uncontroversial reform proposal enacted by a largely indifferent Parliament. No interest groups opposed the measure; Parliament passed it without a single dissenting vote; and there have been few, if any, postenactment repercussions. Thus, except for the motor vehicle no-fault proposal, which has counterparts in this country, the New Zealand reforms abolished a tort system that was far less significant than the American one and replaced it with a welfare scheme that represented relatively modest extensions of existing social welfare programs.

Midway through his description and analysis of the New Zealand experience, Palmer offers the following observation: "In general it is true to say that the larger the change contemplated in a democratic parliamentary system, the more difficult that change


107 In 1970, for example, there were only 60 arguably serious medical malpractice claims in the entire country, and insurance premiums for doctors that year ranged from $17 to $28. Palmer at 43.

108 See id. at 65.
will be to achieve."\textsuperscript{109} In light of the relative ease with which the changes in New Zealand were accomplished, I can only conclude that they were less significant than Palmer believes.

**CONCLUSION**

If reforms such as have been enacted in New Zealand were proposed for implementation in the United States, I would oppose them for several reasons. First, uncompensated accident victims present a relatively low priority social problem. Second, apart from the magnitude of the costs involved, abolishing tort liability and moving to a universal compensation system for all victims of accidents and illnesses would have serious negative effects on allocative efficiency and shared notions of fairness. Finally, despite my strong criticism of expansionary trends in American tort law, reforms aimed at curbing judicial excess should be given a chance to work before the tort system is scrapped altogether.\textsuperscript{110}

Notwithstanding this criticism, *Compensation for Incapacity* should be taken seriously. It is one of the most intelligent and readable books on no-fault compensation in the literature. Palmer frequently anticipates criticisms and candidly addresses troubling conceptual points. Moreover, when I describe the New Zealand reforms as being less significant than one might have imagined, I make that assessment in the context of a society traditionally committed to ambitious public welfare programs and not nearly so dependent on tort law as our own. I do not intend to belittle the New Zealand experience; on the contrary, I view it as an intellectual triumph of humanism over self-interest. A small group of intelligent people advanced a principle consistent with their country's traditions and won nearly universal support for it, even from those called upon to sacrifice their own interests. I may disagree with them on the merits, but I certainly admire their style.

\textsuperscript{109} Id. at 197.

\textsuperscript{110} See text and note at note 63 supra.