Universal Disability:
A Variety of Perspectives
March 1993
Industrial Disease Standards Panel

In 1985 the Ontario legislature established the Industrial Disease Standards Panel (IDSP) to investigate and identify diseases related to work. The Panel is independent of both the Ministry of Labour and the Workers' Compensation Board. At the end of each fiscal year the WCB reimburses the Ministry for the Panel's expenditures.

The Panel's authority flows from section 95 of the Workers' Compensation Act and its functions are set out as follows:

(8) (a) to investigate possible industrial diseases;
(b) to make findings as to whether a probable connection exists between a disease and an industrial process, trade or occupation in Ontario;
(c) to create, develop and revise criteria for the evaluation of claims respecting industrial diseases; and
(d) to advise on eligibility rules regarding compensation for claims.

Decisions of the Panel are made by its members who represent labour, management, scientific, medical and community interests. Once the Panel makes a finding, the WCB is required to publish the Panel's report in the Ontario Gazette and solicit comments from interested parties. After considering the submissions the WCB Board of Directors decide if the Panel's recommendations are to be implemented, amended or rejected.

To assist with its work the Panel has a small staff of researchers, analysts and support people. In addition to its own staff, the Panel relies heavily on the advice of outside experts in science, medicine and law, as well as input from the parties of interest.

<table>
<thead>
<tr>
<th>Canadian Cataloguing in Publication Data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Main entry under title:</td>
</tr>
<tr>
<td>Universal disability</td>
</tr>
<tr>
<td>(IDSP occasional paper)</td>
</tr>
<tr>
<td>Includes bibliographical references.</td>
</tr>
<tr>
<td>ISBN 0-7778-1060-3</td>
</tr>
<tr>
<td>1. Insurance, Disability. 1. Ontario. Industrial Disease Standards Panel. II. Series.</td>
</tr>
<tr>
<td>HD7105.2U54</td>
</tr>
<tr>
<td>368.3'86</td>
</tr>
<tr>
<td>C93-092537-8</td>
</tr>
</tbody>
</table>

Additional copies of this publication are available in writing:
Industrial Disease Standards Panel
69 Yonge Street, Suite 1004
Toronto, Ontario M5E 1K3
(416) 327-4156
# Table of Contents

1. Introduction ........................................................................................................... 1

2. Some Thoughts on Universal Disability Insurance ............................................. 2  
   *Karl Crevar*

3. UDI—The Case for Building a System ................................................................... 5  
   *Gary Cwitco*

4. Universal Disability Insurance .............................................................................. 12  
   *W.K.C. Morgan, M.D.*

5. Gates and Gatekeepers ......................................................................................... 16  
   *D.C.F. Muir*

6. Universal Disability Insurance .............................................................................. 18  
   *Patrick Reid*

7. The No-Fault Model of Workers’ Compensation: Its Future Prospects ............... 21  
   *Paul Weiler*

8. About the Authors ................................................................................................. 27
Since its inception, the primary function of the Industrial Disease Standards Panel has been to investigate possible industrial diseases, determine whether there is a probable work connection to these diseases, and provide advice to the Workers’ Compensation Board on entitlement to compensation benefits for such diseases.

Historically and currently, causation proves the major stumbling block to establishing entitlement for industrial diseases. Many diseases occur in the general population as well as in specific work groups. What portion, if any, of certain diseases is attributable to work exposures and what portion can be linked to hereditary, environmental, or just unknown sources? How much and what kind of evidence is required to make a link to the workplace conditions?

In numerous cases, there is no current scientific knowledge sufficient to allow one to determine how to apportion causality between work exposure and lifestyle choices. Furthermore, there is no available mechanism in the current workers’ compensation system to limit responsibility to that portion of the disease which is work-related. There is also no mechanism to apportion to society in general its liability resulting from compensation for diseases.

The difficulties have caused experts such as Professors Weiler and Isom to address the question of universal insurance. Employer groups, workers’ representatives and medical practitioners have all raised this issue.

While it is not the intention of this Panel to conduct an investigation into the subject of universal insurance, the Panel is well situated to provide the parties of interest with a public forum in which to express and compare views. Therefore, the Panel has chosen to facilitate dialogue among affected parties. Invitations were extended to employer and worker groups as well as to medical practitioners in the field of industrial disease, to submit a three-four page paper expressing the views of that particular group or individual on the subject of universal insurance.

The Panel has not edited any of these papers, nor does it have an opinion of its own on the need for, or appropriateness of universal insurance. Rather, it is hoped that sharing perspectives and ideas may foster a useful dialogue amongst the parties this issue affects. In this regard, it is interesting to note that while perspectives certainly vary in the papers submitted, there are certain principles that are also shared.

The Panel wishes to thank those who gave their time and thought to this issue. We hope it may provide the focus for future, ongoing discussion.
Some Thoughts on Universal Disability Insurance

by Karl Crevar

I have been asked to write something about Universal Disability Insurance. No particular focus was suggested, so I decided to write about the things that Universal Disability Insurance will not do merely by removing the issue of causation from determining whether someone gets compensation. It is important that the injured worker movement understand exactly what problems a system of Universal Disability Insurance (UDI) is meant to address, and what problems it will not address by itself, so that the movement is prepared to continue advocating for injured workers if and when these problems continue with UDI. The biggest problems with the current Workers’ Compensation system are around the compensation of the long term disabled worker, vocational rehabilitation and the related issue of job security for injured workers. Merely removing the issue of causation will not address these problems. Furthermore, while UDI will solve the problem of compensating people for industrial disease, unless great care is taken, the issue of funding the system for these diseases will become a problem.

One of the biggest difficulties that injured workers face with the Workers’ Compensation system is the level of benefits that are given to people with permanent disabilities. Injured workers with permanent disabilities are seriously undercompensated both under the current FEL/NEL system and the pre-bill 162 pension system.

Under the old pension system, only the most serious injuries tended to attract high pensions; bilateral blindness would attract a 100% pension and limb amputations also attracted very high percentage pensions. However for the bulk of the disabilities that injured workers tended to get, the pension awards were totally inadequate. People with low back disabilities would get a pension based on a 30% benchmark for a totally immobile low back. Knee disabilities would be compensated based on a 25% reference for a totally immobile knee. Similarly the maximum elbow award was 20% and the maximum wrist award would be 12.5%. People with moderate psychotraumatic disabilities would receive between 15% and 25%.

For many permanently disabled injured workers, these injuries were career ending. This was especially true amongst workers who were either unskilled, uneducated, older or immigrant workers. These workers would face poverty because their permanent disability awards did not reflect the workers long term loss of earnings.

Bill 162 has made this bad situation worse. Payments to workers who are permanently disabled are now based on what the Board estimated that injured workers future loss of earnings to be. This permits the Board to deem a worker to be earning money from employment that the worker does not have; if after one year of searching for employment, that worker still remains unemployed, then the worker is faced with the prospect of living off of a totally inadequate Future Economic Loss award.

The creation of a UDI system will not do anything to solve these problems. A UDI system that compensates workers with long term or permanent disabilities in the way that the Workers’ Compensation Act has historically compensated permanently...

---

1 All percentages come from the WCB’s Operational Policy Manual Doc 05-03-03.
2 Workers’ Compensation Board Operational Policy Manual Doc 03-3-03.
disabled injured workers will continue to have these problems. Injured workers must remain relentless in fighting for improved benefits for the permanently disabled injured workers and will, in all likelihood, have to continue these struggles even after UDI is enacted.

The second major problem with Workers' Compensation is that its provisions of vocational rehabilitation is deficient. Currently the Workers' Compensation Board employs ill-trained caseworkers who are overworked due to the fact that there are too few of them. These factors impede the Board's ability to effectively rehabilitate an injured worker so that that worker can be returned to work.3 More importantly, many of the benefits that an injured worker can receive depend on that worker actively co-operating with the Vocational Rehabilitation that is provided by the Board; this often reduces vocational rehabilitation to being merely a benefit control function.

Until we develop a commitment to training people to provide effective services, vocational rehabilitation will remain deficient, no matter what system is used to compensate an injured worker. Furthermore any UDI system that makes the receipt of certain benefits depend on active co-operation with Vocational Rehabilitation that is provided by the universal disability insurer, vocational rehabilitation will always risk becoming solely a method of controlling disability benefits.

Related to the issue of vocational rehabilitation is the issue of job security for injured worker. Currently an injured worker faces a myriad of programs that provide some protection so that the worker actually has employment when the worker is able to return to work. Unionized workers have the job security provisions of the collective agreements; unfortunately the majority of workers are not unionized, and therefore do not enjoy these protections. Other workers must either use the limited Re-employment rights contained in s. 54 of the Workers' Compensation Act, or the administratively inefficient mechanisms contained in the Ontario Human Rights Code.

Neither of these are very effective in protecting injured workers' employment while they are disabled, and consequently many injured workers face unemployment if, and when, they are ready to return to work. Again, Universal Disability will not address these merely by being a Universal Disability Insurance scheme. Injured workers will have to continue the struggle to maintain job security.

One thing that a Universal Disability Insurance system will do is that it will ensure that workers who are disabled as a result of industrial diseases will get compensation without having to prove the work-relatedness of their condition. This fact, by itself, would make a Universal Disability Insurance system worth implementing. However, since Universal Disability Insurance removes the issue of causation from determining the issue of compensation, we run the risk that employers will not be forced to pay for the disabilities that are caused by industrial diseases, because the victims of industrial diseases will no longer have to aggressively pursue the issue of compensation in order to get benefits.

In order to prevent this, any universal dis-

ability system would have to incorporate some form of research function that studies issues around industrial diseases; this would be similar to what the Industrial Disease Standards Panel does in the current Workers' Compensation system. Any universal disability scheme would have to contain something similar to Schedules 3 & 4 of the Workers' Compensation Act to determine which types of disease are funded by which types of employers. To make this work, the administrators of the scheme will have to take seriously their responsibilities for identifying industrial disease and scheduling them. If this is not done, employers will continue to be able to shift the costs of using dangerous materials to society.

In conclusion, the Ontario Network of Injured Workers Groups supports a comprehensive analysis of a Universal Disability Insurance plan. A royal commission on the subject may be the most appropriate approach. We support the concept of UDI for two main reasons. The first is the elimination of the cumbersome process of determining entitlement. The second is the expanded coverage for Occupational Disease.

While expressing support for UDI we must also be cautious. Until those issues relating to benefit levels, vocational rehabilitation and the funding of the system are resolved, we cannot fully endorse a system of Universal Disability Insurance.
UDI—The Case for Building a System

by Gary Cwitco

...the ultimate goal should in fact be to abolish the Workmen’s Compensation Board and replace it with a scheme of universal insurance for accidental injury regardless of whether or not the individual is a wage-earner and irrespective of fault.

Floyd Laughren MPP, August 1980

There is a problem ...

I would be very surprised, even astonished to find someone, anyone, who sincerely believes that this country’s current patchwork system of programmes effectively responds to the needs of people who are affected by injury, illness and death.

Patchwork may be too kind—in a quilt at least the patches are stitched together, sometimes there is even a pattern. It would be hard to discern a pattern in the existing array of programmes. The current Canadian system includes but is not limited to: workers’ compensation, CPP/QPP death and disability benefits, unemployment insurance sickness benefits, employer provided sickness and accident plans (including long term disability), sickness or disability benefits within private pension plans, private individual disability insurance, benefits provided through automobile insurance, compensation for the victims of crime, legal awards provided by action through the courts, plus when all else fails the social assistance and welfare plans.

Each of these plans has its own rules, benefit levels and systems of adjudication plus its own administrative structures and costs. To the extent that they are integrated, this only serves to reduce the payments from one plan of eligibility until a second can be established.

With all of these programmes and opportunities many people still do not have any meaningful, secure and rapid protection from the economic effects of an injury or illness. Those who are supposed to be protected, all too often fall through the cracks. Even when benefits are, in fact paid, the level received by the injured party is often inadequate. This is certainly the case in the Workers’ Compensation system, the segment with which I am most familiar.

However it must be noted that even with its many faults the WCB system provides better benefits than any of the others.

While the WCB has historically been able to respond quickly, even efficiently to the simple accidental trauma cases, there have always been problems around questions of entitlement for more complex cases like soft tissue injuries or occupational illnesses or those cases in which the role of the work place was less clear. Now, as result of a number of factors, including economic restructuring with its more intense pressure on employers to find ways to cut costs as well as the increased use of experience rating systems, employers have taken a greater interest in the compensation system. This in turn, has limited the ability of the system to respond expeditiously to the needs of injured workers and their families.

Employers will often make their own judgements about the type of benefits a worker

---

1 The views expressed in this paper are those of the author and do not necessarily represent the views of the union.
should receive and route claims to the sickness plan rather than through the WCB. If a dispute arises the worker is caught between bureaucracies, an even more uncomfortable location than the proverbial rock and a hard place. It is not that the officials in these programmes are evil people, rather the systems set the rules and the tone for the relationship.

Workers who find their initial claim rejected endure the fight, seemingly endless, through the compensation bureaucracy as the question of causation is adjudicated. At the same time they may be dealing with or responding to the needs of a private insurance plan, the Unemployment Insurance Commission or the Canada Pension Plan.

Increasingly workers’ compensation cases and appeals are adversarial contests between injured workers and employers or employers and the Board—arguing about the role which can be assigned to the work or the workplace in the causation of an individual condition.

In my experience even when workers win in this system they often still lose. By the time a decision is rendered, both the financial and psychological costs of the battle have extracted an enormous toll from these workers which is added onto the effects of the original injury. They have won the battle for compensation but not the war. Their desire to be a productive, working member of the community too often has been taken from them.

When they lose, more often than not, if their disability is permanent, they are impoverished.

From the worker’s perspective, except for the needs of the compensation system, the question of causation is not relevant. What the injured worker needs is income maintenance, medical and in some cases vocational rehabilitation and a process for an appropriate re-integration into the workforce.

A worker who falls from a ladder in the backyard and suffers a broken arm will be just as disabled, have the same need of income replacement and rehabilitation as the worker who falls from a ladder at work and breaks the same limb. The first worker legitimately wonders why the location of the accident rather than its effect, determines how she or he will be treated and the level of benefits, if any that will be received.

As New Zealand’s Woodhouse Commission pointed out so succinctly in 1967: "...how a claimant was injured does not change the individual’s needs or losses."

The preceding discussion only summarizes, in the most cursory way, the economic questions around the system. We still tend to think of compensation in terms of the money that is or is not paid out and forget that rehabilitation and re-integration into the workforce are the only long-term solutions for disabled people. Too often, the so-called rehabilitation programmes are little more than benefit control plans directed at rushing injured workers back into the workplace. Additionally, when the injured worker cannot return to the pre-injury employment, the rehabilitation should offer more opportunity for economic and intellectual challenge.

The result is a system that, even when it functions as it was designed, doesn’t meet the societal goal of protecting those who are the victims of illness or injury from eco-
nomic and psychological ruin. It is a system that cannot work and is in desperate need of change, radical change, that will provide the community with what is needed.

It is my view that a system of Universal Disability Insurance (UDI) is the needed change.

What is Universal Disability Insurance?

While there is no complete plan ready to be taken off the shelf and put into place tomorrow, there are a number of fundamental components to this type of plan. First the plan would apply to everyone, employed or not. Coverage would be mandatory and the cause of the accident, injury or illness would be irrelevant for the receipt of benefits. The system would be under public control and access to the courts would be eliminated.\(^2\)

There have been, among some in the labour community, a number of long-standing criticisms of UDI schemes which are separate from the concerns that the employer community possesses.

The most often cited critique of UDI systems among my colleagues purports that the plan would allow employers to evade their financial responsibilities to workers whose disability "arises out of and in the course of employment." This would supposedly occur because in a universal system causation would not be important in adjudicating any individual case and the workplace role in producing injury, illness and death would be hidden. Therefore, the argument continues, the costs of compensating workers would be transferred to the public purse.

While I support the intent of the argument, that employers should collectively bear the economic responsibility for compensating the victims of the workplace, I do not believe the current system achieves that end in any way.

The under-compensation plan...

Whether we look at the case of a permanently disabled worker who can't find a job and who has benefits frozen at pre-accident wages or a miner with cancer and a social service worker suffering depression both of whom can't get benefits—we see situations in which people do not receive adequate compensation. The costs associated with these disabilities have been externalized by employers and are currently borne by society at large. While there might be some debate from employers regarding the under-compensation of injuries due to accidents, there is no similar debate about the lack of an adequate response to compensating work-related illnesses and who in fact, bears the costs resulting from those illnesses.

Some years ago the U.S. National Institute of Occupational Safety and Health (NIOSH) estimated that as much as 40% of all cancer was linked to the workplace. Other, more conservative estimates have placed the workplace contribution to overall cancer levels as low as 4%. Whatever the real contribution is, the actual number of cases accepted, demonstrates a significant undercompensation of occupational cancer.

If the lower estimate is used as a benchmark, then in 1990 the benefits Ontario's WCB paid in the 56 accepted cancer cases amount to one in thirteen of potentially eligible cases.

---

\(^2\) I am indebted to the writings of Professor Terrence G. Ison of Osgoode Hall Law School whose work on UDI has had an important role in shaping my thoughts on such a plan.
A study by epidemiologist Peter Barth among insulation workers with asbestos-related diseases showed that only 47% had actually applied for benefits from the compensation system.

Contrary to the popular belief the costs associated with these disabilities are not borne by employers through payment to the WCB. They are carried by the workers and their families and society in general.

Another critique suggests that a universal system would reduce or remove the incentive for employers to deal with hazards in the workplace because the cost of payments to a UDI plan would simply become “a cost of doing business.” This is essentially the same argument that is used to support experience rating systems and assessment rates based on risk. That is, high compensation payments lead to more emphasis and expenditures on prevention plans.

There is no evidence that such a link exists. Experience rating and risk-based assessment rates encourage employers to hide accidents or minimize their impact through phony modified work programmes, more than they encourage changes in the conditions of work. The consequence they are trying to avoid is the payment to the Board not the injury to the worker. If we want to establish systems that will encourage the more effective elimination or control of hazards, then we must concentrate our prevention efforts on plans that focus on what we want the employer to do rather than on the consequence of ineffective prevention methods. Indeed, in the current employer-led discussion (hysterical attack) on the costs of the Ontario compensation system there is a deafening silence on the topic of prevention.

The emphasis of these discussions is on cutting employer costs by attacking the so-called abuse of the system, reducing benefits levels, introducing co-payment schemes or eliminating eligible disabilities from the compensation system.

If, however, the analysis is faulty and there is a meaningful economic link between causation and prevention, that relationship can only be effective in a universal system where employers pay the full cost of all workers’ illnesses and injuries because, as noted above, the compensation system is incapable of recognizing the full range of work’s impact on health.

A political case for prevention...

It is possible that the absence of groups of injured workers struggling for compensation could reduce the political pressure on unions, employers and governments to clean up the workplace. This has always been a problem with occupational illness because the victims have been invisible. Without the ongoing mobilization of injured workers for compensation and rehabilitation it might be easier to forget the victims or to see them as part of the social cost of producing goods and services. This problem can, however, be avoided.

A universal system could play a crucial role in assisting prevention and keeping the objective of eliminating the causes of injuries and illnesses on the political front burner. This would be accomplished by making certain the work-relatedness of injuries and illnesses is not ignored. The system must include a research unit that through the collection of statistical information will for the first time develop aggregate epidemiological data that would define the workplace role in the causation of specific conditions. This in-
formation must be publicly available and should be used not only by the health and safety enforcement agencies of government but also by the workplace parties in their efforts to improve the conditions of the workplace.

This discussion is not aimed at minimizing the pivotal question of “Who Pays?”, rather it is an attempt to illustrate that the current system fails to fairly allocate to employers the real costs of workplace injury, illness and death.

Another objection to a UDI plan is its vulnerability to attack in the future. One need look no further than the current attack on universal health care or unemployment insurance for examples of essential programmes, valued by overwhelming numbers of Canada’s populace, that can be undercut by those ideologically opposed to a proactive state role in society. A crystal ball is not needed to predict that whatever the original employer contribution to funding a UDI system, there will eventually be attempts to decrease the level of direct employer contributions.

Should UDI be established, that struggle will be unavoidable. But will it be substantially different from the current battle to defend a compensation system that doesn’t work? One difference might be the absence of a group of injured workers who are without adequate benefits. In the final analysis, the only question to be answered asks: In which system will disabled people be better off?

**Who pays?**

For many years, Robert Sass, the former Associate Deputy Minister of Labour in Saskatchewan has been telling us that work is at the centre of a worker’s life and that it influences all other aspects of that worker’s existence. More recently, in presentations (aimed at limiting the scope of the compensation system), before Ontario’s Occupational Disease Task Force employers, actuaries and company doctors have, perhaps unwittingly, accepted Sass’s analysis. They have claimed that work can be shown, in some way, to contribute to every illness a worker suffers. This is a hypothesis I suspect that Sass would endorse.

The current system spends an incredible amount of money and human energy trying to ascertain, for every individual case, what, if any, this workplace role was and whether or not it was significant. As described above, it is not a task that the system performs very effectively. It would be insane to trade a system that tries to determine causation as a determining factor for eligibility into a system that, as some have suggested, uses causation to try to apportion costs on individual claims (e.g., a lung cancer is caused 30% by asbestos, 30% by smoking, 15% by genetic factors etc.). Instead, we should accept the proposition that work, to a greater or lesser extent, is a factor in every worker illness. The least complicated way to respond to that fact would be to assign the full costs for the employed within a UDI system to the employer community. While not all of these expenditures will be new costs (employers already pay for sickness and accident insurance, long term disability, etc.)—employers will likely resist this notion.

An analysis of the cost and funding mechanisms of a UDI plan is beyond the capacity of this paper. It is clear, however, that such an investigation would need to form part of a more detailed proposal for establishing a scheme.
One issue that will have to be addressed within that study is the question of benefit levels. There is nothing magical about the current level of WCB payments at 90% of net or the previous 75% of gross wages. The objective with respect to benefit levels must be to completely replace the economic loss suffered by the individual. Once that were achieved one could begin to discuss the question of taxing benefits.

Also included in such a study would be a detailed analysis of all of the costs currently absorbed by the various actors (employers, workers and various levels of government) either directly or indirectly for the full range of existing programmes. As well, estimates for any new costs would be required (such as higher levels of benefits for non-work-related disabilities and newly included participants). The costs of the existing administrative systems, inquiries into causation and the incredible amounts drained from the system by the legal profession also need to be quantified. The analysis would also need to calculate the savings to health insurance and welfare plans for payments that are currently made on behalf of injured workers who are not receiving compensation. As well, the increased economic participation of injured workers who return to appropriate jobs would need to be evaluated.

Additionally we must resolve the ongoing debate about whether a system should be fully funded or should operate based on current costs. A fully funded system makes no sense. The argument for current costs on the other hand is quite simple. This system is not a pension plan, hence it will never mature. There is an important “but” in the argument for current costs a “but” which demands there be a provision for a reserve fund to deal with economic downturns. The New Zealand experience offers some insight here. When they went to current costs they also slashed assessment rates. This eliminated any possibility of creating such a reserve, so that there was a financial crisis when recession hit the economy.

It is my view that when all of the real costs of the current system are tabulated, UDI will be found to be not only economically viable but a system offering important savings.

When this analysis is complete the question of how the costs are shared will need to be addressed. Whatever the final answer, the employers’ contribution will be an important part of this equation. Historically, workers and the general public through the government have been subsidizing the real cost of compensating injured workers. This is the case notwithstanding employer concerns that compensation costs too much. The creation of a UDI plan will provide an opportunity to address the actual aggregate contribution of work and the workplace to society’s cost of injury, illness and death.

It must be remembered that many employers pay (through private insurance carriers) most, if not all, of the costs of existing sickness and accident plans which provide benefits for workers whose illness or injury is unrelated to work. That these plans exist for approximately 70 per cent of the workers surveyed through the Ontario Ministry of Labour Collective Agreements Library and that employers pay for them is a recognition that there is a societal benefit in providing some security to workers who are injured or become ill irrespective of cause. While it is clear that not all workers are protected by these plans and the levels and length of benefits are variable and often inadequate, they do play an important role in existing disabil-
ity-related income protection plans. While UDI could be seen as a radical departure from these systems, the philosophical roots are the same. The differences are of scope rather than of objective.

An interesting and instructive study was commissioned by the Alberta Workers’ Compensation Board in 1990 with the purpose of determining if private insurance would be a more “cost-effective” option than the WCB. In reading the report it is clear that the authors wanted to conclude that a private system would be preferable but it was a conclusion that their analysis would not support. They pointed out that various factors make the WCB “appear more expensive” and that “large sectors of the [employer] population benefit financially under the WCB”. This grudging endorsement of the WCB bolsters the argument that the system should remain under public control with strong links of accountability to the community.

A final thought...

When I was younger, I associated the term UDI with Ian Smith’s Unilateral Declaration of independence in the former African colony of Rhodesia. It was something to which I was unalterably opposed. In the current incarnation of the UDI acronym, there is also a potential for a declaration of independence for disabled people in our society. Not the kind of society Ian Smith had in mind, but UDI nonetheless.
In the 19th century the only recourse open to a workman who was injured while at work was to bring a common law action against his employer. Since he had neither the understanding nor the money to finance such litigations, successful actions were rare. To help the workmen, Employer’s Liability Statutes came into effect. These made provisions for financial compensation in the case of industrial disease or injury, but the employer had three powerful defences against such actions. Thus, an employer was not held responsible if he could show that (1) another worker was wholly or partly responsible for the injury, (2) if the injury occurred as a result of the worker’s own negligence, or (3) if the workman knew or should have known that such an injury or illness was an inherent risk in his occupation. With such defences available to the employer it was indeed unusual for a worker to win his case.

In the first few years of the 20th century a series of Workmens’ Compensation Acts were put into effect in Britain and somewhat later in the U.S. and Canada. Whilst in Britain the Acts applied to the whole country, in the U.S. and Canada each state or province enacted its own laws. The prime purpose of the Workmens’ Compensation laws was to provide adequate benefit while limiting the employers’ liability to Workmens’ Compensation payments. The payments or premiums were to be predetermined so as to avoid uncertainty for the injured man and the employer. Appropriate medical care was to be provided and costly litigation avoided. Most important of all was the establishment of the principle of liability without fault; the cost of the compensation was to be assigned to the employer not because he was always culpable, but because of the inherent risks of industrial employ-

The present system for compensating work related injury and disease in Ontario has many defects. To the worker the system often appears as dilatory, cumbersome, and inordinately slow to respond; an opinion which is often shared by those physicians who refer patients to the Board. The WCB appears to be bureaucratically top heavy and fulfills all the criteria of Parkinson’s first and third laws. First, the total number of persons employed by the Board has increased while the volume of work has remained roughly the same. Secondly, the expansion of the WCB has meant additional complexity and the complexity, as usual, has led to decay.

The Workers’ Compensation Appeals Tribunals (WCAT) seem in the main to operate on the principle that any disease occurring in workers is of necessity related to his or her occupation. The WCAT frequently flies in the face of science and medical facts, giving
the impression that those who sit on the Tribunal are advocates rather than objective assessors. While it is entirely appropriate for the WCAT to assess the degree of impairment present in a claimant, those on the Appeals Tribunals seldom have any expert knowledge and cannot weigh the often contradictory evidence as to cause and effect given by so called experts. Often decisions go against accepted scientific fact. The same attitude prevails in some of the Ministry of Labour Worker Advisors, so much so that a better title for them in most instances would be Worker Advocate. An impression is given that the Worker Advisor is seeking compensation for the claimant often at the expense of truth and justice. Moreover, if one or more respected experts do not give an opinion that is favourable to the claimant, the Worker Advisor will seek a favourable opinion elsewhere, if necessary by consulting and eliciting the help of foreign “experts”. The assumption seems to be that anybody who gives a favourable opinion from abroad is necessarily better informed than his colleagues in Ontario or Canada, when in reality this is seldom so. As a result the opinion of a maverick with a hidden political agenda often prevails.

Whilst sympathy for and a desire to compensate disabled workers are worthy sentiments, it is unacceptable to expect industry to foot the bill for nonwork-related injuries or illnesses. Ethics and altruistic considerations should be founded on truth and not vice versa. If one allows ethical or philosophical considerations to control one’s view of truth, absurdities become inevitable thereby introducing manifest injustice. The driving force of the WCB and its ancillaries such as the Industrial Disease Standards Panel (IDSP, etc.) appears to be to make science and medicine fit in with prevailing political sympathies or their concept of ethics. Unless the WCB has policies and the regulations are fair and based on realistic science and medical knowledge, then industry will suffer and will leave Ontario for greener pastures. This has happened in the U.S. where industry has left the Northeastern States such as Pennsylvania, New York, and Massachusetts and migrated to the south. Were the southern states to become more liberal—profligate?—there will be a further exodus to Taiwan, Singapore and Mexico. As the present Ontario government is slowly finding out, if it wishes to have a “welfare state”—in this instance a welfare province—this is possible only when there is a flourishing private economy, since only the latter can pay the taxes necessary for supporting social programmes.

The WCB and IDSP appear to have a hidden agenda and create the impression that they wish to introduce regulations that would assume any malignancy occurring in a worker is work related, at least to some extent and therefore compensable providing the SMR for that particular group of workers is above 100. In doing so they appear to eschew science and to disregard confounding factors such as smoking, exposure to other toxins, etc. Such a policy is grossly unfair to those persons not covered by Workers’ Compensation. Thus, lung cancer occurring in a heavy smoker who happens to be a metal miner or chemical worker will be compensated while the bank teller, gas station attendant, or clergyman with the same disease will not. Clearly a uniform and fairly administered system to serve all workers and industry is desirable. This can be achieved by the introduction of universal disability insurance. Such a system has been adopted in the Netherlands and in New Zealand.
In Britain, the issue of Tort has been the subject of much discussion and in 1973 a Royal Commission on Civil Liability and Compensation was set up. Its Report was published by Her Majesty’s Stationery Office in 1978 and is frequently referred to as the Pearson Report after the judge who was Chairman of the Commission. The charge given to the Commission was to consider to what extent, under what circumstances, and by what means compensation should be payable for death and injury suffered under the following five circumstances: (a) in the course of employment, (b) during the use of a motor vehicle or other means of transportation, (c) through the manufacture, supply, or use of goods or services, (d) on property belonging to or occupied by another party, (e) otherwise from an act of omission by another person where compensation is recoupable only on proof of fault or under rules of strict liability. More explicitly, the Commission was charged with producing a report that would recommend the first steps to be taken towards the introduction of a unified system that would deal with all industries and which would apply to the whole country. In time the system would be extended so that provision would be made to compensate all disabled persons irrespective of cause, that is to say, whether the disability was a result of injury, or of acquired or congenital disease.

Some of the more radical suggestions related to the modification of the Laws of Tort, namely those actions arising from private or civil wrongs. While not recommending the complete abolition of Tort, the report did seek to limit its role as a means of obtaining redress for injuries, e.g., by offsetting social security payments against Tort awarded damages. They also recommended that compensation awards should be indexed so that the payments did not decrease with inflation. Other suggestions were related to the elimination of certain minor claims and changes in the method of assessment of damages. The Pearson Report should be regarded as a model and the first step towards achieving comprehensive and equitable compensation for all forms of disability. It proposes and supports the concept of No Fault and suggests that those who are disabled should be compensated because of their needs rather than because of another’s fault.

Inherent in any civilized society is the tenet that such a society should provide its disabled members with sufficient financial support for the necessities of life. Ethically and morally it matters little whether the disability is industrially acquired or not. If this doctrine is accepted, the same impairment and the same disability should receive the same compensation. The continue with the present Tort law suggests that the person who loses a leg in an industrial injury is somehow worthy of a greater compensation than a man who for no fault of his own loses his leg in a car accident. Such an inequitable system operates under Workers’ Compensation in Ontario at the present time in that some people are covered while others are not.

The main difficulty rests in implementing such a programme. Ideally this would involve an agreed upon criteria for impairment and disability and should be applied across the whole nation. Contributions to the fund should come from the employer and from what would amount to Social Security payments that are put towards premature and permanent disability awards. Such a system would ensure that the employer would be compelled to assume finan-
cial responsibility for industrial injury and disease, and premiums could be weighted according to the health and safety record of the company concerned. The impairment would then be determined by a panel of physicians with a wide experience in disability assessment rather than left to the whims of a judge or partial jury. This would avoid much of the expense that goes into WCB and WCAT hearings and the numerous expert opinion which are sought by those concerned in the award of such compensation. I believe the major difficulties would be blending the provincial and federal governments contributions to such a system. Nonetheless, universal insurance is a far better approach than the present piecemeal, wayward, and nonuniform system that presently operates in Ontario.
The title of this paper is taken from an editorial by Burry (1990). It refers to the ethical issues that arise when a physician acts as in a judicial capacity in determining when an ill person should receive financial benefit. The problem is explored further in this short review.

When a patient consults a physician an ethical contract is established such that the physician can ask detailed and personal questions, can carry out a physical examination and arrange for appropriate tests or investigations. This invasion of the privacy of the patient is legitimized by the assumption that the physician is acting entirely and completely on behalf of the patient. The subsequent advice or opinion is given in private and the patient is completely free to follow the recommendations or to ignore them.

However, physicians have accepted many different roles on behalf of society. Patients are certified as fit (or not fit) to work, as disabled or incapacitated (or not), as being injured by work (or not). In these roles the physician acts on behalf of a third party and the consequences have important financial effects on the patient.

The resulting tensions have generated a substantial research literature. Some have investigated the proposition that some patients exaggerate or lie about their symptoms (Keltner, 1988; Tait, 1988). Complex methods have been developed for detecting such bias either during a clinical history or on physical examination (Bender, 1992). Equally it is suggested that physicians are not different from other members of society and that some are susceptible to the financial pressures of refusing applicants who may in future consult a different physician, who has a more compliant attitude, and may take friends and relatives with them. Some consider physicians to be subjected to strong pressure if employed by industry or unions. A treating physician is likely to have established a bond with a patient which makes it almost impossible to give an objective opinion. Finally, physicians may have a political bias either for or against patients seeking financial help.

These difficulties persist whether the physician is acting within a framework where an illness caused by occupational exposures is treated as a special category or within the framework of a universal sickness benefit scheme. Someone, somewhere, is going to ask a physician to step out of the politically and ethically correct medical relationship and act as a judge. Removing the final decision to a lay administrator does not alter the position.

It is unlikely that the legal profession would have allowed themselves to be trapped in this way. Imagine going to one’s private solicitor and asking for a decision as to whether or not you were guilty of a driving offence. Your solicitor may advise you whether to plead guilty or not but this advice is totally confidential. A judge will surely decide your case, but not on the basis of information which he has obtained from you in private.

Is it possible to escape from the impasse? Supposing, for example, that physicians had resolutely refused ever to participate in the process. It is more than likely that society, ably advised by lawyers, would have developed a sickness benefit system (whether within a workers’ compensation system or a universal plan) which was reasonable, fair to all and which did not bankrupt the nation. Self certification by the patient for sick-
ness absence in industry is an excellent example of how to manage without the intervention of physicians.

Alternatively, supposing, patients seeking support for long-term sickness or disability were able to consult one or more physicians of their choice, the opinion in each case to be given to the patient in confidence who is then free to use it or tear it up and try someone else. The physicians would have to be free of vested interest (i.e., salaried) and to have recognized training and skills. Clearly the patient may shop around and use only the most favourable report. However physicians could be monitored in true modern style for validity, sensitivity and specificity by suitably selected agents provocateur. This practice is widely used for monitoring car repair mechanics and there is no reason why physicians should be exempted.

The advantage of the system is that it restores the proper ethical relationship between physician and patient. It does not prevent physicians participating in adjudication as members of tribunals or other bodies. The medical assessment selected by the patient can be evaluated critically in the judicial process and other physicians can assist in this evaluation. Physicians can give evidence concerning general health related issues. All that is barred is the physician acting as gatekeeper to the many financial benefits provided to patients by society on the basis of evidence obtained during a patient/physician interaction. It also removes the element of vested interest (whether political or financial) on the part of the physician to provide a biased opinion either for, or against, a patient.

The ethical and private contract between patient and physician is fundamental to the practice of medicine and should be protected against all incursions. The appalling consequences that can emerge when the contract is broken were amply illustrated in Europe 50 years ago. While it is obvious that acting in a judicial capacity for social benefits is of a different order of magnitude, the ethical paradox is precisely the same. It may well be that many patients provide an honest and accurate account of their symptoms and, no doubt, many physicians carry out a valid and unbiased assessment. At least they think they do. However the point is that acting as a gatekeeper is incompatible with the one on one relationship on which the medical profession is based. It is the uniqueness of the relationship which is so important. Where one or more are gathered together it may be that physicians can act ethically on behalf of a third party. Thus, two physicians interviewing a patient who is accompanied by an advisor might provide an acceptable framework. These various possibilities merit discussion and are pertinent within a system of compensation for injured workers or within a universal framework.

Reference


The Ontario Mining Association first suggested in September, 1984 that this issue be studied. The Association's position then was that "a way must be found to protect disabled people from a financial nightmare, a way that does not impair the ability of the industries of this province to compete in the outside world." This is still our view.

Workers' compensation is only one of many systems to ensure that people who are unable to work will receive an income. The cost of every system to provide money to the unable must be borne, in some fashion, by the able. The root question, therefore, is "Who pays?", and a secondary but important question is "How much?".

The Workers' Compensation Act of 1915, according to Mr. Justice Roach in a review in 1950, "swept away the old common law doctrines...and rested the right to compensation upon the mere existence of the employer-employee relationship". This resulted in benefits to employers, employees and the public, which Mr. Justice Roach enumerated.

The learned Justice also pointed out that the Act was a scheme by which compensation is provided in respect of injuries to workers in industry, and not a system for dispensing charity, or unemployment insurance, or social legislation for the purpose of elevating the standard of one group in society at the expense of another. He went on to say that "certain amendments" had been introduced which were in fact social legislation, and which imposed upon industry "burdens which should be born by society generally."

We are not suggesting that our society has to be frozen in time, bound by the thinking of past generations. Far from it; we are saying that the present undesirable situation was forecast not just nine years ago, but 43 years ago, and perhaps even before that. It is past time to do something about it.

In 1984 when we first sounded our warning, WCB assessment revenues were $1.2 billion, total expenses were $2.0 billion, and the unfunded liability was $2.7 billion. In 1991, the latest year for which we have figures, assessments were $2.5 billion, expenses were $4.2 billion, and the unfunded liability will be $10.3 billion. We believe the numbers will be worse in 1992, and again in 1993. The unfunded liability is a measure of the WCB's overspending.

The number of registered claims in 1984 was 389,000 while in 1991 they totalled 410,000—an increase of only five percent. The substantial increase in costs cannot be explained by inflation or increased claims.

We have attached four graphs to illustrate the above statistics. The mining industry experience is illustrated in the following table.

<table>
<thead>
<tr>
<th></th>
<th>1976</th>
<th>1991</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>($ million)</td>
<td>($ million)</td>
</tr>
<tr>
<td>Assessments</td>
<td>4.620</td>
<td>83.572</td>
</tr>
<tr>
<td>Costs</td>
<td>3.831</td>
<td>115.062</td>
</tr>
<tr>
<td>Unfunded Liability</td>
<td>1.541</td>
<td>729.346</td>
</tr>
</tbody>
</table>

These numbers are extremely disturbing to mining people, both operators and investors. Part of the reason is that they add the cost of compensation to all the other payroll taxes—Unemployment Insurance, Canada Pension Plan, Employers Health Tax and group insurance, income tax and so on. Some of our members have calculated that for every payroll dollar they pay for production, they pay 76 to 84 cents for no production.
Up to 75 percent of current WCB costs for the mining industry are for employees of companies that are no longer in business, and/or employees that stopped working in the industry 10 or more years ago.

When the workers' compensation system was operated as a group insurance plan to compensate employees injured at work for lost income, the Association fully supported it. However, as the system changed into a social program, with sharply escalating costs, we knew that changes would have to be made.

The OMA's position is:

1. The costs of workers' compensation have spiralled out of control and are not sustainable by the mining industry in Ontario.

2. Lifestyle, such as smoking, diet, drugs, obesity and drinking contribute on their own, or synergistically to disease. This is not adequately taken into account, if at all, in WCB adjudications. Employers should not be required to pay for these lifestyle decisions.

3. Regardless of cause, people need money to live.

4. A study (perhaps a Royal Commission) is required to ascertain why the present system is so costly, how it should be funded, and at what levels, and who should pay. Benchmarking with other jurisdictions should be part of the enquiry, including other provinces such as Manitoba and New Brunswick. This study should take no more that six months.

5. A universal disability program should be one, but not the only, option examined.
The No-Fault Model of Workers' Compensation: Its Future Prospects

by Paul Weiler

It is a great honour to be invited back to Toronto to speak at this gathering, commemorating the 75th anniversary of the appearance of workers' compensation in Ontario. It is only appropriate that such a symposium take place, celebrating one of the important events in the evolution of Canadian social policy in this century. And I take special pleasure in having had the chance for the last decade to help refashion our workers' compensation system to make it a more effective policy instrument for the next century.

I hope you will forgive me just a few minutes' personal reminiscence, because this will be pertinent to the substantive observations I will be making this morning. Though I am sure few people recollect that fact, I started out my law professor career in Toronto as a torts teacher and scholar. It was only the coincidental fact that I was on sabbatical in Vancouver when the Barrett government came to power in the early 70s that diverted me into labour law as Chairman of the British Columbia Labour Relations Board. I know that Bob Elgie did not know anything about my earlier interests and work in torts when he asked me, nearly ten years ago today, to be his special counsel in the review of workers' compensation in Ontario—a task that he assured me would take no more than six months out of my life.

Actually, it should not have made that much difference had Bob known of my torts work. Like just about everyone else in Canada (and in the United States) who taught and wrote about tort law at that time—Terry Nelson, I might say, being a conspicuous exception to that rule—I know little about workers' compensation; and thus my Osogood Hall students and future tort practitioners learned almost nothing about it either. Workplace injuries tended to be treated as an entirely separate field, with its own rather exotic and somewhat antiquated version of administrative no-fault. What was then considered truly interesting, truly worthy of legal attention were the common law principles governing motor vehicle, medical, consumer product and other such injuries that were handled through tort litigations in the ordinary courts.

In one respect the situation is markedly different today. There is a lot of interest in the no-fault idea right now. For example, I am now heading up two major studies in this area (to a considerable extent because I did take up Bob Elgie's invitation to return to the field of personal injury law). One is a multi-disciplinary, empirical study which a group of us at Harvard are doing for Governor Mario Cuomo of New York, investigating the way that medical injuries and medical malpractice occur in hospitals and how these cases are then treated by the legal system. Our objective, among other things, is to provide the data necessary to judge the feasibility and the desirability of a no-fault compensation program for these medical injuries. My other project is an American law Institute study of the broader field of personal injury policy and tort reform, which is also taking a serious look at the pros and cons of no-fault administrative compensation schemes for product, environmental and medical injuries.

And this winter and spring when I spent a wonderful six months back in Toronto, it was also apparent how many people north of the U.S. border are talking about the no-fault alternative. Much of the interest has arisen within the political minefield of motor vehicle accidents and insurance. But I
also understand that the Federal-Provincial Task Force which has been reviewing the medical malpractice problem in Canada is going to recommend in its forthcoming report a program of no-fault patient compensation to supplement the existing tort system (as now exists in Sweden).

Notwithstanding that broader interest in and attention to the no-fault idea, at least in the popular and political area these sentiments are fuelled almost entirely by what we know and dislike about tort litigation, not by any real appreciation of the realities of no-fault in workers’ compensation. For example, in my own conversations in Toronto a few months ago about the viability of a no-fault option for motor vehicle injuries, I was regularly struck by how many people appear to assume that this policy step would involve only a rather simple shift from the fault to the no-fault principle as the basis of liability and compensation. As we practitioners and constituents of workers’ compensation realize, though, the no-fault model entails a number of complex and contentious program features. Let me mention some of the key ones.

(i) Substituting an inquiry about the cause of the injury rather than about the fault of the injurer often poses grave difficulties in its own right, as was amply demonstrated by the debate in Ontario WC about long latency, non-signature occupational diseases.

(ii) Even if entitlement is quite clear on causal grounds, the structure and scope of the benefits payable is an equally touchy problem; something Bob Elgie and I will testify to personally after having wrestled for ten years with the subject of permanent partial disability.

(iii) While one might remove decision-making about these issues of entitlement and benefits from the courts because of concern about legal deals and costs, still one needs to have an administrative process which is both reliable and fair in its decision-making: ultimately that will require law and lawyers, as exemplified by the experience of Ron Ellis at WCAT.

(iv) Finally, in specifying the sources of funding and insurance for such a system one faces a real tension between the values of collective or of individual employer responsibility, as revealed by the debate this decade about introduction experience rating into Ontario workers’ compensation.

Thus, to return to the point I made earlier, while there is growing political interest in the no-fault idea, there is still a serious dearth of understanding about the actual experience with and implications of this model. And there is now much less excuse for that gap because, especially in the United States but also in Canada, serious analytical and empirical work is being done about the operation and the effects of no-fault workers’ compensation. One reason I know about that research is because I have had the good fortune to have working for me on my own projects two of the very best specialists in this field, Bill Johnson of Syracuse (who is somewhere in this room) and Kip Viscusi of Duke. And to illustrate the value and importance of such research, I will mention briefly three crucial topics in the debate about no-fault, and the research findings which should be crucial to that debate.
Cost

An immediate issue is that of costs. The no-fault idea is often promoted as a way of containing or reducing the expense of liability insurance. The assumption is that even after the expansion in basic coverage, there would be a far greater saving in damage awards and administrative expenditures on litigation. I expect that a good many employers in Ontario—some of you in this very room—may have laughed somewhat hollowly when you heard or read such claims made in the past year’s debate about motor vehicle liability insurance. Nor should we be under any illusion that the steady and steep rise in WC costs is peculiar to Ontario or even Canada. In the United States, employer expenditures rose from about $1 billion in 1950 to $30 billion in 1985—a 30-fold increase which was roughly proportionate to the expansion in all forms of tort coverage during that same quarter century.

Still, both Canadian and American employers remain committed to the principles of workers’ compensation. Certainly they would react with horror to any potential repeal of the WC program that would thereby expose employers to tort litigation by their injured employees. I believe these sentiments have two roots.

First, while the costs of WC are steadily rising, they do so at a reasonably predictable pace. True, there is one recent exception in this province, due to the unfortunate fact that early in the 80s both the Board and the Government stumbled somewhat in the methods they used to institute and to finance inflation adjustments in long term pensions. But there is no doubt that the costs of an administrative no-fault system which pays a defined share of the economic consequences of injuries are much more predictable—and thus more easily adjusted to by the firm—than are the costs of tort liability insurance which are so dependent on the fortuities of litigation (especially in front of juries) about the issue of fault leading to at-large damage awards.

Second, and even more important, sophisticated employers realize that at least over a reasonable timeframe, they will be able to recover the increased costs of WC from somewhere else. Whatever the popular and political rhetoric, the Workers’ Compensation Board is not a Robin Hood which collects money from rich businesses in order to distribute largesse among poor workers. It is true that employers do write the cheques for WC assessments. However, these increased labour costs are then passed on to others—primarily to workers themselves, in the form of lower compensation than the employees would otherwise enjoy. Nor should one be at all surprised by this outcome. If one assumes that workers do value this kind of disability protection—just as they do other fringe benefits paid for by the employer—then one should expect that employees will be prepared to accept the lower compensation which employers must offer them in other parts of the compensation package in order to pay for increases in this item of the firm’s costs of production. Nor is this any longer just an hypothetical prediction from fancy economic theory. We now have documented proof from American research that, which a reasonably short time frame, increases in WC premiums to employers are matched by reductions in the direct compensation earned by the employees from these firms. Thus, in appraising the pros and cons of increases of cut-backs in WC benefits, the crucial starting point must be frank recognition that this program
is actually paid for by healthy workers to provide the kinds of benefits needed by disabled workers.

**Cause**

Of course, WC is a rather peculiar form of disability benefit. In fact, it should really be called workplace rather than workers’ compensation, because its protections and benefits are offered only for those disabling injuries which “arise out of and in the course of employment.” From a compensation perspective it does seem rather strange and inequitable to have the payment of disability benefits turn on the source—i.e., the etiology—of an injury rather than on the injury’s consequences, the needs it creates among the worker and his or her family. Also more and more visible is the fact that to insist on cause as a precondition to entitlement produces administrative costs in a no-fault program that, while still far less than under tort fault, are quite substantial and are growing.

Nor, on closer examination, are these administrative costs and difficulties evenly distributed. In the cases of traumatic accidents, this is not a particularly serious problem overall. For the bulk of workplace accidents, and also for motor vehicle accidents, it is reasonably easy to identify and attribute the injury to its source. However, in the case of serious long-latency diseases, (e.g., lung cancer among foundry workers), very serious difficulties have been encountered in Ontario workers’ compensation. (And I might add that much of the Board’s problems with back conditions are attributable to the fact that these disabilities share more of the characteristics of a disease than of an “accident”).

This same factor is also the reason why, however initially appealing no-fault patient compensation might appear as a substitute for medical malpractice litigation, there would be substantial difficulties in its implementation in that setting. At least in the workplace context, the employee comes to work healthy, and thus if he or she goes home unhealthy, one has a fairly reliable basis for judging whether the disability arose out of the job (again, long latency diseases being the exception). But when patients go to a doctor or a hospital, typically they are already unhealthy, and the treatment they need is itself often traumatic in character. Thus, it is an inherently difficult task to try to disentangle the disabling effects of the illness, or those effects expected from the treatment used, in order to isolate and pay for only the disabling consequences of some accidental injury which may have been the by-product of the care received in the hospital. As those administering forms of no-fault patient compensation in Sweden and New Zealand have found, it is no easy task, (e.g., to distinguish infections caused by the patient’s original wound from those picked up in the hospital, or to decide whether the harmful side effects of chemotherapy or prescription drugs should be compensable or not).

**Control**

Reflection on these and other injury settings, (e.g., product use causing injury to consumers or bystanders), has suggested to many that while no-fault WC may well be a signal improvement over fault-based tort liability, it is best viewed as a halfway house on the road to the preferred destination of universal disability insurance (in particular, for earning losses, since we already have such insurance for most health care costs).
know that Terry Ison has always been an eloquent exponent of that view, and I have felt the tug of its attractions myself.

That position is most compelling from a vantage point in which we look back at those injuries which have already occurred, which we must accept as a fact of life, and as to which we must now decide what is the most humane and sensible mode and level of compensation. The problem with that perspective is that it brackets out the equally compelling question of what effect this system of compensation might have on the likelihood that the injury will occur in the first place. The fundamental argument for retaining WC as a separate, self-contained system of workplace compensation, a program which confronts employers with meaningful financial incentives through an actuarily credible insurance rating scheme, is that this system can also make a material contribution to reducing workplace injuries.

In my second report on WC I reviewed the analytical reasons why one would expect such a desired incentive effect with respect to the original occurrence of the injury. Recently Michael Trebilcock of the University of Toronto Law School has observed that I downplayed a further such incentive effect. Even for those initial injuries that do take place, the magnitude and the duration of the disability may itself be materially affected by the inducements for rehabilitation which the compensation program directs—or does not direct—at the Board, the employer and also the employees themselves.

This also is no longer just an analytical claim. We now have a body of a research which corroborates this expectation. The latest and most powerful study is by Kip Viscusi, my economist colleague in the ALI study, who has shown that the current WC program in the United States has actually reduced workplace fatalities by nearly 30% from what they would otherwise have been. In tangible terms, this means that WC saves roughly 2,000 American worker lives every year, a far more powerful effect than any yet detected from enforcement of occupational health and safety legislation. And when one pursues further the economic implications of this WC effect, it turns out that such a reduction in the risk of workplace injuries in turn reduces the amount of extra wages which employers must pay to induce workers to face these hazards on the job. Taken together with the wage substitution effect I mentioned earlier, the remarkable conclusion, then, is that WC in the United States now more than pays for itself from a financial point of view: and this is a finding about U.S. state programs which are generally less extensive, and thus produce less of an incentive effect, than does WC in Ontario and the rest of Canada.

If one takes seriously this mode of analysis and research, it would seem premature to consign the no-fault policy to the history books. Again, one must introduce certain qualifications. Thus, for reasons I explained in my second Ontario Report (though I cannot go into them here), one should not expect any such significant preventive effect of WC upon long-latency industrial diseases. Again, that expectation has been empirically corroborated by Donald Dewees of the University of Toronto, another economist colleague of mine in the ALI Study. Ironically, then the preferred future for disability policy may well be in precisely the opposite direction of New Zealand: i.e., comprehensive disability for disease (including occupational disease) but specialized no-fault programs for different categories of accidents.
Conclusion

I do not mean to state the last in too strong and dogmatic a fashion, because I realize how many complications must still be considered. But I do mean to leave you with the sense that the no-fault idea has a real future as well as a storied past. And to reiterate the observations I made at the outset, it is high time that public policy makers and tort scholars immerse themselves in the experience with and the research about workers' compensation, where implications of this no-fault model have been most vividly and visibly displayed.

Thank you.
About the Authors

Some Thoughts on Universal Disability Insurance
Karl Crevar, President
Ontario Network of Injured Workers Groups
Hamilton, Ontario

Karl Crevar is president of the Ontario Network of Injured Workers Groups which represents more than 30 advocacy organizations across the province. He is also a member of the Board of Directors of Injured Workers Consultants, a legal clinic specializing in compensation assistance.

UDI—The Case for Building a System
Gary Cwitco, National Representative Communications, Energy and Paperworkers Union of Canada
Toronto, Ontario

Gary Cwitco is a National Representative with the Communications, Energy and Paperworkers Union of Canada (CEP). Over the past 12 years he has been responsible for programs in occupational health and safety and workers’ compensation including significant activity in the area of regulatory reform. Previously Mr. Cwitco was employed by The Centre for Labour Studies at Humber College in Toronto and the Government of Manitoba.

Universal Disability Insurance
W.K.C. Morgan, M.D., Director, Chest Diseases Unit
University Hospital
London, Ontario

Dr. Morgan graduated in 1953 from the University of Sheffield in Britain. Since then he has been in various medical schools in Canada and the United States. He is also the Director of the Appalachian Laboratory of Occupational Respiratory Disease which is part of NIOSH.

Gates and Gatekeepers
D.C.F. Muir, Occupational Health Program
McMaster University
Hamilton, Ontario

Dr. Muir is a physician, Department of Medicine at McMaster University Faculty of Health Sciences and Director of the Occupational Health Program. Special interests include occupational lung disease and the physical properties of aerosols.

Universal Disability Insurance
Patrick Reid, President
Ontario Mining Association
Toronto, Ontario

Patrick Reid, a former MPP (Liberal-Labour) for Rainy River, is currently President and Chief Executive Officer, Ontario Mining Association. He is also a Member of the Canadian Institute of Mining, Metallurgy and Petroleum, Prospects and Developers Association and Secretary of the Mining Research Directorate.

The No-Fault Model of Workers’ Compensation: Its Future Prospects
Paul Weiler, Professor of Law
Harvard Law School
Cambridge, Massachussets

Paul Weiler is professor of labor law and personal injury law at Harvard Law School. From 1979 through 1989 he was Special Adviser to the Government of Ontario in the area of workers’ compensation. Weiler’s three reports on reform of workers’ compensation led to numerous changes in the system, including a new benefit structure (particularly for permanent partial disability), experience rating of employer premiums, and creation of both the Workers’ Compensation Appeals Tribunal and the Industrial Disease Standards Panel.